Privy Council Appeal No. 79 of 1944

Antonio Buttigieg - - - - - - - - - *Appellant*

v.

Captain Stephen H. Cross and others - - - *Respondents*

FROM

THE COURT OF APPEAL, MALTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH OCTOBER, 1946

Present at the Hearing:

LORD ROCHE
MR. M. R. JAYAKAR
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* LORD ROCHE]

This is an appeal by leave of His Majesty's Court of Appeal (Civil Hall), Malta, from a judgment of the said Court of Appeal, dated 8th November, 1943, allowing an appeal by the respondent, Brigadier Geoffrey F. H. Stayner on behalf of the Competent Military Authority (hereinafter referred to as H.Q.) from the judgment of His Majesty's Civil Court, First Hall, dated the 30th July, 1943.

The main question falling to be determined in this appeal is whether the Competent Military Authority in Malta, now represented by the respondent, Brigadier Normal Salew, is liable to the appellant in damages for alleged breach of contract in and about the opening by the appellant of Maxim's Club Valetta, by reason of H.Q. placing the said Club out of bounds to service members.

The facts are as follows:

In April, 1941, it was proposed by H.Q. that a Club for officers serving in His Majesty's Forces should be opened in Valetta, and the appellant, who was the Proprietor of the Monico Bar, Valetta, was approached on behalf of H.Q. with a view to his becoming Manager of the Club. In his letter of the 10th April, 1941 (Exhibit 2), addressed by the appellant to the Staff Captain, H.Q., the appellant stated his willingness to take on lease certain premises, and to fit them up for the use of the Club, and he asked H.Q. to procure for him a licence similar to that held by certain other named establishments which would enable the appellant to continue the Club after the termination of the war. According to the evidence of the appellant, H.Q. failed to obtain such a licence for the appellant as the Police were unwilling to grant it. The appellant was informed of this by Captain Longsdon on behalf of H.Q. and, according to the appellant, Captain Longsdon then used these words: "I (the appellant) should have a guarantee 'seeing that the war was not likely to come to an end quickly and that the Club would be kept open throughout the war'".

Although the desired licence could not be obtained the proposals for forming a Club continued, and the appellant took a lease of certain premises at rents which amounted to £362 10s. per annum, and spent money in fitting up the premises as a Club. The Club was to be managed by a committee of officers and the appellant was to be the Commercial Manager. The first members of the Committee were nominated by H.Q. and included the first three respondents: Captain Cross, who became Chairman of the Committee, Captain Roddy, who became the Honorary Secretary of the Committee, and Captain Turner. Rules for the conduct of the Club were drawn up by Captain Roddy and approved by H.Q.

These Rules, which are Exhibit 3, provided so far as material—Rule 8—that the Club should be managed by a Committee consisting of Chairman, Honorary Treasurer and Honorary Secretary and such members of the Committee as should be decided from time to time, but it should never be less than three in addition to the three officers. The Committee should be elected at each bi-annual General Meeting and they should hold office for six months. The Committee should have power to engage or dismiss any servant of the Club whose wages were paid wholly or partly by them. The Committee might make, alter or vary such By-Laws and Regulations as, in their opinion, might be necessary for the better regulation of the Club. They might purchase, or cause to be purchased, such articles as might be required for the necessary carrying on of the Club, and they should be responsible for paying all rent appertaining to the Club. The Committee should have power to appoint a Commercial Manager to superintend all the commercial matters of the Club. Rule 15 provided that the Commercial Manager should be responsible for all commercial and financial matters affecting the Club with the exceptions therein specified. He was to be responsible for the supply of all catering requirements, intoxicants and other liquor, furniture and such other amenities as might be necessary from time to time. He should be responsible for meeting all bills relating to the matters under his control. Rule 18 provided that the Club should, as at present constituted, endure only during such time as the then state of hostilities existed. On the cessation of hostilities a General Meeting should be called to decide the status of the Club. On the dissolution of the Club as such, the name, premises and such appurtenances as should be decided at the General Meeting should revert to the Commercial Manager. Although the rules did not expressly so state, it is admitted that all the profits made by the Club in catering, and by the sale of liquor, were to belong to the Commercial Manager. Although it is common ground that H.Q. took an active interest in the formation of the Club and in procuring officers to serve on the first Committee, it is clear from the rules that once the Club was formed, H.Q. had no part in the management.

The Club was opened on the 3rd September, 1941, and on the 31st May, 1942, the Club was placed out of bounds for service members by order of H.Q. The Order was made admittedly in the interests of military discipline because the Club was being mismanaged by the sale of liquor long after permitted hours and by the admission of undesirable women to the premises. As the Club was a purely Service Club this Order brought the Club to an end, and it was subsequently wound up. Correspondence took place between the appellant and H.Q. in which the appellant complained of the loss to which he had been put by the action of H.Q. in placing the Club out of bounds and sought to hold H.Q. responsible for such loss. On H.Q. repudiating any liability this suit was instituted on the 12th January, 1943.

The original defendants to the suit were the first three respondents but, on the 12th March, 1943, after most of the evidence had been heard, Brigadier Stayner was, by order of the Court, called as a party to the suit. It is not disputed that Brigadier Stayner and, subsequently, Brigadier Salew, effectively represented H.Q. In the Writ it was alleged that the defendants, in their capacity aforesaid, commissioned the plaintiff to open the said Club and an adjoining restaurant for the duration of the war and undertook to pay the rent of the premises, and that the Club was closed down before the period agreed upon. The plaintiff

claimed first, that the defendants should be condemned to pay the plaintiff the rent for the said premises paid by him, and secondly, that the defendants should be held responsible for the damages sustained by the plaintiff in consequence of default on their part; such damages consisting of the expenses incurred by him in connection with the opening of the said Club as well as the subsequent payments of rent for the said premises.

At the trial the learned Judge allowed the appellant's first claim in respect of rent against the first three respondents, Captains Cross, Roddy and Turner, and as against Brigadier Stayner he allowed the appellant's claim for damages.

Against this judgment both the appellant and the respondents appealed to the Court of Appeal. It was contended by the appellant that there were no lawful grounds for excluding the amount due for rent from the damages in respect of which Brigadier Stayner had been held liable, and he prayed that the judgment of the Civil Court should be varied accordingly.

On the 8th November, 1943, the learned Judges of the Court of Appeal gave judgment allowing the appeal of Brigadier Stayner, with costs, and dismissing the appellant's appeal. The reasons for allowing the appeal of Brigadier Stayner are given in the following passage:—

" Supposing that it had been sufficiently proved that there had been an explicit agreement between the Military Authorities and the Plaintiff to keep the Club open throughout the war, and that the Military Authority had so stipulated with the Plaintiff, it is obvious that the Brigadier or other Authority had acted *jure administrationis* in order to ensure that officers should have a Club to go to when on leave. But the Military Authorities could never have renounced the rights which appertain to them *jure imperii*. It is a settled principle, and it has been constantly held by this Court and in local case-law, that those two functions of the Civil or the Military Government are totally distinct. The Military Authorities could not have renounced those rights, inasmuch as it would have been immoral and against every fundamental principle of Constitutional Law if the Authorities, in order to open a Club—which is a purely administrative act —were to sacrifice interests which are far more important and therefore of a much higher order, whether political, moral or affecting public order. Consequently when, within the administrative sphere, the Government enters into a contract with a private individual, the Government is bound to respect that contract, but it does not thereby deprive itself of its political power to issue orders that may become necessary by reason of public order, *jure imperii*—even though, in consequence of such orders, the contract itself becomes impossible of fulfilment."

In appeal to this Board the case of the appellant has been based on grounds other than those taken in the courts below. So far as the claim for rent is concerned it has not been argued that the appellant, having obtained judgment against the defendants, Cross, Roddy and Turner, can now recover on an alternative claim against H.Q., but it is contended that rent paid by the appellant, which has not been refunded to him by the other respondents, can be added to the damages payable by H.Q. The only question for consideration therefore arises on the claims for damages against H.Q.

Sir Roland Burrows, on behalf of the appellant, mindful of such cases as *Adams* v. *London Motor Builders* (1921) 1 K.B. p. 495, and *Rederiaktiebolaget Amphitrite* v. *The King* (1921) 3 K.B. 500, properly conceded that it was not open to the Crown to bind itself not to close the Club if that course became necessary in the public interest and, further, that the Order placing the Club out of bounds was justified in the circumstances which existed. In the latter of the two cases above mentioned Rowlatt J. at page 503 said: " It is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State." These words appear to their Lordships to cover that aspect of the present case. A different contention was therefore resorted to, viz. that

H.Q. were under a contractual obligation to the appellant so to organize and conduct the Club that it would not be necessary to close it during the war, and he claimed damages for the breach of this obligation. It was argued that such a contract must be implied from all the circumstances of the case. No such contract as is now relied upon was pleaded or was considered or passed upon by either of the lower courts, nor in their Lordships' opinion is there any evidence to support it. In their Lordships' view, no contract whatever is proved to have existed between the appellant and H.Q., nor was any such contract ever contemplated. The passage in the plaintiff's evidence quoted above and relied on by the appellant as embodying the contract, even assuming it represented the actual words used, conveys an intention, which undoubtedly existed in the minds of all parties, and not a contract by H.Q. The guarantee referred to was the business probability that a Club so initiated would continue as was intended for the duration of the war. There is nothing to show that it would not have so continued if it had been properly conducted. At the hearing before the Civil Court the evidence and the findings were concerned with the question whether the fault for its misconduct rested with the Committee represented by the first three defendants, or with the appellant who after all, as far as drinking after hours was concerned, owned and presumably controlled the liquor which was consumed. But the trial judges thought the fault lay with the Committee and it is quite unnecessary for their Lordships to pronounce upon this matter. Suffice it to say that no one made or supported by evidence any charges against H.Q. in this connection or suggested what they ought to have done or could have done in the matter. In these circumstances it seems to their Lordships that the suggested implications so far from being necessary are neither reasonable nor even possible. To give efficacy to a contract with such implications, Rules quite other than those adopted would have been necessary. In these circumstances the contentions advanced before this Board fail and the result arrived at by the Court of Appeal was in the opinion of their Lordships correct. On this view of the matter it is unnecessary for their Lordships to consider whether the precise grounds upon which the Court of Appeal based their decision were or were not valid and particularly whether the distinction relied upon between the *jus administrationis* and the *jus imperii* exists under Maltese Law. Their Lordships accordingly express no opinion upon this matter.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

(51982) Wt. 8013—5 90 10/46 D.L. G. 338

In the Privy Council

ANTONIO BUTTIGIEG

v.

CAPTAIN STEPHEN H. CROSS
AND OTHERS

DELIVERED BY LORD ROCHE

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