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Appeal No. 9 of 1950.

In the Privy Council.

<p>ON APPEAL FROM THE COURT OF APPEAL, MALTA.</p>	<p>UNIVERSITY OF LONDON W.C.1. 17 JUL 1953 INSTITUTE OF ADVANCED LEGAL STUDIES</p>
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BETWEEN

10 ANTONIO CARUANA, MICHELE MAGRO, for and on behalf of the firm of JOSEPH MAGRO, JOSEPH STELLINI, for and on behalf of the firm S. STELLINI & SONS, ANTONIO BONNICI, EMMANUELE FARRUGIA, JOHN TABONE, SALVATORE MIFSUD, CARMELO MUSCAT, PAOLO MICALF, ROSARIO SCHEMBRI, for and on behalf of the firm of GIOVANNI SCHEMBRI, CARMELO LOPORTO, for and on behalf of the firm of PACE & LOPORTO, ANTONIO VELLA, MICHELANGELO SCIBERRAS, PAOLO FARRUGIA, CARMELO BELLIZZI, for and on behalf of the firm of CARMELO BELLIZZI & Co., GIUSEPPE PORTELLI, for and on behalf of the firm of EDGAR PORTELLI, FELICE CUTAJAR, GIUSEPPE DEBRINCAT, for and on behalf of the firm of A. DEBRINCAT & SONS, GEORGE DEBATTISTA, JOSEPH GAMBIN, GIUSEPPE BUHAGIAR, JOSEPH GRECH, ANGELO BRIFFA, for and on behalf of the firm of VINCENZO BRIFFA; and JOSEPH & WILFRED STELLINI vice their father JOSEPH STELLINI, deceased

Plaintiffs-Appellants,

AND

30 JOSEPH DEBONO, PHILIP AGIUS, JOHN CALLEJA, AGOSTINO AZZOPARDI, ANTONIO CUSCHIERI, ANGELO BONELLO and DOMENICO CACHIA, respectively in their capacity as CHAIRMAN, SECRETARY and DIRECTORS of the WHOLESALE FOODSTUFFS POOL

Defendants-Respondents.

CASE FOR THE RESPONDENTS.

1. This is an appeal from the judgment of the Court of Appeal, Malta, dated the 16th May, 1949, which affirmed, subject to one variation,

RECORD.

RECORD. the judgment of H.M. Commercial Court of Malta of the 25th November, 1948.

2. The issues raised on this appeal relate to the true construction of the constitution and present status of the Wholesale Foodstuffs Pool which was formed, by order of the Government of Malta, to regulate the distribution of rationed food commodities in that Island.

pp. 5—6
& pp. 17—19.

3. According to the evidence given by Mr. E. Petrocochino, the Food and Commerce Control Officer of the Government of Malta, the Pool was set up, following Government notification, for the purpose of forming a representative Commission consisting of the Distributors of a given commodity who were willing to join the Pool, subject to their paying to it a certain percentage out of their profits. That percentage was fixed by the Government from time to time, and it was impossible for any trader to act as a Distributor without continuing to be a member of the Pool. 10

p. 18, ll.
26—30.

4. By an instrument under private signature dated the 27th February, 1945, a limited liability company was formed by the food distributors under the name "The Wholesale Foodstuffs Pool Ltd." with the object of sharing between the shareholders, according to quotas, the percentage of gross profits payable to the company by the distributors "appointed or who might be appointed by the competent authorities"—which percentage was stated to be that mentioned in the letter dated the 23rd November, 1943, addressed by the Assistant Lieutenant-Governor to the Honorary Secretary of the Chamber of Commerce, "or any other percentage which the said authorities might fix from time to time." 30

pp. 43—54.

Clause 11 of the said Instrument provided that "the General Meeting shall have the power (c) to extend the life of the Company in accordance with Clause 14 of the present agreement."

Clause 14 provided:—"The Company is being formed for the period of two years which, to meet the ends and purposes of the aforesaid letter of the 23rd November 1943, is to be deemed as commencing from the 24th January 1944. The aforesaid period is subject to extension for further periods of one year. However, if in view of any instructions issued by the competent authorities, the objects for which the Company has been formed were to come to an end before the termination of the initial period of two years or the subsequent extension or extensions thereof, the present agreement shall be deemed to have elapsed from the date mentioned in any such instructions." 30

"The Board of Directors in office at the time of the termination of the Agreement is hereby empowered at once to wind up the Company."

p. 1.

5. The present proceedings were initiated by a Writ-of-Summons issued in His Majesty's Commercial Court on the 10th February, 1948, by the Appellants—as members of the said "Wholesale Foodstuffs Pool"—calling upon the Respondents, in their capacity as Chairman, Secretary and Directors respectively of the said Pool, to shew cause (1) why it should not be declared and adjudged that the said Pool came to an end *ipso jure* 40

on termination of the period for which it was set up; and (2) why the Respondents should not proceed to effect the liquidation of the Pool. RECORD.

In a "Declaration" filed in the said Court on the same day, the Appellants contended that "no General Meeting had been convened at the end of the said period of two years for the purpose of extending the life of the Pool in terms of clauses 11 and 14 of the instrument constituting the Pool. That notwithstanding this fact, the Respondents maintain that the Pool is still in being and claim payment of the profits in accordance with the conditions governing the Pool." P. 3.

10 6. By a judgment delivered on the 25th November, 1948, the Commercial Court held:— pp. 10—11.

- (1) The document produced (to wit, the agreement of the 27th February, 1945) is of itself sufficient evidence that what the Plaintiffs and the Defendants have been calling a commercial partnership (*société*) is not a commercial partnership (*société*) within the juridical meaning of the term. It is a Pool and, as consistently held by the Courts in Malta, a Pool is not a commercial partnership;
- 20 (2) A Pool consists of the amalgamation of a number of traders promoted by the Government with the object of facilitating the importation and distribution of rationed commodities in the abnormal conditions of the world markets;
- (3) Those who joined the Pool did so because it suited them, and they are at liberty to quit as soon as the period agreed upon runs out;
- (4) Nevertheless, once the Pool is still in being, and is still required by the Government, it does not fall to the Plaintiffs to demand the liquidation thereof—even though they themselves may not be obliged to extend the period of their own membership now that the contractual period has elapsed;
- 30 (5) The Pool is subject to the final decision of the Government that brought it about and must continue in being so long as the circumstances that justified its creation persist and endure;
- (6) Just as the Pools were set up without the consent of the members, so they may not be wound up merely by the consent of the interested parties. Those who may wish to retire may do so, provided they are prepared to take the consequences;
- (7) Therefore the claim for the liquidation of the Pool is premature, and as formulated, untenable.

40 The Court accordingly dismissed the Plaintiffs' claim, with costs—saving any action to which the Plaintiffs might be entitled when the Pool came to an end, "according to law and if according to law."

7. The Appellants appealed from this judgment to the Court of Appeal, Malta, which delivered judgment on the 16th May, 1949, holding that:—

- (1) As rightly held by the Court of First Instance, and as held in the various judgments given by this Court affirming those given by the Court below, the Pools that were formed during the war cannot be considered as true commercial partnerships within the meaning of the Commercial laws;
- (2) That the Appellants have overlooked what is a most important factor both as regards the creation and the termination of the Pools—namely, the intervention made by the Government which, in the abnormal circumstances then prevailing, had every interest to urge the formation of the Pools; 10
- (3) The evidence established that the Pools were required by Government so as to facilitate control and it was the Government itself that had to appoint the Distributors, making the selection, however, from amongst the members of the Pool;
- (4) Once that was so and once the Government had decided at the outset that Distributors should retain a certain percentage of the profits to be shared between all the members of the Pool, including the Distributors themselves, the Pool cannot be wound up and dissolved without the authorisation of the Government; 20
- (5) Once the competent authorities, notwithstanding the lapse of so much time, consider that a certain degree of control is still necessary, and that the Pools must be kept on for the sake of that limited amount of control, the parties concerned may not, *marite proprio*, claim the right to dissolve the association independently of Government authorisation;
- (6) Once the Pool is still there, and is still required by the Government to meet present-day exigencies, and once the Appellants have continued to hold their appointments as Distributors, and are still members of the Pool, it is beyond them to bring the present action which, in that sense, is premature—for in order to be able to advance any claims they may have vis-a-vis the Pool, they must first relinquish not only their appointments as Distributors, but also their membership of the Pool. 30

On these grounds, the Court of Appeal adjudged and declared that the present action was premature and accordingly non-suited the Defendants—and in that sense, in so far as the claims were dismissed by the Court below, varied that Court's decision by allowing Plaintiffs' appeal—each party to bear its own costs in both the first and second instance—Registry fees to be paid by the Appellants. 40

8. In so holding, the Court of Appeal followed and approved its previous decision in *Fava v. Bonnici* delivered on the 18th November,

1946, " that by no stretch of the imagination could the Pools be considered as commercial partnerships subject to the provisions of the Commercial laws relating to commercial partnerships. It would be absurd in a partnership if the members were to be imposed by the Government and if they were to be associated together otherwise than of their own free will and choice, for in that case, there would be no such thing as the *affectio societatis*." RECORD.

9. In granting on the 27th June, 1949, conditional leave to appeal to His Majesty's Judicial Committee of the Privy Council, the Court of Appeal construed its judgment of the 16th May, 1949, as being final in so far as it bore upon the rights with which the Plaintiffs claimed to be vested at present, without prejudice, however, to such rights as they might have in future and held, further, that it was beyond doubt that the present Defendants had succeeded in resisting both the claim for a judicial declaration that the Pool had come to an end and that for the liquidation thereof at the present moment. By its further decree of the 16th December, 1949, the Court granted the Appellants final leave to appeal from its said judgment to His Majesty's Privy Council.

10. The Respondents submit that the said judgment of the Court of Appeal, Malta, dated the 16th May, 1949, is right and should be affirmed with costs for the following, amongst other,

REASONS:—

1. Because both Courts in Malta were right in law in holding that a Pool is not a commercial partnership, but an association *sui generis*.
2. Because the evidence produced before both Courts proved that the Wholesale Foodstuffs Pool was formed to meet Government requirements which still existed at all material dates.
- 30 3. Because the said Pool could not be wound up without the authorisation of the Government of Malta which has not yet been granted.
4. Because it was *ultra vires* the Appellants to bring any action for the dissolution of the said Pool until they had relinquished both their appointment as Distributors and their membership of the Pool.
- 40 5. Because the true purport of clause 14 of the agreement of the 27th February, 1945, is that a Distributor who desired to leave the Pool could do so on its termination subject to his fulfilling all his obligations up to that date.
6. Because the Appellants brought this action solely for the object of being relieved of their obligation to pay the percentage due to them by the Pool.

7. Because the Appellants' said obligations hold good and subsist independently of any constituting instrument.
8. Because in the alternative the Appellants' delay of more than two years in issuing the Writ-of-Summons is inconsistent with their plea that the Pool terminated by effluxion of time on the 23rd January, 1946.
9. Because, in any event, the action of the Appellants is premature and untenable at the present time.
10. Because the concurrent findings of fact and of law of both Courts in Malta are right and ought to be affirmed. 10

C. J. COLOMBOS.

HY. S. L. POLAK & Co.,
20 & 21, Took's Court,
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