Privy Council Appeal No. 8 *of* 1964

Banque Genevoise de Commerce et de Credit – – – *Appellants*

v.

Compania Maritima de Isola Spetsai Limitada – – – *Respondents*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JULY 1964

Present at the Hearing:
LORD REID.
LORD HODSON.
SIR BENJAMIN ORMEROD.
[*Delivered by* LORD REID]

This is an appeal from the Federal Supreme Court of Nigeria exercising Admiralty jurisdiction originally conferred by the Colonial Courts of Admiralty Act, 1890. That Court on 7th November 1962 dismissed an action *in rem* brought by the appellants against the respondents' s.s. " Spetsai Patriot " a vessel flying the Liberian flag. The appellants are a Swiss Bank to which this vessel was mortgaged in 1958 by a deed of mortgage registered in Liberia and admittedly valid. The mortgage was to secure the repayment of £292,790 with interest and bank charges. That sum ought to have been repaid by instalments in 1958 and 1959 but no part of it was ever repaid. On 30th June 1962 while the vessel was in the Port of Lagos the appellants raised the present action and arrested the vessel.

The appellants sued for £380,627 being the whole sum secured by that mortgage together with interest and bank charges. In their defence the respondents founded on an agreement of 26th October 1961 which they alleged was a novation of the 1958 mortgage or had rescinded or revoked it. There had been a number of disputes and litigations in various countries in which the appellants and respondents and others were involved, and the parties to this agreement were the appellants and their subsidiary referred to as SISCO, the respondents and Mr. Petroutsis their Managing Director, and also the American Trading Company of Panama. As the decision of the present case turns on the proper construction of that agreement it is necessary to set out the relevant provisions in some detail. The agreement was in French but there is an agreed English translation from which these excerpts are taken. In them " the Bank " means the present appellant and " CMIS " means the respondent.

" At all events the contracting parties with a view to a definitive settlement of all the accounts and litigation between them agree by these presents as follows:—

Settlement:

Article 1. The parties waive the drawing up of detailed accounts. CMIS acknowledges that it is indebted to the Bank in the sum of three hundred thousand pounds sterling (£300,000) as the balance of all accounts and of all claims between the Bank and SISCO of the one part and CMIS and Petroutsis of the other part. It is a comprehensive figure, acknowledged to be a capital sum but which bears no interest.

Article 2. The recovery by the Bank of the above mentioned sum is assured by the realization of the following assets of CMIS:

(*a*) A claim against the hull insurers of the s.s. " Spetsai Glory " estimated at £ sterling 125,000 already assigned to the Bank.

(*b*) A claim against the insurers or charterers of the s.s. " Spetsai Glory " etc. for expenses disbursed by the Bank for the account of the ship (included in the sum of £ sterling 300,000), for general average and " special charges " estimated at £ sterling 70,000 and for the guarantee in connection with the collision with the s.s. " Leonidas ".

(*c*) The s.s. " Spetsai Island " registered in the name of SISCO which is to be sold to Japan at an estimated £ sterling 80,000.

(*d*) Two maritime mortgages also as security are to be given by CMIS in favour of the American Trading Company of Panama for £ sterling 50,000 each on the s.s. " Spetsai Patriot " and the s.s. " Spetsai Navigator " which is to be transferred by SISCO to CMIS."

. . . . . .

Article 5. Promising good and faithful carrying out of the present settlement the parties reciprocally discharge each other for the balance of all accounts and of all claims and waive all civil or criminal procedure. CMIS and Petroutsis undertake to eliminate at their own expense and their liability any hindrance which may arise from sequestrations and arrests effected by third parties on the s.s. " Spetsai Island " and the s.s. " Spetsai Navigator " in Greece. The Bank also shall release as soon as this settlement is signed the sequestrations or other measures taken by it on the s.s. " Spetsai Patriot " and the s.s. " Spetsai Fortune " in order to facilitate the placing of the said vessels at the free disposition of CMIS and of Petroutsis. The mortgage on the s.s. " Spetsai Patriot " shall be limited to £ sterling 50,000 and transferred in favour of the mortgagee and the mortgage on the " Spetsai Fortune " shall be cancelled immediately upon the signing of these presents.

In order to facilitate the formalities for the releasing of the seizures, arrests, etc. the Bank this day shall hand to Petroutsis an express authorization to the Italian lawyers (Office Berlinghieri) to proceed immediately to this end so that these two vessels may immediately be at the free disposal of CMIS and Petroutsis and shall telegraph in the same terms to such lawyers.

The seizures and arrests of s.s. " Spetsai Patriot " and s.s. " Spetsai Fortune " imposed by Andreas Valsamakis and Cap. D. Tsekouras shall be lifted and discharged solely at the expense and at the liability of C. Petroutsis and CMIS, the Bank having no responsibility whatsoever in this connection. In addition SISCO shall immediately restore ownership of the s.s. " Spetsai Navigator " to CMIS and undertakes to carry out all the necessary formalities to fulfil this undertaking which in the case of the " Spetsai Navigator " shall include putting into possession.

The Bank and the Mortgagee also undertake to supply a certificate regarding the s.s. " Spetsai Patriot " intended for the Liberian Authorities under the terms of which this vessel shall change its name in accordance with the instructions of C. Petroutsis.

Article 6. In as much as the realization of the claims for C.T.L., G/A etc. on the " Spetsai Glory " and the sale price etc. of the " Spetsai Island " are not envisaged before a year, the mortgages in favour of the mortgagees (in accordance with art. 2(*d*) of these presents) shall become due as to one half (£ sterling 25,000 for each mortgaged vessel) on the 1st November 1962 and as to the other half on the 1st May 1963, but only up to the amount of the balance not realized by the Bank by such date as provided in art. 2(*a*), (*b*) and (*c*), the intention of this contract being that the Bank shall not receive more than £ sterling 300,000.

Any payment made to the Bank arising from the sources set out in article 2(*a*), (*b*) and (*c*) over and above £ sterling 200,000 shall be considered as payment on account of the mortgages (a half on each) and an act to this effect signed by the mortgagee shall be delivered at the

same time as the receipt by the Bank and the necessary registrations shall be made. Also all payments made to the mortgagee by virtue of the above-mentioned mortgages shall be considered as a payment made to the Bank on account of its claim for £ sterling 300,000."

There was much argument before the Federal Supreme Court about the effect of this agreement, but as a result of the clear and cogent judgment of that Court delivered by Sir Lionel Brett F.J., Counsel for the appellants felt bound to admit the validity of practically the whole of that judgment excepting the concluding part, and their Lordships are satisfied that this admission was wisely and properly made.

It is now admitted that the 1961 agreement superseded the agreement in the mortgage of 1958, and the contention of the appellants now is that under the agreement of 1961 the old mortgage deed remained in operation with the substitution of £50,000 and of the dates in Article 6 of the agreement for the sums and dates of repayment set out in the old mortgage. The mortgage deed of 1958 contains elaborate provisions requiring the shipowner to comply with and satisfy all the provisions of the Liberian Maritime Code (Section 4); not to do or permit anything to be done which might injuriously affect the registration of the vessel (Section 5) and to maintain the vessel in good running order and repair (Section 11). The appellants say that the respondents were in breach of these obligations on 30th June 1962 and that they were therefore then entitled to the remedies provided in Section 21 of the Mortgage Deed including the right to " (3) bring suit at law in equity or in Admiralty as it may be advised to recover judgment for any and all amounts due or otherwise hereunder and collect the same out of any and all property of the shipowner whether covered by this mortgage or otherwise ".

So the first question which their Lordships must consider is to what extent, if at all, the 1958 Mortgage Deed remained operative in 1962. It is now admitted that that must depend on the intention of the parties to the 1961 agreement as determined by a proper construction of its terms. On the one hand the respondents found on Article 2(*d*) which provides for the granting of new mortgages in favour of the American Trading Company of Panama, and undoubtedly if such new mortgages had been granted they would have superseded the 1958 mortgage. On the other hand the appellants found on a sentence in the middle of Article 5 " The mortgage on the s.s. " Spetsai Patriot " shall be limited to £ sterling 50,000 and transferred in favour of the mortgagee ". They maintain that this was an alternative to Article 2(*d*) or at least that it was effective to keep the 1958 mortgage alive until new mortgages were granted under Article 2(*d*). The true construction and effect of these provisions is not at all clear but their Lordships are prepared to assume, without deciding the matter, that on this question the appellants are right.

There is no provision entitling the appellants to the benefit of any mortgage after the making of the 1961 agreement. Under Article 2(*d*) new mortgages were to be granted in favour of the Panama Company and not of the appellants and Article 5 provided for transfer of the old mortgage to the " Mortgagee " which meant the Panama Company. But it is plain from various provisions of the 1961 agreement that there must have been some close connection between the appellants and the Panama Company, and their Lordships will assume that in 1962 the appellants were entitled to enforce all rights which the Panama Company could have enforced if the 1958 mortgage had been transferred to them; but in any event the appellants cannot have any greater right than the Panama Company could then have had.

It therefore becomes necessary to consider what would have been the rights of the Panama Company on 30th June 1962 if the 1958 mortgage had been transferred to them before that date. The leading provision in favour of the Panama Company is Article 2(*d*) and it must be read in conjunction with Articles 1 and 6 and the rest of Article 2. Whatever be the meaning and effect of the sentence in Article 5 authorising transfer of the old mortgage to the Panama Company it cannot, in their Lordships' judgment, be held to confer on the Panama Company any greater rights that they would have had if

new mortgages had been granted under Article 2(*d*). " Limited to £50,000 " must have been intended to mean limited to the obligation in respect of which the new mortgage was to be granted.

The general scheme of the 1961 agreement is clear. The round sum of £300,000 is substituted for all claims which the appellants might then have had, and that sum was to be recovered primarily out of the assets specified in Article 2(*a*), (*b*) and (*c*). The estimated value of those assets stated in Article 2 was £275,000 and Article 6 makes it clear that the mortgages were only to secure payment of the amount of any balance remaining after those other assets had been realised. If those assets had realised £25,000 more than their estimated value nothing would have been due or recoverable under the mortgages. If they realised considerably less than their estimated value then the Panama Company could use the mortgages to recover any balance of the £300,000 up to a maximum of £50,000 on each mortgage. Article 6 states that the realisation of those other assets was not envisaged before a year i.e. before 26 October 1962, and in order to allow time for their realisation it provided that the first instalments of the sums secured by the mortgages should become payable on 1st November 1962.

Normally a mortgage is granted to secure payment of a specified sum. The date of payment is merely postponed and if by reason of a breach of a condition in the mortgage, the mortgagee becomes entitled to immediate payment he can sue for payment of that sum. But in this case there was no ascertainable sum secured by the mortgage and no sum due until the year had elapsed and it was seen by how much the sums realised from the other assets fell short of £300,000. So when the vessel was arrested on 30th June 1962 and the present action was raised a few days later no sum had become ascertainable or due. Nothing would have been recoverable if the new mortgage had been granted under Article 2(*d*) and nothing was recoverable by virtue of the old mortgage. As the present action is an action to recover a sum of money and no sum had become due or ascertainable when it was raised it must fail. That was the ground of decision set out in the last two paragraphs of the judgment under appeal and in their Lordships' judgment it is correct. It therefore becomes unnecessary to decide any of the other issues raised in argument. Their Lordships have already tendered their advice that this appeal should be dismissed. The appellants must pay the costs of the respondents.

(90605) Wt. 8069/113 90 10/64 Hw.

In the Privy Council

BANQUE GENEVOISE DE COMMERCE ET DE CREDIT

v.

COMPANIA MARITIMA DE ISOLA SPETSAI LIMITADA

DELIVERED BY
LORD REID

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