9, 1948

In the Privy Council.

No. 80 of 1945.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE SITTING AS A COURT OF CIVIL APPEAL

UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES
14216

BETWEEN

ISRAEL MARGOLIS... ... ... (*Defendant*) APPELLANT

AND

SARKIS IZMIRILIAN ... ... (*Plaintiff*) RESPONDENT.

CASE ON BEHALF OF THE RESPONDENT

1.—This is an Appeal from a Judgment dated the 12th December, 1944, of the Supreme Court of Palestine sitting as a Court of Civil Appeal (D. Edwards, British Puisne Judge and G. Frumkin, Puisne Judge), setting aside the judgment dated the 12th March, 1944, of the District Court, 5 Tel Aviv and awarding the Respondent (the seller) the difference between the contract and the market price as damages for the Appellant's (the buyer's) breach of contract of the sale of goods.

2.—The main question at issue in this Appeal is whether a buyer's belief that the import licence required under Section 3 of the Licensing 10 of Imports Order, 1939, would not be granted justifies him in repudiating a contract of sale of goods, if subsequently during the currency of the contract and despite an apparent refusal the necessary licence is obtained.

3.—Before setting out the events in sequence leading up to the litigation out of which this Appeal arises, it might be convenient to 15 summarise the more important of them in the form of a chronological table :—

1 March 1942. Contract of Sale of Goods between the Parties.
15 ,, 1942. Letter from Buyer to Seller's Agent, that he has applied for the necessary licence.

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26 March 1942.	Letter from Buyer to Seller's Agent, that he wishes to be free, as he is unaware whether he can be included in the list of authorised importers.
26 ,, 1942.	Postscript to above letter, enclosing a refusal of licence from the Director of Customs dated the 24th March.
9 April 1942.	Letter from Buyer, that he cannot do anything until he knows whether the supplier has obtained an Export licence and in any case what is the hurry, the parties have up to the 31st August.
22 April 1942.	Letter from Food Controller to Seller's Agent that the necessary licence will be granted.
26/7 ,, 1942.	Seller's Agent so informs the Buyer, who promises a reply and later returns " a nasty answer."
27 ,, 1942.	The s.s. " Fred " with consignment of the contract goods reaches Haifa.
1 May 1942.	Information repeated in the form of a Notarial Notice, calling upon the Buyer to take up and pay for the goods.
4 ,, 1942.	Letter from Buyer's Advocate in reply; Buyer considers the contract cancelled as from the 26th March.
5 ,, 1942.	Delivery Order in respect of the said goods handed to Palestine Oil Industry " Shemen " Ltd. against a guarantee of the Anglo-Palestine Bank, Haifa.
2 August 1942.	Action begun in the District Court, Tel Aviv, claiming the difference between the contract price and the price obtained from Palestine Oil Industry " Shemen " Ltd.

4.—On the 1st March, 1942, Charles Schlick, a mercantile agent of Alexandria, Egypt, entered into a contract on behalf of an undisclosed principal in the Sudan for the sale of cotton seeds to the Appellant. The contract was in the following terms :—

Alexandria, 1st March, 1942.

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Seller.—Charles Schlick, Alexandria or substitute people from Sudan.
Buyer.—Israel Margolis, 11 Yehuda Halevy Street, Tel-Aviv, Palestine.
Quantity.—1,000 (thousand) tons of 1,000 Kgs. each.
Goods.—Sudanese cotton seeds, new and old crop.
Packing.—In old bags, suitable for export.
Price.—L.E. 12 (twelve Egyptian pounds) per 1,000 Kgs., netto/brutto, on basis origin weight, by public Sudanese weigher.
Insurance.—Covered and included in Seller's price, to final destination.
Destination.—To Haifa or any Palestinian port.
Shipment.—By sea or rail at Seller's option from Port Sudan, to c.i.f. Palestinian ports or rail station.

RECORD

Delivery.—During March until 31st August, 1942, from Port Sudan in one or four lots shipment.

Payment.—By opened confirmed letter credit through the Barclays Bank, or by remitting the money by telegraph to the same bank, 5 when Seller advises having any chance for place on ship to load goods.

Licences.—Subject to Seller's export licence, and to Buyer's import licence.

The said contract was signed by the above named Buyer and Seller 10 and was duly endorsed to the intended principal, the Respondent in this Appeal. p. 20, l. 3

5.—Among the measures called for by the outbreak of war in 1939 was the Import, Export and Customs Powers (Defence) Ordinance, 1939, which by Section 3 empowered the High Commissioner to make Orders 15 for the purpose therein stated. By virtue of the said powers the Licensing of Imports Order was duly made on the 11th December, 1939. From time to time the terms of the said Order were varied or amended, but at the date of the aforesaid contract the relevant provisions were as follows :—

S. 3. Nothing in the foregoing provisions of this Order shall be 20 taken to prohibit :— p. 38, l. 12

(*a*) the importation of any goods under the authority of a licence granted by the Director of Customs, Excise and Trade, provided that all conditions attaching to the said licence are complied with.

The various Orders will be found set out among the Additional Documents 25 agreed between the Parties (A, B, C and D, pp. 38–42).

6.—Almost from the first the Appellant would seem to have entertained doubts as to his ability to fulfil his engagement. On the 4th March he would appear to have cabled the said Charles Schlick with regard to the difficulty of obtaining the necessary import licence. On the 15th March 30 he is apparently trying to reassure his Seller (" You are quite aware that " inasmuch as the seller wants to sell the goods, the more I desire to buy " it, and it is not a children's play "). On the 26th March he cabled cancelling the Order (D./8) and on the same day he wrote a letter (D./9) confirming the cancellation, and concluding " At present, however, I wish 35 " to be free, as I am unaware whether I should be included in the list of " importers at all." p. 26, l. 32 p. 20, l. 22 p. 28, l. 5 p. 28, l. 10 p. 28, l. 27

7.—In the Respondent's contention the said cable and letter of the 26th March constitute a repudiation of the contract, and subject to such defence as the letter of the Director of Customs, about to be mentioned, 40 might afford, a wrongful repudiation.

p. 27, l. 33

8.—On the 24th March the Director of Customs wrote to the Appellant (D./7) " With reference to your application dated the 15th March " 1942 for a licence to import cotton seeds from Sudan I regret to inform " you that the licence for which you ask cannot be granted."

p. 25, l. 28
p. 20, l. 16
p. 26, l. 33
p. 30, l. 7

Whether the Appellant's application was bad for want of form or other 5 reason—the form in evidence in these proceedings (D./6) is dated the 6th March not the 15th as in the Director's above-mentioned letter, and this is the application the Appellant notifies to his Seller in his letter of the 15th March (P./6), which makes no mention of any or any further application of the same date—or whether the 15th was inserted in the 10 Director's said letter through inadvertence or extreme pressure of work intelligible enough under prevailing war time conditions, the circumstances were such as to raise a query in the mind of the Seller's said agent as to whether adequate steps had been taken to secure the licence or whether such refusal could be or was meant to be final (" I am assured here that 15 " import licence for cotton seeds are easily allowed," and see further the fourth paragraph of his letter of the 3rd April, P./9).

9.—But in any case the Appellant would appear to be precluded from relying upon the Director's said letter as justifying him in repudiating his contract having regard to the letter (P./5) he himself subsequently wrote 20 to the Seller's said agent on the 9th April—

p. 24, l. 4

> " . . . . likewise I also cannot do any thing unless I enquire " whether the supplier has obtained an export licence. There is " a clause in our contract that the transaction is subject to Import " and Export Licences accorded by the Palestine and Sudan Govern- 25 " ments respectively. Unless *no* (*sic*) such licences have been accorded " there is no validity to our understanding. And generally, why are " you in such a hurry ? Our understanding is up to the 31st of " August . . . ."

This would seem to recognize that an application for an import licence, 30 to be effective, should be based upon the availability of an export licence, that such application was yet to be made, and in any case there was plenty of time to see whether the contract could be carried out.

p. 21, l. 28

10.—On the 13th April the Respondent wired his agent in Palestine Y. N. Mindgeretsky (variously spelt Miedzyrzecki) that his information was 35 that the authorities in Khartoum had communicated with the authorities in Jerusalem and had satisfied themselves that an import licence would be granted (P./1) and supplying the relevant references to facilitate the necessary application.

p. 6, l. 1
p. 21, l. 39

11.—The said agent thereupon made a further application and on 40 the 22nd April he was notified that the necessary import licence would be granted. " In reply to your letters of the 14th and 17th April *re* import " licence for 1,000 tons cotton seed now en route to Palestine from the

"Sudan I have to inform you that an import licence will be granted to the "buyer of this consignment." (Letter from Food Controller, Jerusalem P./2). The said Licence, numbered 70,989 would appear to have been issued in due course.

p. 2, l. 12

12.—On or about the 27th April, on which day the S.s." Fred" reached Haifa with a consignment of the said cotton seed, the said agent had an interview with the Appellant in his office, informed him that an import licence would be granted to him (the Appellant) and showed him the above quoted letter (P./2).

p. 6, ll. 3, 31

The Appellant said he would give a reply, and later, over the telephone, returned "a nasty answer."

p. 6, ll. 32, 33

13.—In the Respondent's contention this amounted to a clear repudiation of the contract on the part of the Appellant.

14.—Subsequently, on the 1st May a formal notarial notice (P./3) was served upon the Appellant on behalf of the Respondent, notifying him of the arrival of the contract goods, of the availability of the necessary import licence, and calling upon him to take up and pay for the said goods. "In the event of the Appellant failing to take up the goods the Respondent "reserves to himself the right to sell the goods to someone else and claim "any difference in price from the Appellant."

p. 22, l. 10
p. 22, ll. 22, 26
p. 23, l. 7

15.—The Appellant did not take up or pay for the goods or make any reply to the above notarial notice other than to instruct his advocate who on the 4th May replied (P./4) to the effect that the Appellant considered the said contract cancelled as from the 26th March.

p. 21, ll. 11, 12, 16, 17

16.—On or after the 3rd May the said agent sold the said goods to the Palestine Oil Industry "Shemen" Ltd. at L.P.8.500 a ton (P./7), and on the 5th May a delivery order was given to the said company "Shemen" Ltd. against a guarantee of the Anglo-Palestine Bank, Haifa.

p. 25
p. 7, l. 30

17.—On the 2nd August 1942 action was begun in the District Court, Tel Aviv, with a Statement of Claim in which the Respondent claimed the difference between the contract price and the price received from "Shemen" Ltd.

18.—By his Defence the Appellant raised some eleven technical pleas: The power of attorney of the Respondent's advocate was bad (paragraph A); the Respondent was not the proper person to sue (paragraph B); the time allowed by the Notarial Notice was unreasonably short (paragraph F); that it was timed to expire on the Sabbath (paragraph G) "and it is "generally surprising how Plaintiff (Respondent) could apply for and "obtain a licence from (? for) Defendant (Appellant), and it is to be "assumed that if such licence was ever obtained it was received in an

p. 3
p. 3, l. 29

"irregular way and no doubt it was dangerous to make use of it." But the substantial plea was that already relied on, that the parties' contract was dependant upon the obtaining of an import licence, and as from the date when the required licence was refused (i.e., from the 24th March, 1942) the Defendant (Appellant) was discharged from the agreement and was no longer liable to receive the goods (paragraph D).

p. 3, l. 19

19.—The District Court, Tel Aviv (Their Honours Judge Israel Many and Judge P. Korngruen), gave judgment on the 12th March, 1944, dismissing the Plaintiff's (Respondent's) claim for the following principal reason :—

p. 13, l. 23

That the Defendant (Appellant) was entitled to consider the contract as null and void when the competent authorities refused to grant an import licence. The letter of the Director of Customs of the 24th March, 1942 (D./7) was a final refusal.

Upon this ground alone the Plaintiff's action might be dismissed, but the Court found it necessary to express its views on the other points raised.

p. 13, l. 40
p. 14, l. 2

The Court found that the licence was obtained and the goods forwarded in the name of the said "Shemen" Co., the Notarial Notice served upon the Appellant was therefore a simple formality and not an honest offer to to Appellant to accept the goods.

p. 14, l. 5

The Court found further that as the contract in question was a sale on c.i.f. terms the Appellant was only bound to pay against the tender of bills of lading, and these the Respondent did not have in his possession at the time of the Notarial Notice.

p. 19, ll. 5, 6
p. 19, ll. 30, 31
p. 13, l. 40

20.—With regard to these findings the Respondent will respectfully contend that these latter findings, expressly *obiter*, are misconceived, because (*a*) the contract was not strictly on c.i.f. terms, the Seller having the option of forwarding the goods by rail and in any case payment was to be on quite other terms, and (*b*) that at any time after the Appellant had repudiated his contract (i.e. after the 26th March or in any case on and after the 27th April) the Respondent was at liberty to sell the goods to anyone willing to buy, and have such Buyer's name inserted in the necessary documents. (The Respondent however must not be taken to accept the accuracy of the statements set out in this paragraph of the Judgment of the District Court) ; (*c*) the said Notarial Notice was a simple formality only in the sense that it was required (if at all) merely for purposes of evidence. There was no call on the Respondent, in view of the Appellant's attitude, to repeat his offer of the 27th April. It might further be pointed out that the only answer in respect of the said Notice was not that the Appellant wanted further time to comply with the contract, but that he regarded the contract as cancelled as from the 26th March.

With regard to the main ground of the decision it is a little difficult to follow their Honours' reasoning. There was no final refusal of a licence

because within a few weeks and well within the currency of the contract the necessary licence in respect of the said goods was issued. Moreover the terms of the Order under which such licences are required in no way preclude a fresh or even repeated applications, and in any case the grant 5 is made wholly discretionary.

RECORD

21.—On the 28th March, 1944, Notice of Appeal was lodged against the above decision of the District Court, Tel Aviv. The first two grounds of appeal were as follows :—

1. The Court below was wrong in holding that the Respondent 10 (Appellant) was entitled to consider the contract at an end after he had received a refusal of a licence to import cotton seed.
2. The Court below misunderstood the contention of Appellant (Respondent). Even if, which is not admitted, the Respondent (Appellant) was not bound to take any further steps to secure an 15 import licence, he was bound to wait a reasonable time before repudiating the contract.

22.—On the 12th December, 1944, the Supreme Court of Palestine sitting as a Court of Civil Appeal gave Judgment in favour of the Respondent. By his Judgment Mr. Justice Edwards (with whom the p. 15 20 other Puisne Judge G. Frumkin agreed) found that the Appellant's letter of the 26th March, 1942, amounted to a repudiation of the contract. " In p. 16, l. 29 " that letter he categorically stated ' I wish to be free '." As for the point that the Notarial Notice only gave the Appellant 24 hours in which to comply, and that it expired on the Sabbath, the Court accepted the 25 Respondent's contention that if the Appellant felt the period insufficient he could have asked for an extension of time. But this he did not do. p. 16, l. 38

As the time for fulfilment of the contract was not to expire until the 31st August, 1942, the Appellant should have waited a reasonable time to see whether an import licence might not be obtained.

30 " In this connection Mr. Goitein for the Appellant (Respondent) p. 17, l. 3 " has called our attention to the case of *Austin Baldwin & Co.* v. " *Wilfrid Turner & Co.* . . . . 36 T.L.R. 769 and to the case of " *Andrew Miller & Co.* v. *Taylor & Co. Ltd.* (1916), K.B., pp. 402, " 414 and 416 where Swinfen Eady, L.J., held at p. 415, that it was 35 " the duty of the Plaintiffs to have waited a reasonable time for the " purpose of seeing whether it were possible to fulfil their contract, " and it was said that if they had waited the contract could have been " carried out as usual without any difficulty. In our view the parties " before us expressly provided for such a period in the contract itself. 40 " We therefore consider that the Respondent should have waited till " the 30th August, 1942, and we accordingly hold that the Respondent " (Appellant) was not justified in breaking the contract."

23.—In the Respondent's respectful submission the Judgment of the Supreme Court is correct and, among other reasons, for those therein stated.

RECORD

24.—In the Respondent's contention the sole purpose of the clause in the parties' contract as to licences was to relieve the parties from liability in the event of the necessary licences proving unobtainable; not to affect the validity of the contract itself, and still less to entitle a party to put an end to the contract should the obtaining of a licence prove more difficult than anticipated. The writing of such a letter as that of the Director of Customs of the 24th March is only evidence that the granting of licences was no mere formality. It is no evidence that the Director, or whoever the proper authority might be, would not entertain a further, or a better supported application. There is nothing in the terms of the Order which permits of the grant of such licences precluding more than one application. On the contrary as the Director need assign no reason for a refusal (Licensing of Imports Order, 1939, section 5 (1), section 6) so for good reason he might reconsider; and it might be his duty to reconsider, especially if it could be subsequently shown that the proposed importation would accord with the needs of the country at the time, for this is Defence legislation (see Title and Preamble). But in any case the apparent refusal of the 24th March would not seem to advance the Appellant's case because subsequently on the 9th April he is saying: "I also cannot do anything "unless I enquire whether the supplier has obtained an export licence."

pp. 38, 39
p. 38, l. 30
p. 39, l. 12
p. 38, l. 2
p. 24, l. 4

(Letter to Seller's Agent P./5.)
This is at the least an admission that a more effective application for a licence might be successful and there is plenty of time in which to make it. On the basis of this letter he would appear to be estopped from alleging that the contract was dissolved or "cancelled" as from the 24th March. Within three or four weeks of this letter, and within as many months from the date therein mentioned the necessary licences were available. There was nothing therefore to discharge the Appellant or to excuse his performance.

p. 21, l. 12

25.—The Respondent accordingly humbly prays that the Appeal may be dismissed and the Judgment of the Supreme Court of Palestine affirmed for the following among other

REASONS

1. Because the Appellant is in breach of his contract with the Respondent and has thereby occasioned him loss.

2. Because the Respondent has done all that in him lay to lessen such loss.

3. Because the Judgment of the Supreme Court of Palestine is correct, and for the reasons therein stated.

H. GOITEIN.

In the Privy Council.

No. 80 of 1945.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE SITTING AS A COURT OF CIVIL APPEAL.

BETWEEN

ISRAEL MARGOLIS
(*Defendant*) APPELLANT

AND

SARKIS IZMIRILIAN
(*Plaintiff*) RESPONDENT

CASE ON BEHALF OF THE RESPONDENT

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In the Privy Council.

No. 80 of 1945

ON APPEAL FROM THE SUPREME COURT OF PALESTINE SITTING AS A COURT OF CIVIL APPEAL.

BETWEEN

ISRAEL MARGOLIS — *Appellant-Defendant*

AND

SARKIS IZMIRILIAN — *Respondent-Plaintiff*

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