

D. Benaim and Company - - - - - *Appellants*

v.

Luigi Spiteri Debono (trading as L. Spiteri Debono and Company) - *Respondent*

(Claim—Anchovies.)

FROM

THE COURT OF APPEAL, MALTA.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY, 1924.

Present at the Hearing :

LORD ATKINSON.

LORD WRENBURY.

LORD DARLING.

[*Delivered by* LORD DARLING.]

This is an appeal from a judgment dated the 5th April, 1922, of the Court of Appeal, Malta. By such judgment the Court upheld the judgment dated the 28th September, 1921, of the Commercial Court, Malta (His Honour Dr. A. Parnis), against the appellants.

The appellants in this case were the defendants in the original action. That action was brought by the present respondent against the appellants on a contract for the sale by the appellants to the respondent of anchovies f.o.b., Gibraltar. The goods were delivered and shipped to Malta and paid for, and the respondent subsequently claimed rescission of the contract and repayment of the price. The questions for decision are (1) whether on the facts the respondent was entitled to rescind ; (2) whether, if he had such right, he has not lost it by his own acts and conduct in accepting and dealing with and retaining the goods. These were the issues raised on the pleadings and considered in the judgments. This case involves, in the first place, the question of whether the contract of sale is governed by the law of Gibraltar or of Malta.

The contract under which the present dispute has arisen is contained in telegrams which passed between the appellants and respondent on the 4th and 5th of December, 1917, and confirmed by letters between the said parties dated the 5th December, 1917. These are hereafter set out. By the contract the appellants agreed to sell to the respondent 9/10,000 kilos. anchovies in brine at a price of 1s. 5d. per kilo., f.o.b. Gibraltar. Payment was to be made against shipping documents through a bank at Gibraltar. It was subsequently agreed that the quantity of the anchovies should be reduced to 7,320 kilos. and finally to 6,657 kilos.

The goods were shipped on the 28th December, 1917, and invoiced to the respondent on the 31st December, 1917, at a price of £509 0s. 9d., which included a sum of £37 10s. 0d. in respect of freight from Gibraltar to Malta. The respondent paid the invoice price to the appellants early in January, 1918. The goods arrived at Malta on 10th January, 1918. By a letter dated the 22nd January, 1918, the respondent made certain complaints to the appellants as to the packing of the goods and as to their quality. There was no suggestion in such letter that the respondent had rejected or intended to reject the goods. On the contrary the respondent made a claim against the appellants for a sum of £44 12s. 6d. in respect of an alleged short delivery of 630 kilos.

Previous to their arrival in Malta the respondent had resold all the goods to other purchasers. From the respondent's evidence in the case of *Borg v. Spiteri Debono* it appears that the respondent tendered the goods to his sub-purchasers all of whom, excepting Borg, refused to accept the goods on the ground that the tins in which they were packed were not like those agreed upon in the sub-contract. Borg subsequently started proceedings against the respondent claiming to rescind his contract.

On the 7th March a Referee appointed by the Commercial Court, Malta, in the case of *Borg v. Spiteri Debono* reported that the anchovies sold by the respondent to Borg, which were part of the consignment bought by the respondent from the appellants, were (i) not unfit for human food and were (ii) merchantable but of inferior quality, being of smaller dimensions than ordinary anchovies and owing to their recent preparation had an odour and taste somewhat less pronounced.

A writ was issued by the respondent against the appellants on the 2nd April, 1918, claiming :—

- (i) that the sale of the said anchovies be declared rescinded and that the appellants be condemned to refund the price of the said goods already paid amounting to five hundred and nine pounds sterling (£509) the freight paid being included in such sum with commercial interest from the 15th January, 1918, and thirty pounds and ninepence sterling (£30 0s. 9d.) paid for insurance of the goods with commercial interest from the 12th December, 1917 ;

- (ii) that the appellants be condemned to make good to the respondent the damages sustained by him, consisting in loss of profit and expenses amounting to the sum of two hundred and twelve pounds thirteen shillings and ninepence (£212 13s. 9d.) with commercial interest from the 20th January, 1918;
- (iii) that the appellants be condemned to refund to the respondent the costs sustained by the respondent in an action brought against him by Guiseppe Borg with commercial interest.

By their defence the appellants contended:—

- (1) that the anchovies were according to order and of good consistency and in every respect fit for human food and merchantable;
- (2) that it was not the fault of the appellants if the anchovies could not be sold on the Malta market; and that the respondent should have verified this circumstance before ordering goods determined as to kind without indication of quality, size or other specifications;
- (3) that the respondent had accepted the goods having after examining the quality of the fish asked only to be credited with an alleged shortage of forty-four pounds twelve shillings and sixpence (£44 12s. 6d.) sterling and having offered the goods by auction on his own account.

By an interlocutory order of the Commercial Court dated the 16th April, 1918, Salvatore L. Calleja was appointed Referee and required, *inter alia*, to report upon the condition of the anchovies without prejudice to the interests of the contending parties. On the 25th April, 1918, Calleja reported that the anchovies were bitter and unsaleable upon the Malta market. By sworn evidence given on the 27th May, 1918, Calleja explained and qualified the report as follows:—

“By having stated in my report that the goods are not saleable in Malta I do not intend to say that they are saleable or unsaleable abroad as I have no knowledge of other than the local market. When I saw the goods they were good as to consistency but their defect consisted in their being bitter.”

The action was heard by the Commercial Court and judgment delivered by His Honour Dr. A. Parnis on the 28th September, 1921. By such judgment His Honour Dr. A. Parnis allowed the first claim of the respondent, limited to the rescission of the sale with costs. He held that the anchovies were of a quality inferior to the medium and that upon this ground the respondent was entitled to claim rescission of the sale; he further held that the respondent had not so accepted the goods as to deprive him of the said right.

The appellants appealed to the Court of Appeal which Court affirmed the decision of the Commercial Court and dismissed the appeal with costs.

For the purpose of this appeal it is necessary first to determine whether the contract between the parties, and the performance of it, is subject to the law of Gibraltar or to that of Malta.

Several communications having passed, an agreement was come to in the following terms :—

Eastern Telegraph Company, Limited—Gibraltar.

5th December, 1917, at 11.55 a.m.

From Malta to BENAİM—Gibraltar.

“ Accept ten thousand kilos. anchovies, brine, 1917. Fishing seventeen pence nett, f.o.b. Gibraltar. Packing included 4 barrels, about 240 kilos. Altogether excluded, we require tins weighing not over twenty-five kilos. f.o.b. Gibraltar. Wire acceptance. Will open credit.

SPITERI DEBONO.

“ Gibraltar, 5th December, 1917.

“ Messrs. L. Spiteri Debono & Co., Malta.

“ Dear Sirs,

“ We thank you for your favours of the 9th and 14th ultimo, and confirm ours of the 15th.

“ *Anchovies.*—We are glad to confirm the sale we have effected to your goodselves of 9/10,000 kilos. anchovies in brine, packed in ordinary tins weighing 22/25 kilos. each, at the price of 1s. 5d. (one shilling and five pence) per kilo., f.o.b. Gibraltar, payment against shipping documents through a bank at Gibraltar. We hope you will open the credit in due course as we are trying to ship by first opportunity.

“ For your guidance we may inform you that Anchovies are very scarce at present, due to lack of fishing and tins. The above is a job lot we have purchased in this neighbourhood lately as they were in tins of 22/25 kilos., which, as you know are not current, and a quantity in barrels. But, as you know very well, the main thing now is to get supplies, no matter how the goods are packed; as there are all reasons to believe that no further lots of these goods are to be obtained for some time to come.

“ Yours faithfully,

“ (Signed) D. BENAİM & Co.

“ Malta, 5th December, 1917.

“ Messrs. Benaim & Co., Gibraltar.

“ Dear Sirs,

“ We confirm our letter of the 3rd instant in its full contents, and have to acknowledge the receipt your valued cable of yesterday's date (received this morning) reading as follows :—

“ ‘ Accept 9/10,000 kilos. anchovies seventeen pence f.o.b. Gibraltar, open credit, all weighing 22/25 kilos., approximately, except 140 tins, ten kilos. four barrels, altogether 240.’

to which we have promptly replied by cabling you thus :—

“ ‘ Accept ten thousand kilos. anchovies in brine, 1917. Fishing, seventeen pence kilo. nett, f.o.b. Gibraltar. Packing included four barrels, about 240 kilos. Altogether excluded, we require tins weighing not over twenty-five kilos.’

which we confirm.

“ The above cable is self explanatory and therefore it is useless to transcribe it plainly.

“ We now await your cable reply to open you the required credit as follows :—

“ ‘ 10,000 kilos. anchovies in brine, at 1s. 5d. per kilo. nett, f.o.b. Gibraltar.

“ £708 6s. 8d., plus freight.’

“ Yours faithfully,

“ (Signed) L. SPITERI DEBONO & Co.

(Signed) J. Spiteri.”

In the judgment of the Court of Appeal in Malta it was held that this contract, and all that followed from it, was governed by the law of Malta—which is in effect the Civil Law. In fact, no one then contended that the law of Gibraltar applied.

No doubt this contract should be regarded as made in Malta—for thence came the final acceptance by the respondent of the offer made by the appellants. But it appears to their Lordships to be plain upon the face of the three documents already set out that the contract was to be performed by the delivery of the goods on board a ship at Gibraltar selected by the respondent; from the moment of such delivery the appellants had no further control over the goods, and had parted with their possession and property in them.

The principle of law here applicable is thus stated by Mr. Dicey in his book on "The Conflict of Laws" (3rd edition, page 609):—

"When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*)."

This statement of the law is in full accordance with the judgment of the Court in *Jacobs v. Credit Lyonnais*, L.R. 12, Q.B.D., page 598, and the authorities there cited.

Now, the law of Gibraltar relating to the sale of goods is to be found in Ordinance No. 20 of 1895, which codified the law—Section 35 of that Ordinance provides:—

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered, to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

In this case it is beyond dispute that the manner in which the respondent dealt with the goods in question after their arrival at Malta was entirely inconsistent with the ownership of the seller according to this law of Gibraltar, which is merely the law of England. It is therefore unnecessary to decide whether the acts of the respondent by way of rescission are justifiable under the law of Malta, for that is beside the point.

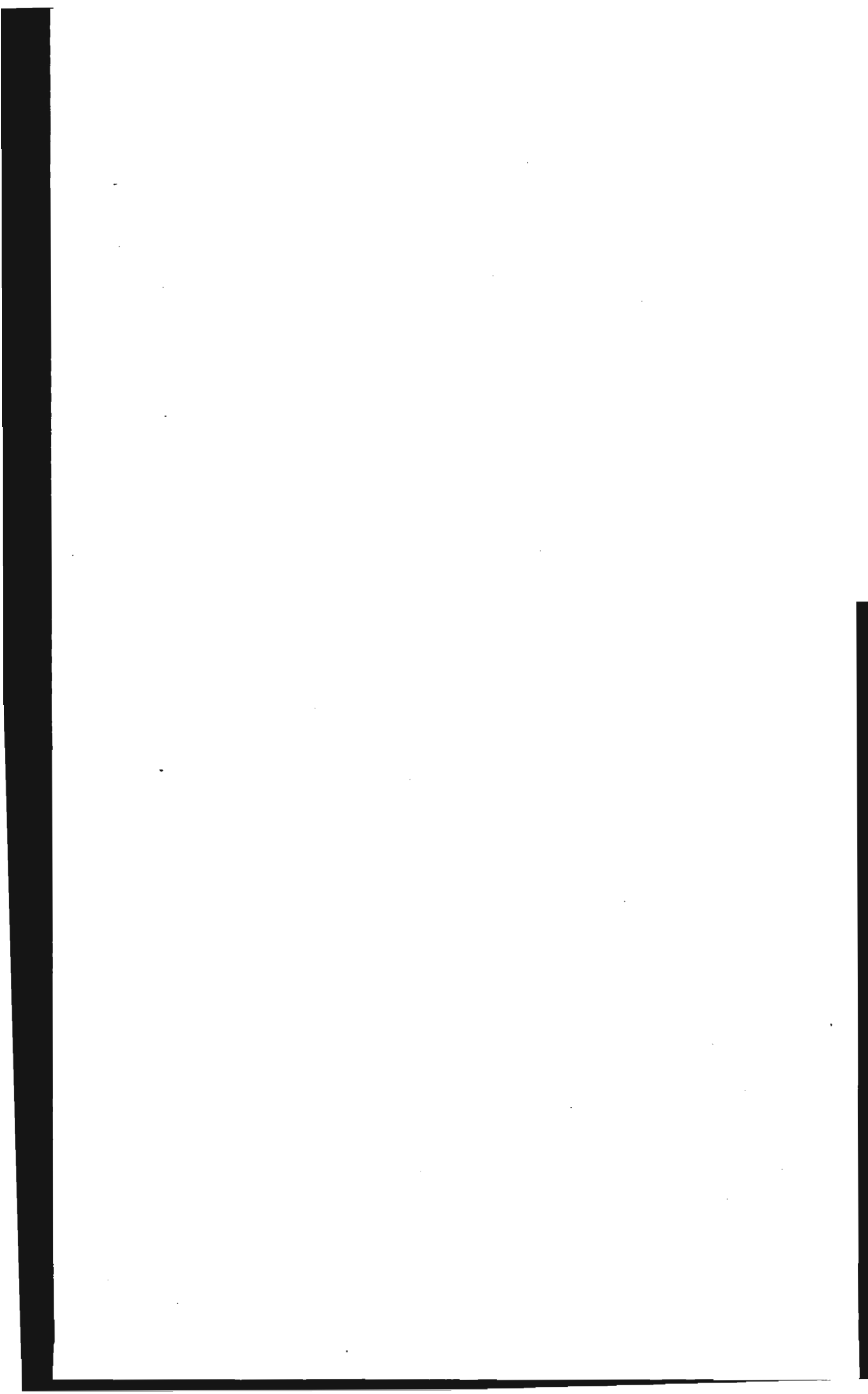
In the opinion of their Lordships, the respondent had parted with his right to reject the goods, and to rescind the contract, which is the question here to be decided. But he may still, possibly, have rights entitling him to recover damages for breach of contract in regard to the condition or quality of the goods delivered and accepted. No such claim, however, has come before this Board; and it is suggested that should it be made, it must fail as being out of time.

The point of view from which their Lordships regard this case was never brought to the notice of the learned Judges who gave judgment in Malta; and there is no reason to discuss whether

their decision was correct supposing the law of Malta to have applied to the making and performance of the contract.

In their Lordships' opinion the appellants are entitled to judgment in this appeal. But they consider that they are not entitled to any costs in the Courts of Malta, seeing that they never there took the point upon which their Lordships consider they should here succeed.

Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs and the action dismissed. The order as to costs in the Court below should stand.



In the Privy Council.

D. BENAIM AND COMPANY

2.

LUGI SPITERI DEBONO (TRADING AS
L. SPITERI DEBONO AND COMPANY).

DELIVERED BY LORD DAILING.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1924.