PYRMONT Ltd. and another v SCHOTT

Privy Council
Lord Atkin, Lord Porter, Sir Lancelot Sanderson.
18, 20, 21 October 1938.

Foreign currency — obligation to pay requires payment in legal tender according to municipal law.

The appellants borrowed a sum of Spanish pesetas which was advanced by means of a cheque. Before repayment became due, the Spanish Government prohibited the export of bank notes unless acompanied by an authorization. Spanish currency, whether in the form of gold or silver coinage or bank notes, was not legal tender in Gibraltar but peseta notes commonly circulated there both before and after the prohibition. After the prohibition, peseta notes accompanied by an authorization were of more value than those without an authorization. After various negotiations, the appellants tendered in repayment of the loan peseta notes unaccompanied by authorizations. The respondent obtained judgment in the Supreme Court and the appellants appealed.

Held: (i) The obligation on the appellants was to pay in pesetas, that is the unit of account in the currency of Spain.

(ii) Peseta notes were not legal tender under the municipal law of Spain and a tender of such notes did not fulfil the contract.

Per curiam. A contract for the supply and return of pesetas in Gibraltar was a contract for the supply and return of commodities, not money.

Cases referred to in the judgment.

In re Chesterman's Trusts, Mott v Browning, [1923] 2 Ch. 466.
British Bank for Foreign Trade Ltd. v Russian Commercial and Industrial Bank, (1921) 38 T.L.R. 65.

Appeal

This was an appeal from a judgment of the Supreme Court. The facts appear from the judgment.

H.U. Willinck K.C. and J. Lawrence for the appellants.
H.I.P. Hallett K.C. and S. Chapman for the respondent.

1 December 1938: The following judgment was delivered—

The appellant company are incorporated in Gibraltar and carry on business as an investment company. The appellant, John Mackintosh, is a director of that company.

In May 1935, the appellants were anxious to borrow a large sum of Spanish pesetas as they did not wish to convert English pounds sterling into that currency, and at that time the respondent had on deposit at Barclays Bank in Gibraltar a credit of over 500,000 pesetas standing in the names of Messrs. Carrara King and Marsh who were trustees of her late husband.

The respondent is an old lady, 82 years of age, whose business affairs were managed by her nephew one Eugenio Gross.

Mr. King, who was a friend of both Mr. Mackintosh and the respondent, having heard that the appellants desired to borrow pesetas approached Mr. Mackintosh and arranged with him that the respondent should lend and the appellants borrow the sum of 500,000 pesetas at 3½ per cent. interest per annum.

Accordingly the appellants executed a bond dated 22 May 1935, whereby they bound themselves to pay the respondent the sum of 500,000 pesetas on 22 May 1936, and meanwhile to pay interest at 3½ per cent. per annum by half-yearly instalments on 22 November 1935, and 22 May 1936.

Upon the execution of the bond, Mr. Pons, the accountant employed by the trustees, prepared and filled in a cheque for 500,000 pesetas drawn on Barclays Bank, Gibraltar, and the cheque was signed by the trustees in whose name the credit stood.

The cheque was then handed to Mr. Mackintosh or to his secretary, Mr. Caston, and paid into the appellants' account at Barclays Bank. From time to time the appellants drew cheques varying in value between 6,000 and 70,000 pesetas upon this account and the whole amount was so withdrawn by the appellants before the end of the year 1935.

Meanwhile on 22 November 1935, the half-year's interest was duly paid.

Before and up to 1898 Spanish peseta coinage was legal tender in Gibraltar, but by an Order in Council of 9 August of that year, sterling money of Great Britain became the only legal tender subject to certain exceptions not material to the present case. Nevertheless pesetas were in frequent use and were regularly given and taken as payment in commercial transactions in Gibraltar.

The peseta was and remains the unit of Spanish currency. It is common ground that at all material times gold coins without limit and silver coins of 5 pesetas alone were legal tender in Spain. It is true that the Bank of Spain

were authorized to issue peseta notes and that for certain purposes, e.g., the payment of sums due to the Government, those notes must be accepted, but in ordinary transactions between individuals they could be refused. In practice, of course, they were accepted inasmuch as the Bank of Spain were under an obligation to meet their notes by providing gold or silver on presentation, but if a strict fulfilment of his obligations were insisted on, a borrower would not fulfil them by tendering notes—he must furnish gold or silver coin.

In Gibraltar pesetas whether in the form of gold or silver or notes were not currency at all, they were a commodity which could be bought or sold like any other commodity. Up to March, 1936, however, peseta notes were commonly given and accepted both in Spain and in Gibraltar as the equivalent in value of the coinage they represented.

By a Spanish decree of 1930 the export of silver from Spain was prohibited. Even before 1936 regulations had been made prohibiting the exportation of bank notes in excess of 5,000 pesetas and on 16 March 1936, the Spanish Government, apparently perturbed by the fact that refugees leaving Spain were found to be taking with them a large number of peseta notes, enacted a further decree under which travellers were prohibited from exporting any notes of the Bank of Spain unless accompanied by an authorization called a "guia."

These "guias" were issued by the Customs authorities who were required to send a daily report of the "guias" issued by them stating the names of the travellers and amounts authorized. After the date of the decree it became illegal for notes to be reintroduced into Spain unless accompanied by "guias" corresponding in amount to the pesetas proposed to be brought in.

Once the external notes were wedded to an appropriate "guia," they could be reintroduced and as they were exchangeable at the Bank of Spain for metal of their nominal amount, they were of the same value as the coinage they represented.

But there were a large number of peseta notes already in Gibraltar for which "guias" were not necessarily forthcoming. It is true that by art. 5 of the decree these peseta notes might be remitted to Spain within five days of the decree, but it is by no means clear that the owners would take advantage of this section since the notes once in Spain could only be exported by permision of the Customs authorities, and in any case, owing to the prohibition of the export of silver, no silver could be taken out in their place.

In addition to these extraneous peseta notes it appears that a large number of notes reached Gibraltar without any accompanying "guias" because many refugees were arriving from Spain bringing notes with them without obtaining "guias". The result was that there were in use in Gibraltar after the date of the decree, two types of notes—those accompanied by "guias" and those unaccompanied.

Precisely how the decree worked does not appear from the decree itself and was not explained in evidence. Presumably any "guia" might be used for the

reintroduction of the same number of peseta notes as it permitted to be exported, and it was not necessary that it should accompany the same notes which were exported under its authority; but in their Lordships' view it is not necessary to determine this point.

Naturally since the notes for which "guias" were supplied could be remitted to Spain and those for which "guias" were not supplied could not, the former had a higher value than the latter. But both continued to be used in Gibraltar.

In these circumstances when the date for repaying the loan of 500,000 pesetas and the second half-year's interest was approaching, Mr. Pons saw Mr. Caston and told him that if payment was to be made with notes they should be accompanied with "guias."

Presumably as a result of this conversation Mr. Mackintosh wrote on 16 May to Mr. King offering to pay (a) by cheque on Madrid; (b) by bank notes delivered in Gibraltar or (c) equivalent sterling at 42 pesetas to the £1 (42 pesetas to the £ being the rate of exchange for peseta notes without "guias"). At the same time Mr. Mackintosh suggested postponement of payment for two weeks.

In reply Mr. King stated that a cheque on Barclays Bank in pesetas would be acceptable, but as it appears from the evidence that that bank dealt only in pesetas accompanied by "guias," Mr. King's suggestion was in the nature of a counter-offer.

On 28 May Mr. Caston called on Mr. Pons and offered to pay the interest up to 22 May in notes without "guias." This offer was refused and ultimately Mr. Caston paid 8,750 pesetas in silver.

Later, on 19 June 1936, Mr. Prescott, a public notary, called on behalf of the appellants on Mr. Pons, paid the interest due up to that date in silver and tendered a cheque on the Credit Foncier for 500,000 pesetas. Mr. Mackintosh had in fact opened a credit with that bank for that sum by lodging with it 500,000 peseta notes obtained partly from an Indian money changer and partly by purchases of small sums when he could get them at about an exchange of 42 to the £.

Admittedly the Credit Foncier would not have supplied "guias" with these notes and the payment was refused unless corresponding Government "guias" were also provided.

On the same day and after this refusal the appellants informed the respondent by letter that they had notified the Credit Foncier in Gibraltar to hold at her disposal the sum of 500,000 pesetas and disclaimed liability for further interest.

Finally on 5 October the respondent's solicitors wrote stating that they had refused payment by cheque on Madrid or bank notes delivered in Gibraltar because such payment would not permit the respondent to deal with such sum and had refused payment at the rate of 42 pesetas to the £ inasmuch as that rate of exchange was over and above the official rate.

The appellants thereupon, on 16 October, tendered a bundle of 500,000 peseta notes without "guias". This tender was refused and action was then brought and the appellants by some means appear to have succeeded in lodging this bundle in court. Presumably they intended by this means to make a payment into court, but as pesetas are not currency in Gibraltar, their action was misconceived and could have no effect upon the result of the case.

Both sides admitted before this Board that the contract was for the supply and return of pesetas in Gibraltar and therefore for the supply and return of commodities and not of money, an admission which their Lordships consider to have been rightly made.

The first question, therefore, which has to be determined is what commodity the appellants contracted to tender to the respondent on 22 May 1936.

For the appellants it was argued that in Gibraltar, pesetas meant peseta notes, that these notes were in regular use in Gibraltar at the time of the making of the contract, that though they were not legal tender in Gibraltar and might not be legal tender in Spain, yet they were treated as equivalent thereto, that peseta notes were in fact supplied in fulfilment of the contract by the respondent to the appellants and that peseta notes were therefore all that the appellants were under an obligation to return.

For the respondent it was contended that the contract was for the supply of pesetas, that a credit on Barclays Bank was accepted in performance of that contract, that peseta notes were not supplied, and indeed, if it were material, that the appellants never operated the credit so as to receive peseta notes but merely transferred to third parties by means of cheques, the credit which had by cheque been transferred to them: that the appellants were, therefore, under an obligation to return pesetas, and that that obligation was not fulfilled by the tender of peseta notes.

In their Lordships' opinion it is established by the evidence that the commodity agreed to be supplied was pesetas and that the appellants accepted a credit upon Barclays Bank in fulfilment of that contract. It follows that in their view the appellants' contract was to return 500,000 pesetas in Gibraltar on the due date, viz., 22 May 1936.

What then is meant by such a contract? The word "peseta" means the unit of account in the currency of Spain. The appellants have contracted to supply 500,000 of such units and their Lordships can find nothing in the contract between the parties to the present litigation to modify that meaning.

The question can, therefore, be stated in another form by asking,—What performance is required to fulfil an obligation to pay a foreign unit of account?

This question does not come before their Lordships devoid of authority. It has already been discussed in *In re Chesterman's Trusts, Mott v Browning*[1]

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1 [1923] 2 Ch. 466.

where the direct question came under consideration. It was there held by Russell J., now Lord Russell of Killowen, and by the Court of Appeal that the obligation was to pay in whatever at the date of repayment was legal tender and legal currency in the foreign country whose money was lent.

This decision is not binding on their Lordships but they think it correctly enunciates the law applicable to the case. In their view the appellants borrowed 500,000 units of account of the Republic of Spain, not 500,000 peseta notes; in performance of that contract they accepted a credit on Barclays Bank for 500,000 pesetas, and they were under contract to return 500,000 such units of account.

That contract is not fulfilled by the tender of 500,000 peseta notes—such notes are not units of account of the Spanish Republic. They were, it is true, frequently accepted in lieu of units of account but the party to whom they were tendered was not obliged to accept them. To adapt the words of Warrington, then L.J., in *In re Chesterman's Trusts* [1], the form in which such payment is to be made must be regulated by the municipal law of the country whose unit of account is in question and what would or would not be a legal tender must depend upon the law on that subject in force at the time when the tender should have been made. If this were not so, their Lordships are unable to appreciate what principle is to be applied in ascertaining the nature of the commodity of which tender has to be made.

It is suggested that Russell J., as he then was, took a different view in *British Bank for Foreign Trade, Ltd. v Russian Commercial and Industrial Bank* [2], where he said:—

> "(2) . . . The true position was that the loan was repayable in any paper roubles issued by the authority of the Russian Government and in use at the material date" and "(3) It was argued that if the debt was to be paid outside Russia it must be paid in gold roubles, because any paper money was only legal tender in Russia and not outside. He did not agree with that view. The mortgagor was suing to recover his securities and was entitled to do so if he fulfilled his legal contract. If he made repayment in full in the kind of money actually advanced to him—paper roubles issued by authority of the Russian Government—it did not matter whether the paper money was legal tender in or out of Russia."

and that his earlier view is to be preferred to the later one.

Their Lordships do not think that there is any conflict between the two cases. In their opinion "in use at the material date" means in use as legal tender. Moreover the statement that "it did not matter whether the paper money was legal tender in or out of Russia", was used in answer to the argument that the tender must be legal out of Russia as well as in Russia, and is a sufficient answer to that argument.

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[1] At p. 483. [2] (1921) 38 T.L.R. 65, at p. 67.

Some discussion took place before their Lordships as to whether in any case the appellants had fulfilled their contract in due time even if tender of notes of the Bank of Spain were a fulfilment of the contract.

Having regard to the view which the Board takes, it is not necessary to determine this matter nor is it material to consider what would have been the result if the respondents had furnished bank notes and not a credit upon Barclays Bank in fulfilment of their part of the contract.

No dispute appears to arise as to the sum found to be due by the Chief Justice.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed and that the appellants must pay the respondent's costs before the Board.