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Judgment  
34/1964

IN THE PRIVY COUNCIL

No. 8 of 1964

ON APPEAL FROM THE FEDERAL SUPREME COURT  
OF NIGERIA

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

B E T W E E N :-

BANQUE GENEVOISE DE COMMERCE ET DE CREDIT  
Appellants

- and -

COMPANIA MARITIMA DE ISOLA SPETSAI LIMITADA  
(the owners of the steamship or Respondents  
vessel 'SPETSAI PATRIOT')

78034

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CASE FOR THE RESPONDENTS

Record

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1. This is an appeal from an order of the Federal Supreme Court of Nigeria (Ademola, F.C.J. Brett, Taylor and Bairamian, F.JJ.), dated the 7th November, 1962, dismissing the Appellants' action, in which they claimed £380,627.0.0. as principal, interest and bank charges allegedly due under a deed of mortgage of the Respondents' vessel 'Spetsai Patriot', and ordering the release of the said vessel from arrest.

P.99

2. The principal question arising in this appeal is whether a deed of mortgage made between the Appellants and the Respondents on the 22nd July, 1958, or the obligations secured thereby, was rescinded, revoked or replaced by a written agreement dated the 26th October, 1961 made between the Appellants, the Respondents and three other parties.

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3. The present action is an action in rem brought in the original jurisdiction of the Federal Supreme Court as a Colonial Court of Admiralty. It was commenced by the issue of a writ of summons, dated the 30th June, 1962. This writ was served by being nailed to the mast of the 'Spetsai Patrio' in Lagos harbour. On the 25th July, 1962, the Appellants obtained judgment for the full sum claimed, and for appraisal and sale of the vessel, in default of appearance by the Respondents. On the 24th August, 1962 this judgment was set aside on the

p.1, 1.15

pp.29-30

pp.58-60

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application of the Respondents. Fresh pleadings were filed and the suit was heard as a contested case.

pp.61-63

4. In their redelivered Statement of Claim, dated the 29th August, 1962, the Appellants alleged that by a deed of mortgage dated the 22nd July, 1958 made between them as mortgagors and the Respondents as mortgagees (hereinafter called 'the mortgage') the Respondents mortgaged the vessel 'Spetsai Patriot' to the Appellants to secure the due repayment of a loan of £292,790.0.0. made by the Appellants to the Respondents, together with interest thereon at 6½% per annum and a bank charge of 1% per annum, both from the said date until repayment of the said loan. The Appellants alleged that no part of the said loan, interest or bank charge had ever been paid, and claimed that the following sums were due to them under the mortgage:-

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1) Principal loan	£292,790. 0. 0.	
2) 4 years' interest at 6% per annum	76,125. 8. 0.	20
3) 4 years' bank charge at 1% per annum	<u>11,711.12. 0.</u>	
Total	<u>£380,627. 0. 0.</u>	

The Appellants further alleged that the Respondents were in breach of the covenants of the mortgage by failing and neglecting to maintain the vessel so as to comply with all applicable Liberian laws, treaties and conventions and rules and regulations.

pp.64-66

5. In their Statement of Defence, dated the 7th September, 1962, the Respondents admitted that the mortgage as alleged by the Appellants was executed by them and the Appellants, but averred that the mortgage was rescinded or revoked by an agreement dated the 26th October, 1961 and made between the Appellants, the Respondents, the Spetsai Island Shipping Company, Limited, the American Trading Company, S.A. and Constantin A. Petroutsis (hereinafter called 'the Agreement of 1961'). By the agreement of 1961, the Respondents' liability in respect of the 'Spetsai Patriot' was limited to £50,000, payable by a first instalment of £25,000 on the 1st November, 1962 and a second instalment

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of £25,000 on the 1st May, 1963; and this liability was conditional upon the inability of the Appellants to realise other assets amounting to £300,000 made available by the Respondents, out of which the Appellants had already realised £40,000. The Respondents contended that since the execution of the agreement of 1961 the relationship between the parties had been governed by that agreement, and its terms had been complied with. They also contended that the agreement of 1961 was a novation of the mortgage. They denied that they had failed or neglected to maintain the vessel as to comply with all applicable Liberian laws, etc.

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6. In their Statement in Reply, dated the 12th September, 1962, the Appellants admitted the agreement of 1961, but denied that the mortgage had thereby been rescinded or revoked. They alleged that the Respondents had failed to effect a transfer of the mortgage as required by the agreement of 1961, or to make any fresh mortgage; and had wilfully failed and refused to perform any of their obligations under the agreement of 1961, in consequence of which the Appellants had elected to treat that agreement as at an end and to exercise their rights under the mortgage, which (they alleged) remained in full force and effect. Alternatively, the Appellants alleged that the effect of the agreement of 1961 was to limit the security under the mortgage to £50,000, but otherwise to leave the mortgage in full force and effect.

pp.66-68

7. The parties to the agreement of 1961 were, of the one part, the Appellants (described as 'the Bank'), the Spetsai Island Shipping Company, Limited (described as 'SISCO'), which was a subsidiary of the Appellants, and the American Trading Company S.A. (described as 'the Mortgagee'); and, of the other part, the Respondents (described as 'CMIS') and one Petroutsis, the Managing Director of the Respondents. The agreement was drawn up in French. The English translation included the following provisions:

pp.136-143

Preamble: (Various advances made by the Appellants to the Respondents, and other matters, were recited.)

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p.137, l.15 -  
p.138, l.15.

"the events which followed on account of the inability of CMIS to liquidate its assets and of the measures taken by the BANK for the recovery of the debt, gave rise to disputes some of which were already the subject of litigation before the Courts of Geneva, the Court of Appeal of Bologna and before the Court of First Instance of Piraeus whilst other actions are to be commenced in accordance with the intention of the parties before the competent jurisdictions. 10

At all events the contracting parties with a view to a definitive settlement of all the accounts and litigation between them agree by these presents as follows:-

Settlement:

Article 1. The parties waive the drawing up of detailed accounts. CMIS acknowledge that it is indebted to the BANK in the sum of three hundred thousand pounds sterling (£300,000) as the balance of all accounts and of all claims between the BANK and SISCO of the one part and CMIS and PETROUTSIS of the other part. It is a comprehensive figure, acknowledged to be a capital sum but which bears no interest. 20

Article 2. The recovery by the BANK of the above mentioned sum is assured by the realization of the following assets of CMIS;

- a) A claim against the hull insurers of the s.s. SPETSAI GLORY estimated at £sterling 125,000 already assigned to the BANK. 30
- b) A claim against the insurers or charterers of the s.s. SPETSAI GLORY etc. for expenses disbursed by the BANK for the account of the ship (included in the sum of £sterling 300,000), for general average and "special charges" estimated at £ sterling 70,000 and for the guarantee in connection with the collision with the s.s. "LEONIDAS".
- c) The s.s. SPETSAI ISLAND registered in the name of SISCO which is to be sold to Japan at an estimated £ sterling 80,000. 40

d) Two maritime mortgages also as Record  
 security are to be given by CMIS in  
 favour of the AMERICAN TRADING COMPANY  
 OF PANAMA for £ sterling 50,000 each on  
 the s.s. SPETSAI PATRIOT and the s.s.  
 SPETSAI NAVIGATOR which is to be trans-  
 ferred by SISCO to CMIS."

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10            "Article 5. Promising good and faith- p.141, 1.20 -  
 ful carrying out of the present settlement p.142, 1.45.  
 the parties reciprocally discharge each other  
 for the balance of all accounts and of all  
 claims and waive all civil or criminal pro-  
 cedure. CMIS and PETROUTSIS undertake to  
 eliminate at their own expense and their  
 liability any hindrance which may arise  
 from sequestration and arrests effected by  
 third parties on the SPETSAI ISLAND and the  
 SPETSAI NAVIGATOR in Greece. The BANK also  
 shall release as soon as this settlement is  
 20 signed the sequestrations or other measures  
 taken by it on the s.s. SPETSAI PATRIOT and  
 the s.s. SPETSAI FORTUNE in order to facili-  
 tate the placing of the said vessels at the  
 free disposition of CMIS and of PETROUTSIS.  
 The mortgage on the SPETSAI PATRIOT shall be  
 limited to £ sterling 50,000 and transferred  
 in favour of the MORTGAGEE and the mortgage on  
 the SPETSAI FORTUNE shall be cancelled  
 immediately upon the signing of these presents.

30            In order to facilitate the formalities  
 for the releasing of the seizures, arrests,  
 etc. the BANK this day shall hand to  
 PETROUTSIS an express authorization to the  
 Italian Lawyers (Office Berlinghieri) to  
 proceed immediately to this end so that these  
 two vessels may immediately be at the free  
 disposal of CMIS and PETROUTSIS and shall  
 telegraph in the same terms to such lawyers.

40            The seizures and arrests of s.s.  
 SPETSAI PATRIOT and s.s. SPETSAI FORTUNE  
 imposed by Andreas Valsamakis and Cap. D.  
 Tsekouras shall be lifted and discharged  
 solely at the expense and at the liability  
 of C. PETROUTSIS and CMIS, the Bank having  
 no responsibility whatsoever in this connection.

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In addition SISCO shall immediately restore ownership of the s.s. SPETSAI NAVIGATOR to CMIS and undertake to carry out all the necessary formalities to fulfil this undertaking which in the case of the SPETSAI NAVIGATOR shall include putting into possession.

The BANK and the MORTGAGEE also undertake to supply a certificate regarding the s.s. SPETSAI PATRIOT intended for the Liberian Authorities under the terms of which this vessel shall change its name in accordance with the instructions of C. PETROUTSIS. 10

Article 6. In as much as the realization of the claims for C.T.L., C/A etc. on the SPETSAI GLORY and the sale price etc. of the SPETSAI ISLAND are not envisaged before a year, the mortgages in favour of the mortgagees (in accordance with art. 2(d) of these presents) shall become due as to one half (£ sterling 25,000 for each mortgaged vessel) on the 1st November 1962 and as to the other half on the 1st May 1963, but only up to the amount of the balance not realized by the Bank by such date as provided in art. 2(a), (b) and (c), the intention of this contract being that the BANK shall not receive more than £ sterling 300,000. 20

Any payment made to the BANK arising from the sources set out in article 2(a), (b) and (c) over and above £ sterling 200,000 shall be considered as payment on account of the mortgages (a half on each) and an act to this effect signed by the MORTGAGEE shall be delivered at the same time as the receipt by the BANK and the necessary registrations shall be made. Also all payments made to the MORTGAGEE by virtue of the above-mentioned mortgages shall be considered as a payment made to the Bank on account of its claim for £ sterling 300,000." 30 40

p.70, 11.29-31  
p.70, 1.43-  
p.71, 1.7

8. The action was tried in the Federal Supreme Court on the 18th, 19th and 22nd September, 1962. Evidence was given by one Dubuis, a director of the Appellants, that no money due under the mortgage had been repaid to the Appellants. In 1961 there had been several Court cases against the

- Respondents by the Appellants, including a case about the 'Spetsai Patriot' in Bologna. That case had not proceeded to judgment, because the parties had reached an agreement - the agreement of 1961. The Appellants, Dubuis said, had not received the sums of £125,000 and £70,000 mentioned in articles 2(a) and (b) of the agreement of 1961, nor had the letter of credit mentioned in article 3(c) been obtained. A mortgage had been given on the 'Spetsai Navigator'. The Appellants, he said, did not think the agreement of 1961, was any more binding on them, because the Respondents had not carried out the terms.
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- Record  
p.71, 1.32 -  
p.72, 1.7  
p.72, 11.39-42
9. Evidence was given for the Respondents by Mr. C. A. Petrousis, their managing director. He said the parties had resolved everything by the agreement of 1961. He had assigned to the Appellants the claims mentioned in article 2(a) and (b) of that agreement, and had not withdrawn the assignment. The Appellants had failed to transfer the 'Spetsai Island' within a month of the agreement. As far as he (the witness) was concerned, he had complied with the agreement of 1961. The Respondents had mortgaged the 'Spetsai Navigator' to the American Trading Co. under that agreement. He had not executed a mortgage of the 'Spetsai Patrio'; he had been waiting for the Appellants to prepare a mortgage for execution.
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- p.76, 11.22-23  
p.76, 11.31-32  
p.77, 11.1-4  
p.77, 11.38-39  
p.78, 11.12-15  
p.78, 11.20-22
10. Judgment was delivered on the 7th November, 1962. Brett, F.J. (with whom the other learned Judges concurred) said the question for decision was whether it was open to the Appellants on the 12th July, 1962 to sue for any sum secured by the mortgage, and, if so, what that sum was. On the pleadings it was open to the Court to give to the agreement of 1961 its true legal effect, whether or not the word "novation" was correctly used of it, and whether or not the mortgage could properly be said to have been revoked.
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- pp.86 - 99  
p.88, 11.13-17  
p.88, 1.47 -  
p.89, 1.14
11. Having referred to the mortgage and the agreement of 1961, and to the evidence, Brett, F.J. said it might be going too far to say it was the duty of the Appellants under the agreement of 1961 to transfer the mortgage to the
- p.94, 11.23-33

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American Trading Co., but it would have been open to them to take that course. It was not clear that the Appellants were entitled to complain because the Respondents had not done what they had never been called on to do (i.e. execute a new mortgage of the 'Spetsai Patriot'), and could not have done until the Appellants released the vessel from the mortgage. The Court had not to decide whether the alleged breaches by the Respondents of the agreement of 1961 could have given the Appellants 10 a right of action for damages, nor whether it had been open to the Appellants on the 12th July to take steps to protect the security, as opposed to obtaining judgment for a sum of money enforceable by sale of the ship. The Court had only to consider whether on the 12th July the Appellants had been entitled to obtain judgment for a sum of money and enforce it by sale of the ship. This was a matter of the construction of the agreement of 1961, to which the question whether there had been breaches of it was 20 irrelevant.

p.95, 11.12-29

p.96, 1.1 -  
p.97, 1.38

12. The intention of the parties, the learned Judge went on, was to be gathered from the agreement of 1961. He attached the greatest significance to the last paragraph of the preamble and the first sentence of article 5. The natural interpretation of these passages was that the parties intended to start afresh, and let their relationship be governed by the agreement, not by any rights or obligations they possessed immediately before the 30 agreement. These passages, furthermore, coupled with the waiver of accounts and the provision that the Appellants were to be enabled to obtain from various sources the whole sum agreed to be due, shewed that the parties intended the agreement of 1961 itself to be taken in accord and satisfaction. The Respondents had performed that agreement in part, at least, by withdrawing litigation and mortgaging the 'Spetsai Navigator". Having taken 40 advantage of that, the Appellants could not treat the agreement of 1961 as cancelled, whatever breaches the Respondents might have committed. If the agreement was in force, the Appellants were not entitled to sue for the full amount originally secured by the mortgage; for the elements of the agreement were not severable, and the parties were bound by the agreement of 1961 as a whole.



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p.98, 1.31 -  
p.99, 1.12

10 13. Finally, Brett, F.J. said the Appellants had contended that, even if precluded by the agreement of 1961 from suing for a mortgage debt of £292,790 plus interest and bank charges, they were entitled to sue for a mortgage debt of £50,000. It was the right of the parties on the 12th July, 1962 that had to be considered. Under article 6 of the agreement of 1961, the first instalment payable on the mortgage was not to fall due until the 1st November, 1962, and the amount of the instalment could not have been calculated before that date. On the 12th July, 1962, therefore, it had not been open to the Appellants to recover either £50,000 or any other sum by virtue of the mortgage. The action should be dismissed, and the 'Spetsai Patriot' released at once from arrest.

p.99, 11.13-19

20 14. The Respondents respectfully submit that the intention of the parties in entering into the agreement of 1961 was to extinguish their rights and liabilities inter se existing immediately before the conclusion of that agreement, and to substitute the rights and liabilities arising under that agreement. The mortgage, in so far as it constituted an obligation upon the Respondents to pay money to the Appellants, was therefore of no effect from the moment of the conclusion of the agreement of 1961. The Respondents performed that agreement at least  
30 in part, and there was no ground upon which the Appellants could treat it as repudiated by the Respondents.

40 15. The Appellants were not entitled, in the respectful submission of the Respondents, to any payment under the agreement of 1961 on the 30th June, 1962 (the date of the institution of these proceedings). The first payment under the mortgages to be executed in accordance with the agreement of 1961 was not to fall due until the 1st November, 1962; and when due that payment was not to be due to the Appellants, but to the American Trading Co.

16. The Appellants respectfully submit that the order of the Federal Supreme Court of Nigeria is right and ought to be affirmed, and this appeal ought to be dismissed, for the following (among other)

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R E A S O N S :-

1. BECAUSE after the conclusion of the agreement of 1961 the Appellants had no right to any payment under the mortgage:
2. BECAUSE under the agreement of 1961 the Appellants had no right to any payment from the Respondents on the 30th June, 1962:
3. BECAUSE under the agreement of 1961 the Appellants had, and were intended to have, no rights in rem enforceable against the 'Spetsai Patriot'.
4. BECAUSE of the other reasons given by Brett, F.J.

J. G. Le QUESNE

DICK TAVERNE.

No. 8 of 1964

IN THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL SUPREME  
COURT OF NIGERIA

B E T W E E N :-

BANQUE GENEVOISE DE COMMERCE ET DE  
CREDIT

Appellants

- and -

COMPANIA MARITIMA DE ISOLA SPETSAI  
LIMITADA (the owners of the steamship  
or vessel 'SPETSAI PATRIOT')

Respondents

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CASE FOR THE RESPONDENTS

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