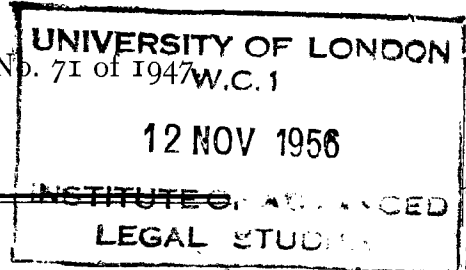


85, 1945

Appeal No. 71 of 1947 W.C. 1



In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL, MALTA.

APPELLANT'S CASE

BETWEEN

ANTONIO BUTTIGIEG, for the firm Messrs. BUTTIGIEG
BROS. & Co.

*Plaintiff-
Appellant,*

AND

10 INEZ, wife of ANTHONY FALZON,
CARMELINA, wife of JOSEPH SALIBA, both with the
assistance of their respective husbands, and
JOSEPH QUINTANO, as legitimate heirs to the estate of
their parents, SALVATORE AND GIUSEPPINA QUINTANO

*Defendants-
Respondents.*

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal from the judgment of the Court of Appeal, Malta, dated the 3rd December, 1945, which affirmed the judgment of His Majesty's Commercial Court, Malta, dated the 21st June, 1945, dismissing the Plaintiff's claims.

pp. 32-38.

pp. 22-26.

2. The questions raised on this appeal are twofold:—

(a) Whether a contract executed on the 18th January, 1944, for the sale by the Respondents to the Appellant for the sum of £700 of a moiety of the concern, goodwill and right of tenancy of the "Palais des Danses," at 34 Strait Street, Valetta, together with all other rights, licences and permits relative and inherent to the said concern, should not be rescinded on the breach of an express condition, namely, that if the Police did not approve of the transfer in favour of the Appellant, nomine, of the permit to hold public dances issued by the Police to Carmelo Bonavia and Salvatore Quintano (the predecessor of the Respondents), the said contract should be rescinded and rendered of no further effect.

pp. 51-53.

(b) And whether, by reason of the decision of the First Hall of His Majesty's Civil Court, Malta, on the 25th November,

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RECORD.

p. 23.

1944, in the action *Carmelo Bonavia et versus Borg Olivier, nomine*, which held that the Respondents had no right of tenancy of the premises on which the said concern was carried on, and the Police were unable to approve of the transfer of the said permit to the Appellant, the said contract should not be rescinded.

p. 1.

3. The present proceedings were commenced by a Writ of Summons in His Majesty's Commercial Court, Malta, on the 28th December, 1944, whereby the Appellant claimed a Declaration that "the aforesaid contract of the 18th January, 1944, be rescinded and declared of no further effect" and the Defendants "be held responsible for the damages which the plaintiff has borne or may bear in consequence" of the contract aforesaid—such damages to be assessed in this or in another separate action, with costs." 10

pp. 51—53.

4. By the terms of the said contract, the Respondents as owners of a moiety of the concern known as "Palais des Danses," formerly conducted by Salvatore Quintano in partnership with Carmelo Bonavia, agreed to cede, convey and transfer to Joseph Pace Bonello, Legal Procurator acting for the Appellant, "the moiety of the concern, of the goodwill and right of tenancy of the 'Palais des Danses' at number 34 Strait Street, Valetta, and of all other rights, licences and permits relative and inherent to the said concern, everything included and nothing excluded and there being also included all rights to indemnity arising from enemy damage by bombing and accorded by the provisions of the War Damage Ordinance," for the mutually agreed sum of £700, the other moiety of the concern continuing to be retained by the said Carmelo Bonavia. 20

5. By the second clause of the said contract, the parties stipulated and made it a resolute condition thereto that the purchase price, viz., the said sum of £700, "as hereby paid," should not be shared between and taken by each the transferors, *i.e.*, the Respondents, until such time as the transfer of the permit to hold public dances issued by the Police to Salvatore Quintano and Carmelo Bonavia on the 29th September, 1925, and bearing No. 83353, should have been approved by the Police. 30

6. By the third clause thereof, the parties expressly stipulated "that this present conveyance is subject to the condition of the transfer of the aforesaid permit and accordingly, if the Police shall not approve the transfer of the said permit to Carmelo Bonavia and the acquiring firm, this present conveyance shall be rescinded and of no further effect, and the acquiring firm shall, in consequence, be there and then entitled to the restitution of the aforementioned sum of £700." 40

The said contract in the said third clause further provided as follows:—

"contrarily, as soon as the Police shall have approved the transfer of the said permit to Carmelo Bonavia and the acquiring

firm, this present conveyance shall become absolute, complete and irrevocable.” RECORD.

7. During the year 1941 the said premises at 34 Strait Street, Valetta, were bombed and extensively damaged, and the said licence remained in abeyance. p. 11,
ll. 28—30.

8. On the 18th January, 1944, the Respondents, together with the said Carmelo Bonavia, filed an application addressed to the Commissioner of Police in Malta for the transfer of the said licence to the name of Arturo Buttigieg, one of the partners in the Appellant firm. On the 28th March, 1944, the Commissioner of Police authorised the transfer of the said licence to the said Arturo Buttigieg. On the 10th April, 1944, the Commissioner of Police ordered, however, that the neighbours' consent to the transfer be produced, in accordance with legal requirements. pp. 11—12.

9. The evidence before His Majesty's Commercial Court disclosed the fact that a neighbour, namely, the owner of the said premises, entered a protest against the transfer to the Appellant and thereupon the matter was referred, under Article 106 of the Police laws, to the Board, which ruled that it could not take further cognizance of the matter until the premises were reconstructed. p. 12.

10. In breach of the condition in the second clause of the said contract, the Respondents cashed the said cheque of £700 and distributed the proceeds thereof among themselves. p. 18,
ll. 8—13.

11. On the 21st June, 1945, His Majesty's Commercial Court of Malta dismissed the Appellant's claims with costs. pp. 22—26.

12. On the 3rd December, 1945, His Majesty's Court of Appeal (Commercial Hall) dismissed the Appellant's appeal with costs. pp. 32—38.

In affirming the judgment of the Court below, the Court of Appeal held:—

- 30 (a) That the Appellant was aware of the damaged condition of the premises at 34 Strait Street, Valetta, and that therefore it was impossible to presume that he did not entertain serious doubts regarding the right of tenancy;
- (b) That the negotiations prior to the date of the contract did not contemplate the tenancy which was subsequently included in the contract because the Appellant's legal adviser informed him that a similar contract was not possible without including the right of tenancy as the permit was inherent to the premises;
- 40 (c) That the Appellant's aim which is revealed in an unsigned draft agreement between him and his partner, Carmelo Bonavia, was to transfer the business to some other premises; p. 55.
- (d) That although the Police had authorised the transfer of the licence, the actual transfer of the permit was not effected

RECORD.

inasmuch as the Police had subsequently required the neighbours' consent and also because the owner of the premises had objected thereto. But the Appellant had achieved his purpose in that the Police had approved that the licence for holding public dances be transferred also in the name of Arturo Buttigieg.

13. The Appellant humbly submits that, on the proper interpretation of the contract, he is entitled to a Declaration rescinding the contract, on the ground of (a) failure of consideration, in that the said or any Police permit to hold public dances is subject to the Police laws of Malta which require, *inter alia*, the consent of neighbours before the grant is made; and (b) because such permits are inherent to the premises in which public dances are to be held. 10

14. The Appellant further humbly submits that the Court of Appeal in Malta was wrong in interpreting the contract as though it were ambiguous and in seeking reasons dehors its clear and unambiguous terms to support the findings of the Commercial Court.

15. The Appellant further humbly submits that according to the evidence adduced in the Commercial Court, the transfer of the licence authorised by the Commissioner of Police could not have been used in premises other than 34 Strait Street, Valetta, without the consent of neighbours and also the authorisation of the Medical and Health Department of Malta, and that the said authorisation was accordingly a nominal and not a real transfer and unable to implement the essential terms of the said contract. 20

16. The Appellant further humbly submits that the Court of Appeal failed to give any or any proper consideration to the judgment delivered by the First Hall of His Majesty's-Civil Court of Malta on the 25th November, 1944, in the cause *Carmelo Bonavia et versus Borg Olivier, nomine*, adjudging that the Respondents had no right of tenancy in the said premises and could not therefore transfer it to the Appellant in the terms of the contract. 30

17. The Appellant humbly submits that the judgment of the Court of Appeal of Malta ought to be reversed with costs for the following, among other:—

REASONS.

1. Because the consideration for the said payment of £700 has wholly failed.
2. Because the Respondents had no right to the said tenancy at the date of the contract.
3. Because the authorisation of the transfer of the licence to hold public dances at 34 Strait Street, Valetta, on the sworn evidence, uncontradicted, was a nominal and not a real transfer. 40

4. Because the appropriation by the Respondents of the sum of £700 before a real transfer to the Appellant could be lawfully effected, was a breach of an express condition of the contract.
5. Because it would be inequitable to allow the Respondents to retain the said sum of £700 or any part thereof in view of their inability, before or since the date of the contract, to transfer the said licence and the right of tenancy to the Appellant
- 10 6. Because the Commercial Court misdirected itself by not giving due or any consideration to the facts adduced in evidence before it.
7. Because the Court of Appeal was wrong in law in seeking to interpret the unambiguous terms of the written contract by reference to negotiations which preceded the execution of the contract.
8. Because the judgment of the Court of Appeal is wrong and ought to be reversed.

RECORD.
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C. J. COLOMBOS.

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Solicitors for the Appellant.

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AND OTHERS *Respondents.*

CASE FOR THE APPELLANT.

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