Privy Council Appeal No. 90 *of* 1944

Joseph Darmanin for the firm C. Darmanin & Son - *Appellant*

v.

Carmel Micallef on his own behalf and for the firm G. Micallef & Son - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE ISLAND OF MALTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH NOVEMBER, 1945

Present at the Hearing:

LORD THANKERTON
LORD GODDARD
SIR JOHN BEAUMONT

[*Delivered by* LORD THANKERTON]

This is an appeal from a judgment of the Court of Appeal, Malta, dated the 9th December 1938, which upheld, by a majority, the judgment of His Majesty's Commercial Court of Malta, dated the 31st May 1938, which dismissed the present appellant's action.

The appellant, on behalf of the firm C. Darmanin and Son, raised the present action in the Commercial Court, Malta, on the 19th February 1938, against the respondent on his own behalf and for his firm, claiming to be entitled to a half share in the profits derived by the respondent from a contract awarded to them by the Royal Engineers on the 27th August 1937 for work to be done at Mosta Fort, in the Malta Command. The appellant based his claim on a written agreement dated the 18th November 1936, which provided as follows,

> "By virtue of this present instrument intended to have all legal effects it is hereby agreed as follows:—
>
> Joseph Darmanin for the firm of C. Darmanin and Son of the one part and Carmel Micallef for the firm G. Micallef and Son of the other part confirm the negotiations already in force since some time between them for the excavation of stone and construction thereof by means of machineries. Wherefore, the parties hereto on their own behalf and for the firms represented by them agree not to undertake, directly or indirectly, the one to the exclusion of the other, works of a similar nature.
>
> Should either of the parties hereto violate this agreement, the other contracting party shall have the right to one half of the profits deriving from such eventual enterprise with third parties and to make a judicial claim for damages sustained."

This agreement is not disputed by the respondent, but he maintains that his contract of the 27th August 1937, which may conveniently be referred to as the Mosta contract, does not fall within the terms of his agreement with the appellant, and he has obtained the judgment of both the Courts below in his favour on this point, which forms the only question in this appeal.

Both the Courts, in the opinion of their Lordships, have erred in approaching the question of what formed the subject matter of the negotiations which preceded the written contract between the parties, without first settling to what extent the contract was so ambiguous as to justify resort to evidence as to the negotiations.

There can be no doubt that it was the likelihood of the Government requiring contractors for the excavation of rock for the construction of military buildings at Mosta that brought the parties together for negotiation in the summer of 1936. There is also no doubt that the main subject of discussion at that time was a wire saw and cylindrical borer, which it was thought might be suitable, and that the appellant went abroad about the end of July 1936 to see how these machines operated, that, after his return, the written agreement was entered into between the parties on the 18th November 1936, and that, on the same date, he was paid half the expense of his trip by the respondent. The wire-saw and cylindrical borer were subsequently discarded as unsuitable for the work. It may be added that the machinery used by the respondents in execution of the Mosta contract was an air-compressor to operate the drills.

Both Courts found a conflict of evidence as to the range of discussion during the negotiations, which is thus stated by the majority in the Court of Appeal—" Whereas the issue involved in this action is whether during the negotiations between litigants which had been ratified by the agreement, an air compressor of the type in use by respondent firm at the works awarded by the War Department and consisting of tunnel digging at Mosta were included with the other types of machinery dealt with in those negotiations, and, therefore, fell within the meaning of the terms of the agreement aforesaid of 18th November 1936. As the Court of first instance has found, the evidence on this point is conflicting: appellant maintains, in fact, that the air compressor had not only been dealt with but that catalogues and photographs of it had been examined—the catalogues and photographs he has produced; respondent, on the other hand, denies that it was ever dealt with as a distinct plant but that it was only spoken of as an accessory to other plants. This version of respondent is corroborated by Bridgeford Pirie's evidence: this witness stated that in his presence, and as far as he could say, the plants mentioned were the wire-saw system, the circular cylinder in the form of a boring pile and the vertical windlass. Questioned about the compresssor, he answered: " I am positive that no compressor was mentioned between plaintiff (appellant) and the representative of the foreign firm ". Other witnesses, such as Moses Fenech and Joseph Farrugia, indirectly corroborate respondent's evidence ". After certain conjectures, the learned Judges agreed with the Court of first instance in deciding the conflict of evidence in favour of the respondent.

None of the learned Judges in the Courts below has considered the full signification of the phrase " works of a similar nature " in the agreement of the 18th November 1936, and the proper construction of these words should have been considered before any recourse was had to evidence dehors the written contract, which clearly provides the " best evidence " under Article 571 of the Code of Civil Procedure. In the opinion of their Lordships there is no ambiguity as to the meaning of these words, viz. that they refer to works " for the excavation of stone and construction thereof by means of machineries ", such works being similar to the works which were the subject of the negotiations. These words clearly add something to the negotiations, and there can be no justification for excluding such works on the ground that the means of carrying out the works, though it is machinery, is machinery which was not discussed during the negotiations. Incidentally, it may be pointed out that the more limited the discussion during the negotiations, the wider will be the connotation of the words " similar works."

Having indicated the proper construction of these words, no ambiguity arises which can justify any resort to oral evidence, and their Lordships turn to the Mosta contract to consider whether it contemplates works of a similar nature within the meaning of the agreement between parties.

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There can be only one answer to that question, namely, that it does. It requires the respondent to perform " all the labour, materials, workmanship, plant, machinery and everything necessary for the erection of buildings at Mosta Fort, in the Malta Command."

It follows that the appeal succeeds, and their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgments appealed from should be reversed, that it should be declared that the appellant is entitled to a moiety of the profits derived by the respondent from the Mosta contract, and that the case should be remitted to His Majesty's Commercial Court of Malta for further disposal. The respondent will pay the appellant's costs of this appeal, and his costs already incurred in both Courts in Malta.

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In the Privy Council

JOSEPH DARMANIN FOR THE FIRM
C. DARMANIN & SON

v.

CARMEL MICALLEF ON HIS OWN
BEHALF AND FOR THE FIRM
G. MICALLEF & SON

DELIVERED BY LORD THANKERTON

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