

Antonio Caruana and others - - - - - Appellants

v.

Joseph Debono *nomine* and others - - - - - Respondents

FROM

THE COURT OF APPEAL, MALTA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 23RD APRIL, 1951

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*Present at the Hearing:*

LORD SIMONDS

LORD MORTON OF HENRYTON

LORD RADCLIFFE

[Delivered by LORD MORTON OF HENRYTON]

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This is an appeal from a judgment of His Majesty's Court of Appeal, Malta, dated the 16th May, 1949, which varied a judgment of His Majesty's Commercial Court, Malta, dated the 25th November, 1948.

On the 27th February, 1945, the appellants, with many other persons, entered into a written contract which began as follows :—

“By virtue of the present instrument under private signature, the following, namely:—” (here follows a long list of names of persons, each of whom is described as a trader) “are forming and constituting between them a Limited Liability Company with the object of sharing between them, according to quotas herein established, the percentage of gross profits payable to the Company by the Distributors appointed or who may be appointed by the Competent Authorities—which percentage shall be that mentioned in letter dated 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’, is being attached to and forms an integral part of the present instrument, or any other percentage which the Competent Authorities may fix from time to time.”

The contract then provided that “The Company is being formed subject to the following conditions:—” A number of conditions are then set out, the first three of which should be quoted.

“1 The Company shall be styled ‘The Wholesale Foodstuffs Pool, Ltd.’.

2. The subscribed capital is declared to be of £1,904 divided into 1,904 shares of £1 each and held by the parties as hereinafter stated:—”

(Here follows a list of shareholders.)

“The shareholders bind themselves to pay up the whole or part of their shares as and when called upon so to do by the Board of Directors.

The shares are non-transferable.

3. The business of the Company shall be conducted by the Board of Directors which, composed of seven members, shall hold office for one year. Each Director must be a shareholder or a duly authorised representative of a shareholder."

There follow various provisions as to the election of a Chairman, a Treasurer and a Secretary and as to the powers of the Board of Directors, which included power to convene a General Meeting of shareholders. By clause 8 it is provided that the Board of Directors shall convene a General Meeting of shareholders at least once every six months and shall convene a General Meeting within ten days of the receipt of a written request to that effect signed by at least twenty shareholders. Clause 11 provides that the General Meeting shall have the power . . . (c) "to extend the life of the Company in accordance with clause 14 of the present agreement". Clause 14 is as follows:—

"The Company is being formed for the period of two years which, to meet the ends and purposes 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 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.

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."

The contract was produced in the registry of the Commercial Court for publication "in accordance with, and for the purposes of, the Commercial Laws", and was entered in the records of a notary, presumably in accordance with section 158 of the Commercial Code of Malta. It is to be noted that by section 159 "a limited liability company must be constituted for a determinate period of time".

The letter of the 23rd November, 1943, referred to in the contract, is in the following terms:—

LIEUTENANT-GOVERNOR'S OFFICE,

Malta, 23rd November, 1943.

No. 6551/42.

SIR,

I am directed to refer to paragraph 11 of the minutes of the 9th Meeting of the Joint Standing Committee, and to request the Chamber of Commerce to form a pool of present distributors and past wholesalers of foodstuffs. In accordance with the terms of Press Notice of the 19th November, a copy of which is enclosed, the Food Distribution and Enforcement Officer will appoint as distributors of rationed commodities only persons who are members of this Pool.

After instituting inquiries about working expenses the Government has come to the conclusion that an allowance of 55 per cent. of the Gross profits would be a fair allowance for such expenses.

New distributors for rationed commodities will be appointed on the 1st December (provided that the Pool has been formed by then) but their appointment will not come into effect until the 1st of January, 1944. Distribution of profits at the new rates will also come into effect on the latter date.

I shall be grateful if you will expedite the formation of the Pool as much as possible.

I have the honour to be,

Sir,

Your obedient servant,

(Sgd.) T. SCRIVENOR,

Assistant to the Lieutenant-Governor.

The Honorary Secretary,  
Chamber of Commerce,  
*Valletta.*

It is not in dispute, and indeed it plainly appears from the terms of the contract of 27th February, 1945, that the body which was formed in response to the request contained in this letter was the limited liability company "The Wholesale Foodstuffs Pool Ltd." Thus the persons who became "members of the Pool," within the meaning of this letter were the persons who became shareholders in this Company. Their Lordships think that some confusion has arisen in this case by reason of the fact that in the writ of summons, and throughout the proceedings, reference has been made to the Wholesale Foodstuffs Pool, without the addition of the word "Limited." They apprehend that the only body to which this appeal relates is the limited liability company constituted by the contract of 27th February, 1945, and they find it convenient to refer hereafter to that company as "the Company" and to the contract of the 27th February, 1945, as "the Contract."

The Board of Directors in office at the end of the period of two years mentioned in Clause 14 of the Contract took no steps to wind up the Company, and on the 10th February, 1948, more than two years after that period had ended, the appellants issued their writ of summons in the present action. The respondents are the defendants in that action, and are described in the writ as "Chairman, Secretary and Directors of the Wholesale Foodstuffs Pool." By their Declaration the appellants alleged that "the Pool" was constituted by virtue of the Contract and that at the end of the period of two years no General Meeting was convened for the purpose of extending the life of "the Pool" in terms of Clauses 11 and 14 of the Contract. They claimed (1) a judicial declaration to the effect that "the Pool" had come to an end, and (2) an Order directing the defendants to wind up "the Pool."

Notwithstanding the absence of the word "Limited" throughout this document, their Lordships think it is clear from the context that "the Wholesale Foodstuffs Pool" and "the Pool" must be interpreted as meaning the Company. They do not think that by a claim so framed, in an action in which the only defendants were the officials of the Company, the appellants were putting forward a contention that the whole system of pooling foodstuffs in Malta automatically came to an end when the two years period expired, and that persons who acted as distributors of foodstuffs after the 23rd January, 1946, under arrangements made with the Government, were free from any obligation to account for any percentage of the gross profits. No such contention was put forward by counsel for the appellants.

The action came before the Commercial Court in Malta and certain oral evidence was given to which their Lordships will refer later. Judgment was given on the 25th November, 1948, dismissing the appellants' claim 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".

From this judgment the appellants appealed to the Court of Appeal, Malta, and further evidence was given by Mr. Petrocochino, the Food and Commerce Control Officer, on the 4th April, 1949. On the 16th May, 1949, the Court of Appeal declared that the present action was premature, and therefore non-suited the appellants, varying to that extent the Order of the Commercial Court, which had dismissed the appellants' claims.

If it were proper to consider only the terms of the contract, and to disregard all the surrounding circumstances, their Lordships would conclude that the appellants ought to have been granted some relief in the action. The Company is described in the Contract as a limited liability company, and this is one of the three kinds of commercial partnerships mentioned in section 128 of the Commercial Code. Moreover, it would appear that the Company answers in every respect the description of such a commercial partnership which is contained in sections 153 et seq. of the Code. The Company was constituted with the object of sharing between the members a percentage of certain gross profits payable to the Company by the Distributors therein mentioned, and it was constituted for a determinate period of time, in accordance with section 159 of the Code. That period of time having elapsed on 23rd January, 1946, it would ordinarily be right and proper for the Board of Directors in office at that date to wind up the Company at once, in accordance with the concluding sentence of Clause 14 of the contract. It is true that the Directors are thereby "empowered" and not compelled "at once to wind up the Company", but, apart from special circumstances, it would be proper for the Company to be wound up, and the shareholders would have legitimate ground for complaint if the Directors refused or neglected to take any steps for that purpose.

Their Lordships do not think that the courts in Malta would have taken any other view of the matter, if the only matter for consideration had been the precise terms of the contract; but these courts have refused to give the relief claimed by the appellants for reasons which relate to the circumstances in which the Company was formed and the events which followed its formation. These circumstances and events must now be examined.

When this appeal came before the Board, the oral evidence given at the hearings in Malta was read, but it appeared to their Lordships that they ought to see the letter of 23rd November, 1943, referred to in the Contract, and that there might be other documents which would throw light upon the surrounding circumstances. They invited the parties to put in evidence this letter and any other documents which might be of assistance. In response to this invitation an affidavit of Mr. Philip Agius, sworn on the 9th March, 1951, with nine exhibits, was put in evidence, and their Lordships have considered these exhibits before arriving at their conclusion.

By the Regulations of 28th May, 1942, which form exhibit "A" to Mr. Agius' affidavit and remained in force until 22nd February, 1946, a "pool" is defined as "a recognised association of persons concerned with the storage and sale of commodities". There is no doubt that the Company was such an association, that it was formed in response to the letter of 23rd, November, 1943, and that it was the Government's intention that no person should be appointed a distributor who was not a member of the Company.

The oral evidence as to the circumstances in which various Pools were established in Malta was given by Mr. Petrocochino on two dates, the 22nd June, 1948, and the 4th April, 1949. The quotations which follow will serve to show the general effect of his evidence on this subject. On the earlier occasion he said: "Naturally it was on orders issued by the Government that the Pools were formed," but in cross-examination he said: "The Pools were set up following Government notification to the effect that the formation of a Pool was required in connection with distribution of a given commodity. The Pools were started in 1943, on the suggestion of a Mr. Nalder, who was then in Malta. All those who joined the Pool were to be paid a percentage of the profits. It was no concern of the Government whether or not a trader joined the Pool; and no one was obliged to join." On the later occasion the witness said: "When Mr. Nalder came to Malta, he decided that, in order to be able to exercise a greater measure of control the Distributors should form a Pool, and that he would then appoint a small number of Distributors from amongst the members of the Pool—stating that he did not wish to have to deal with so many people, numbering over a hundred. It is within my

knowledge that the margin of profit was established and that the Distributors had to give part of the profits to the Pool—that is to say, the Distributor, out of his profits, had to pay one half to the Pool . . . . The profit percentage was established at 45 per cent. and it was paid into the Pool”. In cross-examination he said :

“Pools were formed in respect of other branches of trade. The traders concerned made their own arrangements as regards the constitution of and the conditions governing the Pool. The Government never interfered.

The Government—that is to say, Mr. Nalder—established the percentage.

As I have already stated, Mr. Nalder said : ‘I do not wish to have to deal with so many people—a hundred or more. I want 20 or 30’. Mr. Nalder told them : ‘You form the Pool and I will appoint the Distributors from amongst the members forming the Pool’.

The Pools were autonomous. The Government’s only concern in the matter was that it did not wish to have to deal with too many people. The Pools appointed Committees and the Government dealt with those Committees.

There were many cases in which traders were left out of the Pools : and many cases were brought before these Courts by traders who have been left out.

The Pools had no powers to appoint Distributors and they had no right to establish the percentage payable by the Distributors to the Pools.

The Pools made their own arrangements as regards the number of shares to be held by individual members. The Government established the profit percentage.

To the question put by Prof. Caruana, as to whether in the circumstances in which the Government was placed at the time, it was possible for anyone to continue to act as Distributor without continuing to be a Member of the Pool—I reply that it was impossible. The case is inconceivable. It was impossible for anyone to be a Distributor without being a Member of the Pool.

I am referring to the time at which the Pools were formed, but the same arrangements have prevailed throughout the life of the Pools.”

It is thus clear, from the documentary and oral evidence, that various Pools were established at the request of the Government. It is also clear that the Government, having made this request, allowed the various traders to make their own arrangements as to the constitution of and the conditions governing the Pool.

The only Pool with which their Lordships are directly concerned is that which was formed by the wholesale traders in foodstuffs, and they chose to bring that Pool into being by forming the Company. The evidence shows that the members of the Company had no power to appoint Distributors of foodstuffs. The appointment of Distributors was made by the Government and the Government fixed the percentage of profits which was to be retained by the Distributors and the percentage which was to be paid to the Company. It would appear, from other evidence given by Mr. Petrocochino, that some members of the Company continued to act as Distributors after the period of two years mentioned in the contract had expired, while others who had been Distributors resigned that office on the termination of the two year period, and other Distributors were appointed who were also selected from amongst the members of the company. Letters dealing with the position of Distributors in the year 1948 are exhibited to Mr. Agius’ affidavit.

The learned Judge in the Commercial Court held that the Company “is not a commercial partnership (*société*) within the juridical meaning of the term, it is a Pool and, as consistently held by the Courts in Malta, a Pool is not a commercial partnership.” The view was accepted by the



Court of Appeal, who said: "As rightly held by the Court of First Instance, and as held in the various judgments given by this Court affirming those given by the Court below, the Pools that were formed during the war cannot be considered as true commercial partnerships within the meaning of the commercial laws." Their Lordships were referred to the case of *Fava v. Bonnici*, decided in the Court of Appeal, Malta, on the 18th November, 1946, as an instance of the "various judgments" referred to by the Court of Appeal and were supplied with a typed copy of the judgment of the Court of Appeal in that case. The following passage should be quoted "As rightly held by the Court below in tracing their history and establishing their origin, the Pools are special associations *sui generis* which were set up and which had necessarily to be set up in the abnormal circumstances of the time, so that by no stretch of the imagination are they to be considered as commercial partnerships subject to the provisions of the commercial laws relating to commercial partnerships. . . . As stated, the Association" (that is, the Wholesale Foodstuffs Pool Limited) "is but an Association *sui generis* since it would be absurd in a partnership if the members were to be imposed by the Government and if they were to be associated together otherwise than of their own free will and choice for in that case there would be no such thing as the *affectio societatis*."

Their Lordships do not find it necessary to decide whether the Company is a commercial partnership within section 128 of the Commercial Code. Whether or not it is a commercial partnership within section 128, or a commercial association *en participation* within section 165, it is a limited liability company and by the contract which brought that Company into existence it was agreed that the Company was "formed for the period of two years." It has not been suggested that this contract was in any way contrary to law, and their Lordships cannot find, on the evidence in the present case, that the persons who entered into that contract were compelled to enter into it. The evidence of Mr. Petrocochino is to the contrary effect. No doubt there were very strong reasons why traders should wish to become members of the Company, but as Mr. Petrocochino says: "No one was obliged to join," and it seems impossible to find in the present case that there was an absence of *affectio societatis*. It may be that evidence was given in the case of *Fava v. Bonnici* which led the Court to a contrary opinion in that case.

If Clause 14 of the contract was valid at the time when the contract was signed, their Lordships cannot find any subsequent event which has made it cease to be binding on the parties. It is no doubt true that the Government wished the system of Pools to continue in existence, but there is no evidence of any Statute or Order providing that the Company should continue in being beyond the period of two years. It was, of course, open to the Government to require or request the formation of another company to carry on the Wholesale Foodstuffs Pool as from the 24th January, 1946, but no step seems to have been taken to this end.

If, as their Lordships think, nothing has occurred to nullify clause 14 of the contract, it would appear that the appellants can properly insist upon the company being wound up. On the footing that Clause 14 is still effective, their action can hardly be considered as premature, since they have waited for over two years since the period fixed by the contract expired. Their Lordships do not, however, think that a declaration "that the Pool has come to an end" would be appropriate. No doubt certain rights and liabilities have arisen as a result of arrangements made between Government representatives and persons acting as Distributors since the 23rd January, 1946, and their Lordships would not think it right to make a declaration which might be construed as an expression of opinion upon these rights and liabilities. They do not think that any question as to these rights and liabilities can properly be determined upon this appeal, and the materials before the Board are insufficient for the determination of any such question. The only declaration which seems appropriate in the circumstances is that the period for which the Company was formed came to an end on the 23rd January, 1946, and has never been validly extended.

Their Lordships have not overlooked the fact that Mr. Philip Agius gave oral evidence in the Commercial Court that, almost a year after the end of the two year period fixed by the contract, a general meeting of the Company was held "for the purpose of extending the life of the Pool from one year to another." It is unnecessary to set out the evidence of Mr. Agius in regard to that meeting, as neither of the Courts in Malta appears to have regarded this meeting or anything that took place at it as assisting the respondent's case in any way. This evidence is not mentioned in either judgment, or in the "Reasons" in the respondents' printed case, and counsel for the respondents did not contend that resolutions passed at a meeting held nearly a year after the period fixed by the contract had expired could have the effect of prolonging the period for which the Company was to continue.

Their Lordships will humbly advise His Majesty that this appeal should be allowed. A declaration should be made that the period for which the Company was formed came to an end on the 23rd January, 1946, and has never been validly extended, such declaration to be without prejudice to any question as to the rights or liabilities of any person arising by reason of that person, or any other person, having acted as a Distributor after the 23rd January, 1946. The respondents should be ordered to wind up the Wholesale Foodstuffs Pool Limited forthwith. The respondents must pay the appellants' costs of this appeal and of the proceedings in Malta. But this is without prejudice to any application that they may make in the liquidation of the Company to be repaid such costs and their own costs of this appeal and of the proceedings in Malta out of the assets of the Company.

In the Privy Council

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v.

JOSEPH DEBONO NOMINE AND OTHERS

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