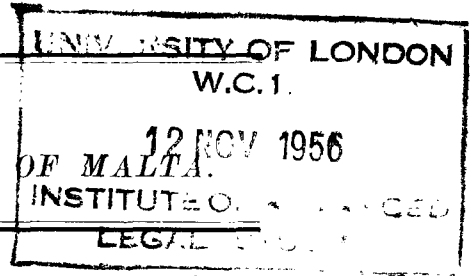


85.1948

No. 71 of 1947.

In the Privy Council.



ON APPEAL
FROM HIS MAJESTY'S COURT OF APPEAL OF MALTA.

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 husband, and JOSEPH QUINTANO as
legitimate heirs to the estate of their parents,
SALVATORE and GIUSEPPINA QUINTANO (Defendants)-

Respondents.

Case for the Respondents

RECORD.

1. This is an appeal from a judgment dated the 3rd December, 1945, of the Court of Appeal of Malta (Borg, C.J., Ganado and Camilleri, JJ.) affirming a judgment dated the 21st June, 1945 of the Commercial Court of Malta (Scembri, J.) by which judgment the Commercial Court dismissed the claim of the Appellant against the Respondents
20 that a contract dated the 18th January, 1944 between the parties should be rescinded and declared of no effect and for damages.

pp. 32-38.

pp. 22-26.

pp. 1-3.

2. It appears from the contract of the 18th January, 1944, and it is not in dispute, that on the 29th September, 1925 the police issued to the Respondents' father Salvatore Quintano and his partner Carmelo Bonavia a permit to hold public dances at 34 Strait Street, Valetta; that the partners had there conducted a dance hall known as "Palais des Danses"; and that the Respondents as legitimate heirs of their parents, both of whom had died before the 18th January, 1944, then held a half interest in the concern "Palais des Danses."

pp. 51-53.

30 3. By the contract of the 18th January, 1944, the Respondents sold and conveyed to one Bonello, as agent for Messrs. Buttigieg Bros. & Co., for £700 the moiety of the concern, of the goodwill and right of tenancy, of the "Palais des Danses" at 34 Strait Street, Valetta, and of all other rights, licences and permits relative and inherent to the concern, there being also included all rights to indemnity arising from enemy damage

pp. 51-53.

pp. 52, ll. 11-18.

RESPONDENTS' CASE

p. 53, ll. 7-12.

p. 52, l. 26.
p. 53, l. 6.

p. 53, ll. 13-15.
p. 53, ll. 15-18.

by bombing and accorded by the provisions of the War Damage Ordinance. The contract was expressly subject to the condition that if the police should not approve the transfer of the licence to Carmelo Bonavia and the acquiring firm the contract should be rescinded and of no further effect. The purchase money was to be paid to the Respondents at the time of the contract but was not to be shared between them until the police should have approved the transfer. If the police should not approve the transfer the money was to be repaid to the acquiring firm. If the police approved the transfer the conveyance was to become absolute, complete and irrevocable.

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4. The Commercial Court and the Court of Appeal made concurrent findings of fact which may be summarised as follows:—

p. 24, l. 39,
p. 25, l. 3,
p. 35, ll. 15-20.

(1) The Appellant's intention was to acquire the Respondents' interest in the licences and permits for the "Palais des Danses" in order after the war to transfer them to other premises.

p. 25, ll. 24-28,
p. 34, ll. 23-37.

(2) The Appellant knew that the premises at 34 Strait Street had been completely destroyed by enemy action, and he knew therefore that the right of tenancy was affected. (The trial judge held that the Appellant knew that the tenancy had been destroyed; the Court of Appeal held that he knew that, if it existed, it was very doubtful.)

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p. 24, ll. 33-39,
p. 35, ll. 11-15.

(3) The negotiations did not originally contemplate that the right of tenancy would be included in the contract. The right of tenancy was included because the Appellant's legal adviser informed the Appellant that, the permit being inherent to the premises, the sale of the permit without including the right of tenancy was impossible.

p. 26, ll. 6-13,
p. 35, ll. 32-43.

(4) As a result of this advice it was agreed that a moiety of the right of tenancy should be included in the contract. At the same time the price to be paid by the Appellant was increased from £550 to £700. This increase was explained, however, by the fact that a claim against the War Damage Commission for £400 was also included in the contract at the same time. (The Court of Appeal further held that the cession of this claim was adequate compensation for the increase in price.)

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. 24, ll. 8-11,
. 37, ll. 25-30.

(5) The Commissioner of Police had in due course approved the transfer of the permit.

. 24, ll. 27-39,
. 25, ll. 14-16.

5. The learned trial judge further held that the purpose of the contract was the cession of the permit, and that the right of tenancy was mentioned only as a means to that end. The Court of Appeal appears to have taken the same view. The Court of Appeal held that the evidence also established the following facts:—

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. 34, l. 42,
. 35, l. 5,
. 35, l. 44,
. 36, l. 15.

(1) The Respondents had informed the Appellant that the right of tenancy was doubtful, and the intention of the parties, carried out by the contract, was to transfer to the Appellant only such right of tenancy as the Respondents in fact had.

(2) Because the police might refuse the transfer of the permit in favour of the Appellant, the application for the transfer was made by the Appellant's brother. p. 37, ll. 21-24.

(3) The Respondents were informed that the Commissioner of Police had approved the transfer of the permit and they informed the Appellant. p. 37, ll. 25-30.

(4) Actual transfer of the licence was not effected because the police had subsequently required the neighbours' consent, and because the owners of the premises had also objected. p. 37, ll. 30-35.

10 (5) The Appellant had achieved his purpose in that the police had approved the transfer. p. 37, ll. 35-37.

(6) When it had been held that the tenancy had been lost by the total destruction of the premises during the war, the only question then was for the Appellant and his partner to provide other premises and to apply for a transfer of the permit to the new premises—a contingency which the Appellant had envisaged. p. 37, l. 38, p. 38, l. 1.

6. The tenancy had been held to be at an end in the case of *Bonavia and others v. Olivier and others* decided on the 25th November 1944 by the First Hall of the Civil Court. There had been a suggestion that the destruction of the premises was partial only. The suit was for the assessment of rent payable for the premises. The Court held that, as the premises were to be considered totally destroyed, the tenancy had ceased to exist. The Appellant had promoted this suit, and both the Commercial Court and the Court of Appeal found that his conduct in respect of it was inconsistent with his claim against the Respondents. p. 57, ll. 16-38. p. 25, ll. 28-42, p. 35, ll. 2-5, ll. 20-25.

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7. After the decision in *Bonavia and others v. Olivier and others* the Appellant brought the present action against the Respondents alleging that as it had been decided that the Respondents did not hold the right of tenancy the police were unable to transfer the permit to hold public dances to the Appellant. The writ ordered the Marshal to summon the Respondents to show cause why the contract of the 18th January should not be rescinded and declared of no further effect and why the Respondents should not be held responsible for the damages, past or future, to the Appellant in consequence of the contract, with costs. pp. 1-3. p. 2, ll. 23-32.

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8. In his judgment Schembri, J., found the facts as above set out and held that the contract was subject to only one resolute condition contemplating the disallowance by the police of the transfer of the permit to hold public dances, and that, as the real purpose of the contract was the transfer of the permit while the cession of the right of tenancy was only to facilitate the transfer, the Appellant's claims were inadmissible. pp. 22-26. p. 24, ll. 3-6. p. 26, ll. 15-21.

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9. The Court of Appeal stated the questions before it to be two : (1) whether when the contract was made the Appellant was sufficiently aware that the right of tenancy, if not forfeited altogether, was doubtful ; and (2) whether the contract was rescindible in terms of its stipulations. p. 34, ll. 16-22.

p. 34, l. 23,
p. 36, l. 20.
p. 36, ll. 15-20.

10. The Court of Appeal answered the first question in the affirmative and held that the Appellant's claim was a disavowal of the understanding between the parties and therefore a breach of good faith.

p. 36, l. 23,
p. 38, l. 2.

11. On the second question the Court of Appeal held that the purpose of the contract had been achieved and that the event had happened upon which according to its terms the contract had become irrevocable.

12. The Respondents respectfully submit that the judgment of the court below should be affirmed and that this appeal should be dismissed for the following among other

REASONS

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- (1) BECAUSE, the transfer of the permit to hold public dances having been approved by the Commissioner of Police, the resolute condition contained in the contract of the 18th January, 1944 does not operate.
- (2) BECAUSE on its true interpretation the contract provided for the cession to the Appellant only of such right of tenancy of the premises at 34 Strait Street, Valletta as the Respondents in fact had, and the Appellant knowingly took the risk of the Respondents' right of tenancy having come to an end. 20
- (3) BECAUSE the object of the contract of the 18th January, 1944 has been achieved.
- (4) BECAUSE the concurrent findings of fact of the courts in Malta show that the Appellant was not entitled to the relief claimed or any relief.
- (5) BECAUSE of the other reasons contained in the judgments of the Commercial Court of Malta and the Court of Appeal of Malta.

FRANK GAHAN.

In the Privy Council.

ON APPEAL

*from His Majesty's Court of Appeal
of Malta.*

BETWEEN

ANTONIO BUTTIGIEG for the firm Messrs.
Buttigieg Bros. & Co. (Plaintiff) - *Appellant*

AND

INEZ wife of Anthony Falzon, **CARMELINA**
wife of Joseph Saliba, both with the assistance
of their respective husband, and **JOSEPH**
QUINTANO as legitimate heirs to the estate
of their parents Salvatore and Giuseppina
Quintano (Defendants) - *Respondents.*

Case for the Respondents

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