Privy Council Appeal No. 1 of 1942

Syndic in Bankruptcy of Salim Nasrallah Khoury – *Appellant*

v.

Mary Khayat – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH MAY, 1943

Present at the Hearing:

LORD RUSSELL OF KILLOWEN
LORD WRIGHT
LORD PORTER
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* LORD WRIGHT]

This is an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Civil Appeal, delivered on the 24th April, 1940, confirming a judgment of the District Court of Haifa dated the 17th January, 1940.

The respondent who was resident in Jezzin, Syria, commenced the action on the 27th October, 1937, claiming 2,347 Turkish gold pounds as due upon three promissory notes. One disputed issue is whether these three instruments were or were not promissory notes. One was for 2,000 Turkish gold pounds and matured on the 23rd May, 1930, the second was for 300 Turkish gold pounds and matured on the 23rd May, 1930, the third was for 47 Turkish gold pounds and matured on the 21st October, 1929.

The appellant who is the Syndic in the bankruptcy of the firm S. N. Khoury, merchants of Haifa, Palestine, did not deny the execution of the instruments but contended that they were not promissory notes but undertakings to deliver certain commodities, namely, the quantity of bullion represented by the specified Turkish gold coins or the corresponding number of Turkish notes; he resisted the claim for interest; he further contended that the rate of exchange to be applied to the monies due should be as at the dates of maturity of the instruments, and not as the respondent alleged, at the actual dates of payment.

The Supreme Court, affirming the District Court, held that the instruments were promissory notes and that interest was payable from the dates of maturity, but not beyond the date of the adjudication in bankruptcy. The Court further held that the dates of payment of the notes were the dates at which the exchange was to be taken. Any claim for interest under Article 305 of the Code was reserved for further decision in Palestine and is not now before the Board.

There had been considerable changes in the rates of exchange of Turkish gold pounds into the currency of Palestine. At the dates of maturity the rate stood at LPo.875 mils in Palestine currency to the Turkish gold pound. At the dates of the actual payments made on account of the debt between August, 1934, and September, 1937, the rates fluctuated between LP1.485

and LP1.510 to the Turkish gold pound. There is thus a considerable difference in the balance due upon the notes according as the dates of maturity are taken on the one hand or the dates of actual payment on the other. The payment actually made was made in the currency of Palestine and totalled in that currency LP1,780, which sum, deducted from LP2,052 the equivalent of 2,347 Turkish gold pounds exchanged at the rate of LP0.875 to the Turkish gold pound left due and owing LP272.375 which the appellant paid into Court. On the other hand the respondent claims that the original debt of 2,347 Turkish gold pounds has been only reduced by the payments on account which are brought in as totalling 1,206.500 Turkish gold pounds if the actual payments which were made in the currency of Palestine were exchanged into Turkish gold pounds at the rates actually ruling at the several dates of those payments. The respondent accordingly claimed that there was still owing a balance of 1140.500 Turkish gold pounds which represented a debt of LP1,722.155 if exchanged at the date of the claim, at the then local currency equivalent of the Turkish gold pound which was LP1.510 to the Turkish gold pound.

The judgments under appeal accept the respondent's contentions and apparently accept her figures of claim, though no definite sum is stated in the judgments. It may be, however, that the precise figures were left for subsequent ascertainment, like the figures of interest due up to the date of adjudication. But since their Lordships for reasons which will appear later do not agree with the view of the Supreme Court that the relevant dates for the exchange are the dates of actual payment but are of opinion that the proper dates are the dates of maturity of the instruments, they see no reason to differ from the figures put forward by the appellant. These first state the amounts of the debts exchanged into Palestine currency at a rate which apparently is not disputed if the appellant is correct in taking the dates of maturity of the instruments as the basic dates. From this figure of total debt in terms of Palestine currency, the payments made and accepted in Palestine currency have been deducted, leaving the balance admitted to be due in the same currency.

Their Lordships will deal with the questions of principle which arise on the judgments appealed from.

On the first question, whether the instruments in suit were promissory notes or undertakings to purchase a commodity, that is, either gold or Turkish notes taken at their gold value, their Lordships agree with the judgments of the Courts below. The form of the instruments is obviously that of promissory notes. The first as translated from the Arabic runs simply:

> " On 23 May 1930, I shall pay to the order of Mrs. Mary Khayat of Jezzin the sum specified above [that is, in the heading] i.e. two thousand gold Turkish pounds. Value received in cash, Haifa, 11 October 1929."

It is signed by the appellant, and duly stamped. The others are *mutatis mutandis* in identical terms.

What seems to be relied on by the appellant is the description of the subject matter of the obligation as " gold Turkish pounds." It is contended that Turkish gold coins are not currency in Palestine: however, it is clear that they are currency in Turkey and Syria, where the respondent was resident. Syria was at the material times a former Turkish territory mandated to the French. A promise to pay a sum expressed in Turkish money, made in Palestine, is not outside any of the recognised definitions of a promissory note. It is a promise to pay in a currency even though it is not that of the country where the note is made or payable. It is very common to have bills of exchange in a currency foreign as regards one of the parties or as regards the place where the bills are issued or payable. Generally in that case one of the parties is in the country in which the stipulated unit of account (such as pound or dollar) is in current use and the payment is to be made in that country. It is true that in proceedings to enforce payment, the debt, being expressed in foreign currency, must be translated into the corresponding amount of the local currency if judgment is to issue. But all the same the promise is a promise to pay money. What is peculiar here is that the note is both made and

payable in Palestine, so as to make it appear strange that Turkish currency is chosen. But then the payee is resident in Syria where the unit of account in use is Turkish. In their Lordships' judgment the three instruments are promissory notes.

Nor were the notes any the less negotiable instruments because of the word "gold." That word does not here import an obligation to deliver gold or pay in gold. What it does is to import a special standard or measure of value. This special measure of value may be described sufficiently, though not with precise accuracy, as being the value which the specified unit of account would have if the currency was on a gold basis. It is equivalent to a gold clause. "Such clauses" were said by Lord Maugham in *Rex* v. *International Trustee for Protection of Bondholders* [1937], A.C. 500, at p. 562, to have been "intended to afford a definite standard or measure of value and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed." Gold clauses were discussed and explained by the House of Lords in the opinion delivered by Lord Russell of Killowen in *Feist* v. *Société Intercommunale Belge d'Electricité* [1934], A.C. 161. Such clauses often specify a standard of value based on a particular weight and fineness of gold. In this case it is taken without objection that the Turkish gold pound has an established value. The distinction between the Turkish pound and the Turkish gold pound was illustrated in *Ottoman Bank of Nicosia* v. *Chakarian* [1938], A.C. 260. In that case a contract which included an obligation to pay in Turkish pounds had been made at a time when Turkey was on the gold standard. Before the date when payment became due Turkey went off gold and the pound depreciated. It was held that the payee was only entitled to be paid at the depreciated rate and could not claim to be paid in gold pounds, that is, in undepreciated currency.

In their Lordships' opinion the Courts in Palestine were right in holding that the three instruments were promissory notes whether the definition applied is that contained in Article 145 of the Ottoman Commercial Code or in the Bills of Exchange Ordinance of 1929, section 84 (1), which corresponds with section 83 (1) of the English Bills of Exchange Act (1882), in particular because the notes were unconditional promises to pay a sum certain in money.

Their Lordships think that the appeal fails on this issue and the respondent is therefore entitled to interest from the date of maturity, though the interest will not run beyond the date of adjudication.

There remains the more serious question which is at what dates must the rate of exchange be calculated. There can, their Lordships apprehend, be now no doubt as to the English law on this point. It is true that different views have been taken at different times and by different systems of law. Indeed there are at least four different alternative rules which might be adopted. The rate of exchange might be determined as at the date at which payment was due, or at the date of actual payment, or at the date of the commencement of proceedings to enforce payment, or at the date of judgment. English law has adopted the first rule, not only in regard to obligations to pay a sum certain at a particular date, but also in regard to obligations the breach of which sounds in damages, as for an ordinary breach of contract, and also in regard to the satisfaction of damages for a wrongful act or tort. The general principles on which that rule has been based are explained by the Court of Appeal in *Di Ferdinando* v. *Simon Smits & Co.* [1920] 3 K.B. 409, a case of an ordinary breach of contract. The rule, however, was established many years before then. It was again enunciated by the House of Lords in *The Celia* v. *The Volturno* [1921] 2 A.C. 544, where the claim was for damages in tort consequent on a collision. It was there contended that the date of the judgment was the proper date for translating the Italian currency in which the damages were assessed into English currency capable of being put into the judgment of an English Court, and some reference was made to different views expressed in the United States. Lord Sumner, however, holding that the

date when the obligation accrued was the date of the breach and that it was at that date that the exchange was to be taken, at p. 555 said:—

> " The agreed numbers of lire are only part of the foreign language in which the Court is informed of the damage sustained and, like the rest of the foreign evidence, must be translated into English. Being a part of the description and definition of the damage, this evidence as to lire must be understood with reference to the time when the damage accrues, which it is used to describe."

This can be applied directly to a case where the damage claimed arises from failure to pay a sum in foreign currency, like the Turkish gold pounds here. It is true that Lord Sumner does not deal specifically and seems to reserve the question of what is the rule where there is a contractual obligation for the payment of fixed or calculable sums in a foreign place and [their Lordships would prefer " or "] in a local currency. He does, however, observe that " Waiting to convert the currency till the date of judgment only adds the uncertainty of exchange to the uncertainty of the law's delays." Lord Buckmaster (p. 548) rejects summarily the idea that the date of the writ or of the commencement of the action is the proper date. His view, in their Lordships' opinion, is summed up by his statement on p. 549 that in regard to damages which have been

> " assessed in a foreign currency, the judgment here which must be expressed in sterling must be based on the amount required to convert this currency into sterling at the date when the measure was properly made and the subsequent fluctuation of exchange, one way or the other, ought not to be taken into account."

In the case of bills of exchange (which include promissory notes) the English Bills of Exchange Act, 1882, by section 72 (4) enacts that the amount of the foreign currency is to be translated into United Kingdom currency according to the rule of exchange for sight drafts at the place of payment on the day the bill is payable. The Act was a codifying Act and did not purport to change the law, but to declare it, and the Palestine Ordinance expressly states that it declares the law. It is true that the Act and Ordinance state the rule as being applicable to bills drawn out of and payable in the United Kingdom or Palestine as the case may be but not expressed in the currency of the United Kingdom or Palestine. But their Lordships think that the essence of the rule applies in a case where the sum is not expressed in the United Kingdom or Palestine currency, and is payable in the United Kingdom or Palestine. Their Lordships accordingly consider the Ordinance to involve an authoritative declaration of the proper rule to apply to the calculation of the exchange in a case like this. Nor do their Lordships think it necessary to consider whether the Ordinance (see S. 72 (4)) applies to all the three notes or only to the notes which matured before the date of the Ordinance. The Ordinance only declares what the English rule is and as it is so it has been for many years.

The reason why the Supreme Court refused to apply the English rule and instead held that the dates of actual payment were to be adopted in converting the currency, was that the decisions of the Courts in Palestine bound them to adopt the latter principle. The Supreme Court, while not contesting what the English rule was, added " As far as Palestine is concerned, however, as the learned President [of the District Court] pointed out in his long and careful judgment, the balance of authority is the other way." What the President had said was " we must treat the decisions of the Supreme Court of this country as part of the law of Palestine and binding on us, unless and until the principles laid down by such decisions have been varied by legislation or the opinions of the Privy Council." Their Lordships agree with this view and must determine what should be, or more precisely, is the rule in Palestine.

The Supreme Court held that in Palestine the principle that the exchange should be taken as at the date of actual payment had been established " since at any rate 1932." But the Court does not quote any authority except the Palestine decisions which do indeed in the words of the Court " lay down the proposition that in an action on a promissory note the conversion into Palestine currency should be at the rate of exchange prevailing at the actual date of payment." These decisions were *Ahmad Hassan Abu Laban* v. *Bergman*, Civil Appeal 39/32 (i.e. 1932), reported in 2 Rotenberg's Reports, p. 658, *Abu Labban* v. *Lieder & Fisher*, Civil

Appeal No. 85/32, reported in the same volume, p. 664, and an unreported decision of the Supreme Court, No. 79 of 1936. The Supreme Court also refer to *Apostolic Throne of St. Jacob* v. *Saba Said*, 6 Palestine L.R. 528, decided in 1938 by this Board, where the issue was whether the bond was or was not a gold bond. It appears from the headnote to the report that the Courts in Palestine had taken the rate of exchange as at the date of payment but no issue was raised on this point before this Board and the judgment shows that it was not considered by the Board. The case cannot be regarded as a decision of the Board on this point.

Their Lordships accordingly have now to decide the question as one which is open to their consideration. Their conclusion is that the English rule should prevail in Palestine. Article 46 of the Palestine Order in Council (1922), must be considered. It was adverted to in a judgment delivered by Sir George Rankin by this Board in *Mamur Awqaf of Jaffa* v. *Government of Palestine* [1940], A.C. 503, and in an unreported case of *Sheik Suleiman* v. *Michel Habib* (P.C. Appeal No. 1 of 1935). In the latter case Lord Atkin, delivering the judgment of the Board, observed that under Article 46 the Courts in Palestine were to exercise their jurisdiction "in conformity with the substance of the common law and the doctrines of equity in force in England." This was to be subject to the provisions of the Ottoman law in force in Palestine on 1st November, 1914, and certain later Ottoman laws and such Orders in Council and Ordinances as were in force in 1922 and are subsequently in force, and to modifications necessarily required by local circumstances. In the present case it is not suggested that there were any provisions of Ottoman law relevant to this point and no Ordinance can be quoted except the Bills of Exchange Ordinance to which reference has already been made, and this Ordinance, as already pointed out, is in substance contrary to the view taken by the Palestine Courts. The Order in Council does not mean that decisions of the Supreme Court which are subject to appeal to His Majesty in Council, are in themselves authorities to establish finally a rule of law contrary to English law. A rule of law to have this consequence must be one laid down in Imperial Acts or Orders in Council or in Ordinances applicable to Palestine or in the former Ottoman law, that is in the various Ottoman Codes, the Mejelle or other authoritative sources of Ottoman law, so far as not superseded by Ordinances of Palestine.

As no rule of law is so laid down their Lordships are therefore of opinion that on this issue it should be held to be the law of Palestine that in such a case as the present the correct date for calculating the exchange should be the date of the breach by non-payment, that is, the date of maturity of the bill or note, and not the date of any actual payment. The Board may further observe that the English decisions seem to consider the date of actual payment as one which cannot properly be taken for converting the exchange. One effect of adopting it would be that a judgment or execution under it could not fix a definite sum because until actual payment the rate could not be ascertained. The date of judgment was rejected by the House of Lords in the *Celia* v. *Volturno* case (*supra*). To adopt the date of payment would be to place the rate of exchange in the control of the debtor who could at his will or convenience delay payment and thus benefit or attempt to benefit by the fluctuations of exchange.

The sum of LP272.375 paid into Court on 13th December, 1937, is not sufficient to cover interest due from dates of maturity to date of adjudication.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the decrees of the Courts in Palestine set aside; that the plaintiff should have judgment for LP2052.375 with interest at 9 per cent. per annum (*a*) on LP2012.500 from 23rd May, 1930, to 27th October, 1930, and (*b*) on LP39.875 from 21st October, 1929, to 27th October, 1930, less a sum of LP1780 paid on account in the years 1934-7: this judgment to be without prejudice to any future claim for interest under Article 305 of the Code. Liberty to either party to apply to the trial Court to withdraw the money paid into Court or any part thereof.

The appellant must pay the plaintiff's costs of the action. The plaintiff must pay the appellant's costs of the appeal to the Supreme Court and of this appeal.

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In the Privy Council

SYNDIC IN BANKRUPTCY OF SALIM NASRALLAH KHOURY

v.

MARY KHAYAT

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