

C5402

Yuzepi
23, 1950

16

In the Privy Council.

21265

ON APPEAL FROM THE COURT OF
APPEAL, MALTA

UNIVERSITY OF LONDON
W.C.1
17 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

JOSEPH and GEORGE GRISTCI proprio et nomine
(Defendants) APPELLANTS

AND

EMMANUELE BORG proprio et nomine ... (Plaintiff) RESPONDENT.

CASE FOR THE RESPONDENT

RECORD

1.—This is an Appeal from the Judgment of the Court of Appeal for Malta affirming the Judgment of the Commercial Court for Malta, which Court had given Judgment for the Respondent for the amount of a debt (£433 6s. 8d.) with interest at 6 per cent. from the 1st March, 1936, until the 15th March, 1948, the date of the hearing in the Commercial Court, and certain legal expenses (£26 6s. 0d.) with costs. p. 26 p. 63

Final leave to appeal to His Majesty in Council was granted to the Appellants by the Court of Appeal for Malta by decree dated the 27th June, 1949. p. 81

10 2.—The right to recover these sums was assigned to the Respondent by Allan and Dey, fish-merchants of Poynerock Road, Aberdeen, Scotland, by an instrument dated the 5th September, 1944, in consideration of a cash payment of £108 6s. 8d. Notice of this assignment was given to the Appellants by judicial letter dated the 9th October, 1944, and proceedings commenced on 27th November, 1944. p. 83 p. 84

3.—The Respondent's case as shown by his writ of summons and accompanying declaration was that the Appellants had become indebted to Messrs. Allan and Dey in the following circumstances: By letter dated 24th September, 1935, the Appellants stated they were proposing to order and by an Order dated 2nd October, 1935, the Appellants did order from p. 1 p. 3 pp. 92 & 88

20

RECORD

p. 90

Messrs. Allan and Dey, fish to the value of £260, and by a further order dated 8th October, 1935, the Appellants ordered from Messrs. Allan and Dey, fish to the value of £173 6s. 8d. Both parcels were delivered but neither were paid for. The Appellants had by their letter of 24th September, represented that the first order was placed on behalf of a Mr. John Mazzitelli. The second order was expressed to be on behalf of "Messrs. Felix Blanc." Messrs. Allan and Dey contended, however, that these orders were fictitious in that although there was a Mr. John Mazzitelli and a Mr. Felix Blanc, the orders were not really placed by them and that their names were merely used to cloak the fact that it was the Appellants who were buying the goods as principals and that therefore Messrs. Allan and Dey were entitled to look to the Appellants as their debtors for £433 6s. 8d. goods sold and delivered, and that Messrs. Allan and Dey did treat the Appellants as their debtors and that the Appellants had accepted the position. It was this claim for £433 6s. 8d. for goods supplied together with accessory rights (e.g. interest and certain legal costs) which was assigned by Messrs. Allan and Dey to the Respondent and which he set up in his writ and declaration. In accordance with the practice in Malta the Respondent was required to indicate in his declaration the evidence on which he proposed to rely in support of his claim and he indicated his intention to rely *inter alia* on admissions and offers of payment made by the Appellants to Messrs. Allan and Dey.

p. 5

4.—The statement of Defence was delivered on 11th December, 1944, and raised the following defences :—

- (A) That the Appellants had "taken over as guarantors" the liability of £173 6s. 8d. to Messrs. Allan and Dey for the goods ordered by Mr. Felix Blanc, but that the other parcel of goods had been delivered to and sold by Mazzitelli and that the Appellants were not liable therefor. Their liability to Messrs. Allan and Dey was therefore limited to £173 6s. 8d.
- (B) That the assignment by Messrs. Allan and Dey to the Respondent was a litigious assignment and that therefore the Appellants were entitled under Article 1565 of the Civil Code to a release from liability on paying to the Respondent the sum he had paid to Messrs. Allan and Dey.
- (C) That although the written assignment by Messrs. Allan and Dey to the Respondent included an assignment of the claim for interest Messrs. Allan and Dey never intended to assign that interest.
- (D) That the Appellants were not responsible for the legal costs assigned.

p. 30

5.—The trial Judge found that Mazzitelli was in the employ of the Appellants and a mere "prete nom" screening them and that the Appellants

were the parties liable for the price of both parcels. He held that the claim was not a litigious claim within the meaning of Section 1565 of the Civil Code, but that in any event the application of that section was excluded by Section 122 of the Commercial Code. He therefore on 22nd April, 1947, gave Judgment for the Appellants for the amount claimed. There is no reference in the Judgment of the trial Judge or in the Notice of Appeal or in the Judgment of the Court of Appeal or in the grounds of appeal in the Petition for leave to appeal to the Privy Council to the points in the Defence referred to in paragraph 4 (c) and (d) above. It is assumed that these points were not persisted in by the Appellants. So far as the claim for interest is concerned it is submitted that the form of the assignment and particulars thereto quite clearly operated to assign Messrs. Allan and Dey's claim to the Respondent. So far as the £26 legal costs is concerned this appears to have been treated as part of the costs. In any event it is submitted that as these two points were not apparently argued before the trial Judge or Court of Appeal they cannot now be raised.

6.—By their Petition of Appeal dated 13th May, 1947, the Appellants appealed to the Court of Appeal on two grounds, viz. :

- 20 (A) That they were not in fact liable for the goods ordered on behalf of Mazzitelli.
- (B) That in any event the Appellants were entitled to a release under Section 1565 of the Civil Code on paying the Respondent the sum he had paid to Messrs. Allan and Dey. They did not by their Petition of Appeal dispute their liability to pay 25 per cent. of the debt due in respect of the goods ordered by Mr. Blanc together with interest thereon. In a Note of Submissions dated 17th February, 1948, the Appellants advanced two further grounds of appeal neither of which were in their defence or taken before the Commercial Court, viz. :
- 30 (C) That notice of the assignment should have been given to Mr. Mazzitelli and Mr. Blanc, and that in the absence of such notice no action lay against the Appellants.
- (D) That the remedy of Messrs. Allan and Dey lay in an action for damages only and that they had no claim for a liquidated debt.

7.—The Court of Appeal gave Judgment on 15th March, 1948, dismissing the Appeal. The Court of Appeal held :—

- 40 (1) That the plea that notice of assignment should have been given to Mr. Mazzitelli and Mr. Blanc was a dilatory plea which by the law of Malta and the practice of the Maltese Courts had to be raised at the commencement of the action and that as it had not been raised in the Court of First Instance it could not be raised on appeal.

- (2) That the Respondent's claim was not a claim for damages but a claim for a debt due to Messrs. Allan and Dey, and assigned to him.
- (3) That on the facts Mr. Mazzitelli and Mr. Blanc were mere pretexts for the Appellants and that the liability to pay for the goods was in the circumstances a direct and personal liability of the Appellants.
- (4) That the Judge of First Instance was right in holding that the Appellants were not entitled to a release under Section 1565 of the Civil Code on re-paying to the Appellants the sum paid by them to Messrs. Allan and Dey. 10

8.—It is submitted that the question whether the true principals were Mr. Mazzitelli and Mr. Blanc or whether their names were merely used by the Appellants as a fraudulent cloak for a purchase by the Appellants and the question whether the Appellants were the true principals were all questions of fact and that there was ample evidence on which the trial Judge and the Court of Appeal could hold the transactions fictitious and the Appellants the true principals, and that the trial Judge and Court of Appeal were right in so holding. The evidence in question was as follows:

- p. 88 (A) The order for the £273 worth of goods was in the name of the 20
p. 92 Appellants although the previous letter indicated it was for Mr. Mazzitelli.
- p. 9 (B) Mr. Abela (called for the Respondent) gave evidence that he was at the material time a traveller employed by the Respondents. Mr. Blanc worked in the Appellants' offices. Mr. Mazzitelli was, he said, a tailor employed by the Appellants. Soon after the transaction both Mr. Mazzitelli and both partners in the Appellant firm absconded from Malta to avoid paying their debts.
- p. 16 (C) Mr. Joseph Gristei (a partner in the Appellant firm) gave evidence that Mr. Blanc was in partnership with his brother George Gristei 30
(the second partner in the Appellant firm) in some independent venture. Mr. Joseph Gristei said the Appellant firm agreed to "take over" the parcel consigned to Mr. Blanc. Mr. J. Pullicino
p. 10 (called by the Respondent) gave evidence, however, that Mr. Blanc had stated that he was only an employee of the Appellants' firm and had never ordered the fish. As the Appellants had admitted liability for this parcel this evidence was only of value as throwing light on the relations with Mazzitelli.
- p. 92 (D) The Appellant firm had in their letter to Messrs. Allan and Dey of 24th September, 1935, described Mr. Mazzitelli as one of their 40
p. 9 best customers. Mr. Abela said in evidence that Mr. Mazzitelli's financial position at this time was "not sound" and that soon

after he absconded from Malta to avoid paying his debt. It also appeared from a Judgment which was produced that he had (prior to 24th September, 1935) dishonoured a bill of exchange for £27 10s. 0d. The trial Judge held that the Appellants' representation as to Mazzitelli being sound financially was false to their knowledge. As Mazzitelli was working in their office it is submitted that this inference was justified. p. 134 p. 30

- 10 (E) Mr. John Gialanze (called for the Appellants) stated that he purchased a parcel of fish from Mazzitelli, took delivery and paid for it. He said, however, that Mazzitelli was a draper and admitted that the purchase was effected through Mr. Abela (the Appellants' traveller). He also said he effected payment in January, 1936, whereas it appears from the official records that Mazzitelli had absconded from Malta before January. p. 24 p. 135
- 20 (F) Mr. Joseph Gristei admitted that he and his brother absconded from Malta on "legal advice" for the purpose apparently of assisting their legal advisers to compound with their creditors out of monies put aside for that purpose. It appears, however, that this scheme did not succeed and they returned to Malta in the summer of 1936 and tried to compound with their creditors and that they made an offer to Mr. Schembri (who was acting as Solicitor to Messrs. Allan and Dey) to compound their debt by a payment of 20 per cent. which was apparently to be made or guaranteed by their mother. This offer applied to the claims in respect of both parcels. It was refused. pp. 16 & 19
- 30 (G) On 25th October, 1937, Mr. George Gristei, one of the partners in the Appellant firm wrote to Messrs. Allan and Dey that he and his brother were then in prison for debt but that when released they hoped to pay the debt over a period of years. No suggestion was made in this letter that the Appellants were not liable. p. 115
- 40 (H) In 1939 the Appellants made an offer to Mr. Pullicino who was then Allan and Dey's legal adviser to transfer to Messrs. Allan and Dey the sum of £209 standing to their credit at Lloyds Bank in England and to pay the balance of £433 by instalments. Messrs. Allan and Dey were apparently prepared to accept this offer but for some reason the settlement did not go through. No suggestion was made at this time that the Appellants were not liable for the two debts. p. 10 p. 119 p. 120
- (I) On 17th November, 1943, Mr. Pullicino sent to the Appellants (for the purpose *inter alia* of preventing the claim being barred by lapse of time) a Judicial Letter demanding payment of the debt. On the next day, Joseph and George Gristei came to see Mr. Pullicino and, he stated, they then made a general statement p. 11

- pp. 17 & 21 that they hoped to settle this and other debts by a composition with all their creditors. Joseph and George Gristei said in evidence that on this occasion they made a definite offer to compound for 40 per cent. of the debt. It was not suggested that at this stage they were disputing liability but only ability to pay in full.
- p. 84 (J) On 9th October, 1944, the Respondent gave notice to the Appellants
p. 85 of the assignment of the debt to him. On 27th October, 1944,
their advocate replied claiming the right under Section 1565 of
p. 129 the Civil Code to be released on paying the Respondent the sum
he had paid to Messrs. Allan and Dey, but not disputing the debt. 10
On 28th October, 1944, George Gristei wrote to Allan and Dey
(heading his letter “*Re ‘ Vincent Gristei & Sons’ in liquidation*”) complaining of the assignment to the Respondent and suggesting that Allan and Dey should have accepted the offer of 40 per cent. which he said he and his brother had made. No suggestion was made in this letter that the Appellant firm were not liable in respect of the Mazzitelli parcel.
- p. 132 (K) In another action between the Respondent and Joseph Gristei the latter admitted in evidence that he owed the whole of this debt of £433. 20
- p. 133 (L) It appeared that in another action the Appellants had admitted liability to pay for goods ordered by them from William E. Rees Limited in the name of Mazzitelli.

7.—The point that no action lay because no notice of assignment had been given to Mr. Mazzitelli or Mr. Blanc was not taken in the Defence but raised for the first time on appeal. It is submitted that the Court of Appeal were right in holding that this was a dilatory plea which, under the Code of Procedure (Section 729) and by the practice of the courts, had to be raised at the commencement of the action and could not be raised for the first time on appeal. It is further submitted that no such notices 30 were in fact required. The Respondent’s case was that the orders given in the name of Mr. Mazzitelli and Mr. Blanc were fictitious and the true principals were the Appellants. If this view of the facts were correct (and both courts accepted it) there was no joint and several liability on the Appellants and Mazzitelli or Blanc. The persons liable were the Appellants. Even if Mazzitelli and Blanc had consented to the use of their names as agents for the Appellants as the true but undisclosed principals, there would have been an alternative liability and by suing the Appellants the Respondent would have elected to treat the Appellants as the persons liable. In these circumstances even had the plea been open to the Appellants (and it is 40 submitted it was not) it is submitted it would afford no defence.

8.—As to the point that Messrs. Allan and Dey’s claim against the Appellants was not a direct claim for a debt but a claim for damages, it is

submitted that the form of the action was clearly a claim in debt and that if the Respondent satisfied the court (as he did) that the orders were in truth given by the Appellants as principals then the Respondent was entitled to succeed.

9.—The Section of the Civil Code dealing with the sale of a litigious right is Section 1565, which is as follows :—

10 “ 1565 (1) Where a litigious right has been assigned, the
 “ debtor in the obligation may obtain his release from the assignee
 “ by re-imbursing to him the actual price of the assignment
 “ together with the expenses and interest to be reckoned from the
 “ the day of the payment of the said price by the assignee.

“ (2) A right is deemed to be litigious if there is a contested
 “ suit as to the existence thereof or if the debt due is not liquidated
 “ and is difficult to liquidate.”

There was no contested suit as to the existence of the debts at the date of the assignment and they were liquidated debts. Therefore it is submitted that the debts were not “ litigious rights at all.” In any event Section 122 of the Commercial Code provides “ The right competent to
 20 “ a debtor under Section 1565 of the Civil Code in the case of assignments
 “ of a litigious right cannot be exercised where the litigious right so assigned
 “ arises from a commercial transaction.” It is submitted that this debt clearly arose from a commercial transaction and for this reason also the Respondents were not entitled to any release under Section 1565 of the Civil Code.

10.—The Respondents humbly submit that the Appellants' Appeal should be dismissed and that the Judgment of the Commercial Court for Malta and of the Court of Appeal for Malta should be affirmed for the following amongst other reasons.

REASONS

- 30 (1) BECAUSE the use by the Appellants of the names of Mr. Mazzitelli and Mr. Blanc was a fictitious and fraudulent device to cloak the true position which was that the Appellants were themselves purchasing the fish.
- (2) BECAUSE the Appellants were the true principals to the contract with Messrs. Allan and Dey, and by their subsequent conduct accepted that position and because Messrs. Allan and Dey by their conduct and the Respondent by bringing this action elected to treat them as such.

- (3) BECAUSE the question as to whether the Appellants were the true principals to the contract and liable as such was a question of fact on which there are concurrent findings of fact by the Judge of First Instance and the Court of Appeal who were unanimous in finding in favour of the Respondent.
- (4) BECAUSE the Appellants admitted liability for the " Blanc " transaction subject to his claim to be entitled to be released from part of such liability under Section 1565 of the Civil Code.
- (5) BECAUSE the right of Messrs. Allan and Dey, which they assigned to the Respondent and which he sued upon in this action was a right to recover a debt, interest and charges and not a claim in damages and the action was properly framed, and because the Respondent was entitled to recover the debt interest and charges. 10
- (6) BECAUSE it was not necessary to give notice of the assignment to Mr. Mazzitelli or Mr. Blanc, and because even had it been necessary to give any such notices the Appellants, not having taken the point in their pleadings or in the Court of First Instance were not entitled to raise it on appeal.
- (7) BECAUSE the claims assigned were not litigious rights within the scope of Section 1565 of the Civil Code and because the operation of that Section was in any event excluded in this case by Section 122 of the Commercial Code. In so far as the character of the debt and its origin are questions of fact there are concurrent findings of fact in favour of the Respondent by the Court of First Instance and a unanimous Court of Appeal. 20
- (8) BECAUSE the Judgment of the Judge of the Commercial Court giving Judgment for the Respondent for the sum claimed with interest and costs and the Judgment of the Court of Appeal in affirming that Judgment are right. 30

ROLAND ADAMS.

T. G. ROCHE.

In the Privy Council.

No. 1 of 1950.

ON APPEAL FROM THE COURT OF APPEAL,
MALTA.

BETWEEN

JOSEPH and GEORGE GRISTCI
proprio et nomine
(Defendants) APPELLANTS

AND

EMMANUELE BORG proprio et
nomine ... (Plaintiff) RESPONDENT.

CASE FOR THE RESPONDENT

THOMAS COOPER & CO.,
27 Leadenhall Street, E.C.3.
Solicitors for the Respondent

GEO. BARBER & SON LTD., Printers, Funnival Street, Holborn, E.C.4, and
(A52993*)
Cursitor Street, Chancery Lane.