Privy Council Appeal No. 30 of 1937

Charles Francis Martin De Bueger - - - - *Appellant*

v.

J. Ballantyne & Company, Ltd. - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY, 1938

Present at the Hearing:

LORD WRIGHT.
LORD ROMER.
SIR LANCELOT SANDERSON.
SIR SIDNEY ROWLATT.
SIR GEORGE RANKIN.

[*Delivered by* LORD WRIGHT.]

This appeal raises a short but interesting question of the construction of an agreement about which the decisions in the Courts of New Zealand have exhibited differences of opinion. The agreement was made in London on the 2nd August, 1932, between the respondents, described as "a company incorporated in New Zealand, whose London Office is at 117, Wool Exchange, Basinghall Street, in the City of London," and the appellant, described as "Charles Francis Martin de Bueger, of 139, Albany Street, Regents Park, in the County of London." Under the agreement the appellant was to proceed to New Zealand, there to be employed by the respondents as a tailor cutter for a period of three years from his arrival at a remuneration of seven hundred pounds sterling a year. The sole question is whether the appellant is entitled under that agreement to be paid according to the English or the New Zealand value of the pound. At the date of the agreement the latter was at about 10 per cent. discount as compared with the former, later during the period of the service the discrepancy rose to 24 or 25 per cent. A special case was submitted to the Court. It states that the appellant had always consistently claimed to be paid the agreed salary "in such sums of New Zealand currency as should be the equivalent at the time of each payment of the same amount in sterling" and that the respondents had refused to pay the £700 otherwise than in New Zealand currency. The case stated three questions for the opinion of the Court, of which the answer to the first is decisive of the dispute. It is (1) "Was the plaintiff [appellant] entitled to be paid the agreed salary in such amounts of New Zealand currency as would be the equivalent of sterling according to the rate of exchange current at the

time of each payment?" No point is raised on the phrasing of this question which might seem to suggest the answer. Question 2 is whether, if the appellant is right in his claim, the deficiency on each periodical payment carries interest? This is not now disputed. Question 3 is whether the payments actually made in New Zealand currency of £700 were a full discharge of the agreed salary? The answer to that question obviously must follow the answer which is given to the first question.

Northcroft J. in the Supreme Court decided in favour of the appellant. He held in effect that the question was purely one of construction of this particular contract. The use of the word "sterling" could not, in his opinion, be regarded as a mere habit of speech not meaning anything more than legal tender. In this contract he thought the word must be construed as signifying English currency in contrast with currency of other countries, and in particular with that of Australia or New Zealand. He referred to recent cases in which this contrast between sterling and other currency was plainly recognised.

In the Court of Appeal that decision was reversed by a majority. Reed A.C.J., who dissented, held that in the absence of the word "sterling" the salary would have been payable in New Zealand currency because it was the currency of the place of performance. But the use of the word "sterling," which was not common form in a contract of service, in a commercial contract drawn and executed in London, must, in his opinion, be taken to express "the intentions of the parties as to the currency in which the remuneration should be paid." He held that "sterling" here meant British currency and was in constant use in that sense.

Ostler J., as also Kennedy J., with whose judgment Blair J. agreed, took the opposite view. Ostler J. held that as in August, 1932, the New Zealand pound was only at a discount of 10 per cent. and was not depreciated to 25 per cent. until January, 1933, the appellant was not likely to have exchange questions in his mind, and if he had, should have insisted on less ambiguous language than the word "sterling," which he said was used both in England and New Zealand as meaning the currency which has now taken the place of gold as legal tender. He would have come to a different conclusion if the New Zealand pound had been a different unit of account when the contract was made, but held that it followed from *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* [1934] A.C. 122, that the English and New Zealand pound were the same and hence that payment in New Zealand currency was a sufficient performance, since in New Zealand the word "sterling" at least until the Reserve Bank of New Zealand Act, 1933, meant nothing more than paper money which had taken the place since August, 1914, of the sovereign as legal tender. Kennedy J. also emphasises as the ground of his decision that "the English pound or the pound sterling, as the unit of account, is not only identical with the English pound

used in England for so many years, but it is also one and the same as the New Zealand pound." "The pound in New Zealand is," he held, "the same unit of account as the pound in England, not merely a unit of account with the same name"; hence he concludes "the obligation to be discharged by payment in New Zealand is expressed in a money of account common to New Zealand and to England and will be discharged by tender of that which is legal tender at the place of performance." Thus in his judgment the word "sterling" adds nothing. It merely, he adds, "emphasises what is already clear, that the money of account is English." He seems to use interchangeably unit of account and money of account, though the former should refer to a denomination and the latter to a currency.

Their Lordships, with the greatest respect, find themselves unable to agree with the majority of the Court of Appeal. It is important to realise what the *Adelaide* case (*supra*) actually decided. The decision was that a sum in "pounds" payable under a contract made in England but payable in Australia was payable not in sterling but in Australian currency. The difference in money value was very substantial, so that to a practical mind it would seem wrong to say that the English pound and the Australian pound were the same. They were only identical in name and as a matter of words, though up to 1914 they had been the same both in name and in fact, both being linked to gold, and based on the same gold coin, the sovereign. This identity in words, combined with practical difference in value was expressed by Lord Warrington of Clyffe in the *Adelaide* case (*supra*) at p. 138, where he said:—

> "I have come to the conclusion that merely as a unit of account, the pound symbolised by the £ is one and the same in both countries, and that the difference in the currencies merely concerns the means whereby an obligation to pay so many of such units is to be discharged."

It was just this difference in the "means" of discharging the obligation, that is, the actual currency, which was the essence of the case.

This practical difference was again emphasised in *Payne* v. *Deputy Federal Commissioner of Taxation,* [1936] A.C. 497, where an Australian taxpayer was objecting to convert income received in English sterling and left in England into Australian currency when making his tax returns. The figure of income, if so converted, was substantially higher than it would have been if he could have brought in his sterling income at its face amount. It was held that he was bound to convert the English pounds into Australian pounds. The name of the measure of the obligation might be identical, but the measure of the value connoted or of the means of discharging it, was different.

It is clear that under a contract like that in question what matters to the parties is the means (that is, the currency) in which the obligation is to be discharged. In their Lordships' judgment the word "sterling" was added in the agreement in order to define what means of discharge,

that is, what currency was being stipulated. The necessity for adding the word was simply because the "unit of account" the word "pound" or symbol £, is the same both in England and in New Zealand. If the word "sterling" had not been inserted the salary would have been payable in New Zealand currency, that being the place of payment, on the principles laid down in the *Adelaide* case (*supra*). The effect of that decision was recently summarised by this Board in *Auckland Corporation* v. *Alliance Assurance Co.*, [1937] A.C. 587 at p. 604:—

> "It is quite clear that the whole problem [in that case] arose because of the divergence in value of the two currencies, and it was solved as a question of construction by determining what currency in the true construction of the contract, was connoted by the use of the word 'pound.' It was held that in the absence of express terms to the contrary, or of matters in the contract raising an inference to the contrary, the currency of the country in which it was stipulated payment was to be made was the currency meant. Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connoting the appropriate currency."

In the agreement here in question, the word "sterling" in their Lordships' judgment is an express term intended to exclude and in fact excluding, the *primâ facie* rule according to which New Zealand pounds would be meant, as being the currency of the place of payment. It is impossible in their judgment to regard the word as indicating simply legal tender at the place of payment, New Zealand. The agreement is clearly on its face a formal and studied document. It is drawn up and executed in London between the respondents' London house and the appellant, a London resident. The insertion of the word "sterling" is not common form in a service agreement like this. If it is used in any business document in London it naturally means "British sterling" and nothing else. It is used in this sense habitually in exchange quotations and in documents dealing with international transactions, in which it is necessary to define the currency intended, including transactions with the Dominions. The contrast between sterling (*sc.*, British sterling or currency) and Dominion or Colonial currency is familiar. The contrasted use of these terms is to be found in seventeenth and eighteenth century authorities, of which some are cited in the *Adelaide* case (*supra*) at p. 153. The contrast between sterling and other currency is also illustrated in the *Westralian Farmers Ltd.* v. *King Line Ltd.*, 43 Lloyds List R. 378, where the charterparty distinguished between British sterling and Australian currency, and also *passim* in recent judgments in this country such as the *Adelaide* case (*supra*) and the *Auckland* case (*supra*). Having regard to the place where, and the parties between whom, this contract was made, their Lordships are satisfied that the appellant's claim is well founded. It is not to be forgotten that in August, 1932, exchange questions were matters of business moment. The appellant who was going to New Zealand might naturally desire to be assured that he would be paid in the currency with which he was familiar.

Their Lordships do not desire to express any opinion on the question whether the construction of the agreement would have been the same if it had been made and entered into in New Zealand. On this question eminent Judges in New Zealand seem to differ and their Lordships need not decide it on this occasion. But it would not, in their Lordships' judgment, be right to attribute to the appellant, or indeed to the respondents' London house, or to those who drafted the agreement, any familiarity with the law and practice of New Zealand in matters of currency, or any intention to import that law or practice, whatever it might be, into the agreement, which was obviously drafted with the idea of eliminating any doubt or dispute that the appellant would be paid the same amount of salary as if he were working in England.

For these reasons, their Lordships are of opinion that the appeal should be allowed and the judgment of Northcroft J. restored. If the parties are unable to agree on the sum to which the appellant is entitled, there must be an order for a reference to the Supreme Court to fix it. The appellant will have his costs of this appeal and his costs in the Courts below.

Their Lordships will humbly so advise His Majesty.

(47838—3\) [illegible]

In the Privy Council

CHARLES FRANCIS MARTIN
DE BUEGER

v.

J. BALLANTYNE & COMPANY, LTD.

DELIVERED BY LORD WRIGHT

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