MARRACHE v ASHTON

Privy Council
Lord Macmillan, Lord Romer, Sir George Rankin, Sir Madhavan Nair.
15, 16 December 1942.

Foreign currency — foreign notes not legal tender in Gibraltar to be regarded as commodities.
Foreign currency — measure of damages for failure to deliver.

By three mortgages, the mortgagor contracted to pay certain amounts of Spanish pesetas. He defaulted and the mortgagees raised actions claiming the equivalent amount according to the official rate of exchange current in London under the Clearing Office (Spain) Order, 1936. There was evidence that there was a regular market for Bank of Spain peseta notes, although under Spanish law such notes could not be exported from or imported into Spain. The Chief Justice gave judgment in favour of the mortgagees for sums based on the official rate. The mortgagor appealed.

Held: (i) As Bank of Spain peseta notes were not currency in Gibraltar, they must be regarded as commodities.

(ii) Bank of Spain peseta notes were legal tender in Spain, there was a market for such notes in Gibraltar and therefore the damages for failure to deliver must be based on the market rate in Gibraltar.

Cases referred to in the judgment.

In re Chesterman's Trusts: Mott v Browning, [1923] 2 Ch. 466.
Pyrmont Ltd. v Schott, [1939] A.C. 145 and supra, p. 78.

Appeal

This was an appeal from a judgment of the Supreme Court in three consolidated actions for sums equivalent to amounts of Spanish pesetas due under mortgage covenants. The only issue was the rate of exchange that should be adopted.

S. Chapman for the appellant.

P. Devlin for the respondents.

22 January 1943: The following judgment was delivered—

The question at issue between the parties to this appeal is as to the legal equivalent in sterling at Gibraltar on 25 May 1939, of certain amounts of Spanish pesetas.

By a mortgage dated 28 October 1931, on freehold property in Gibraltar the appellant Marrache covenanted to pay to the respondent Onos on 31 October 1936, "the sum of 50,000 pesetas" in consideration of an advance of this amount. By a second mortgage on the same property dated 22 November 1933, the appellant Marrache covenanted in similar terms to repay to the respondent Ashton on 31 October, 1936, a loan of "the sum of 25,000 pesetas." And by a third mortgage also on the same property dated 28 March 1934, the appellant Marrache covenanted to repay to the respondent Ashton on 31 October 1936, "the sum of 35,000 pesetas," being the amount of a further loan.

On 25 May 1939, the respondent Ashton took out a writ of summons in the Supreme Court of Gibraltar against the appellant Marrache claiming payment of the sum of £1,433. 10s. as the equivalent of 60,565.45 pesetas at 42.25 pesetas to the pound sterling, being the amount of the principal sums with interest then due under the second and third of the before-mentioned mortgages. On the same date the respondent Onos took out a writ of summons against the appellant Marrache claiming payment of the sum of £1,200 as the equivalent of 50,712.50 pesetas at 42.25 pesetas to the pound sterling, being the amount of the principal sum with interest then due under the first of the before-mentioned mortgages. The actions were not preceded by any demand for payment. They were consolidated on 13 June, 1939.

The appellant Marrache in his defences alleged that at the date of the raising of the actions the market value of pesetas in Gibraltar was 132 to the pound sterling and on 3 July 1939, he tendered payment to the respondent Ashton of £458 16s. 8d. and to the respondent Onos of £384 3s. 9d., being the equivalents of the sums of pesetas due by him at the rate of 132 pesetas to the pound sterling. On the tenders being refused he paid these sums into court on 3 July, 1939.

The rate of 42.25 pesetas to the pound sterling adopted by the respondents in their original claims was admitted to be the official rate of exchange current in London under the Clearing Office (Spain) Order, 1936, but in the course of the proceedings the respondents departed from their claim to apply this rate and maintained that the rate of 53 pesetas to the pound, which they justified as will appear in the sequel, should be applied.

To this contention the learned Chief Justice gave effect and on 4 April 1940, he pronounced judgment in favour of the respondent Ashton for £1,181 14s. and in favour of the respondent Onos for £992 8s. 11d. It is against this judgment that the present appeal is brought.

All three parties were resident in Gibraltar and their rights and obligations under the mortgages in question were admittedly governed by the law of Gibraltar, which was the place of payment of the sums in pesetas due by the appellant. The amount of these sums was admitted to be correctly stated in the writs of summons as at 25 May 1939, when the writs were issued and this date, it was agreed, was the date at which the appellant's liability should be ascertained. The contest was thus narrowed to the question whether for the purposes of the cases pesetas should be reckoned at 53 or at 132 to the pound.

Evidence of legal and financial experts was adduced on both sides. From this it appeared that in October 1936, and until 20 January 1939, gold and silver coins were legal tender in Spain but that from 20 January 1939, and consequently on 25 May 1939, Bank of Spain peseta notes, popularly known as "Franco" notes, were, apart from gold, the only legal tender and currency in Spain. By a decree of the Spanish Government of 24 November 1938, it was declared to be "an offence of monetary contraband" to export from or import into Spain inter alia Bank of Spain peseta notes, unless under conditions immaterial for the present purpose. Nevertheless there was, as the learned Chief Justice found, "a market for these notes both in Gibraltar and London and elsewhere." A partner in Galliano's Bank, Gibraltar, stated that there was a regular market for them in Gibraltar and London and that his bank bought and sold such notes in May 1939, the rate being about 132 pesetas to the pound. He instanced a sale on 6 May 1939, to a London house of 15,000 pesetas at 145 to the pound and produced a cable from the Midland Bank London reporting the market rate ruling in London for "Franco" Bank of Spain peseta notes on 25 May 1939, to be 127 to 131 pesetas to the pound for denominations of 500 and 1,000.

The respondents led evidence to the effect that at the Spanish frontier the official rate fixed in Spain at which tourists and labourers entering Spain from Gibraltar could exchange pounds for peseta notes at the Spanish custom house was 53 pesetas to the pound. This was the rate which the respondents, as above stated, claimed to apply, as being the rate legally recognised in Spain.

In their printed case laid before the Board the respondents stated as a fact not in dispute that "at the material time there were dealings in Bank of Spain notes in Gibraltar and London, these notes being bought and sold at ptas. 132 to the £," but added that "these notes would have to be smuggled into Spain."

It was common ground before their Lordships that while Bank of Spain peseta notes were legal tender in Spain they were not currency in Gibraltar, though they circulated there in considerable numbers. Consequently these

notes must be regarded in Gibraltar as commodities. It was also agreed that the appellant would have specifically performed his covenants if he had tendered to the respondents the appropriate amounts of Bank of Spain peseta notes. This was clearly so in view of the law as laid down in *In re Chesterman's Trusts: Mott v Browning* [1]. There the Master of the Rolls (Lord Sterndale) said [2]:

> "I think that a mortgage to secure a given number of reichsmarks is a mortgage to secure the repayment of whatever may be legal tender at the time of repayment in the country where the reichsmark circulates."

The law so stated was approved by this Board in the case of *Pyrmont Ltd. v Schott* [3]. In that case, as here, there was an obligation to repay in Gibraltar a sum of borrowed pesetas, but at the material time peseta notes were not legal tender in Spain.

The appellant not having specifically performed his contracts by delivering peseta notes to the respondents became liable to them in damages for his failure to deliver to them the stipulated quantity of the commodity which he had contracted to deliver. The measure of damages for his failure is the sum in sterling which it would cost the respondents to obtain for themselves in the market the amount of the commodity which the appellant was bound but had failed to deliver to them. This assumes the existence of a recognised and accessible market for the commodity.

Now on the evidence and admissions above set out it is clear that there was a recognised and accessible market in Gibraltar for Bank of Spain peseta notes and that the respondents on 25 May 1939, could have bought in that market 132 pesetas for a pound sterling. They could thus have provided themselves at this rate with the equivalent of specific performance of the contract. Their Lordships see no reason why, in preference to the rate obtaining in the Gibraltar market, the rate at which sterling was convertible into pesetas at the Spanish custom house at the frontier should be adopted. This was not a market rate of exchange and it apparently worked only one way. The respondents did not need to resort to the Spanish custom house in order to get pesetas for pounds. It was in Gibraltar not in Spain that the appellant had covenanted to deliver pesetas to the respondents.

The learned Chief Justice, however, discarded the Gibraltar market rate. The passage in his judgment dealing with the matter is as follows:—

> "Whatever the liability of the Bank of Spain may be to eventually redeem these notes [i.e. peseta notes out of Spain] it appears to be clear that under the municipal law of Spain they are not regarded while abroad as part of the legal currency of the country and that they are liable to confiscation if identifiable by the Spanish authorities. I am of opinion that while the prohibition against their repatriation remains these notes cannot be regarded under Spanish law as legal currency in Spain."

[1] [1923] 2 Ch. 466.
[2] At p. 478.
[3] [1939] A.C. 145, and supra, p. 78.

With all respect, their Lordships are unable to accept this argument. The only necessary reference to Spanish law was for the purpose of ascertaining what in Spain was legal tender for the payment of so many Spanish units of account. This having been ascertained the court at Gibraltar was not concerned with the domestic currency regulations and restrictions imposed by the Spanish Government. There had been no Spanish decree demonetizing Spanish peseta notes abroad or declaring transactions in these notes by foreigners abroad to be illegal, if indeed the Spanish Government could have effectually so decreed with regard to transactions by foreigners abroad. For the purposes of the present suits the Spanish prohibition on the import to or export from Spain of Bank of Spain peseta notes was in their Lordships' opinion irrelevant. A contract between foreigners abroad involving the introduction of peseta notes into Spain in contravention of Spanish law would have raised quite a different question. No such question arose here. The parties were not governed by Spanish law. All that the court had to do was to ascertain what was legal tender in Spain for so many pesetas and then to inquire whether there was a market in Gibraltar for the sale and purchase of such Spanish currency and if so what was the market rate. Bank of Spain peseta notes were legal tender in Spain, there was a market for such notes in Gibraltar and the rate there prevailing was 132 pesetas to the pound sterling.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed, that the judgment of the Chief Justice of the Supreme Court of Gibraltar of 4 April 1940, be recalled and that the case be remitted to the Supreme Court at Gibraltar to give judgment against the appellant Marrache in favour of the respondent Ashton for the sum of £458 16s. 8d. and in favour of the respondent Onos for the sum of £384 3s. 9d. The respondents will pay to the appellant his costs of the present appeal and of the proceedings in the Supreme Court of Gibraltar subsequent to 3 July 1939, when the appellant paid into court the sums for which he is now found to be liable. As the writs in the actions were issued without any previous demand for payment the parties will each bear their own costs of the proceedings prior to 3 July 1939.