

## THE NORFOLK MULTINA: Wells Fargo Ltd. v Owners of the ship Norfolk Multina

Supreme Court

Spry, C.J.

28 October and 14 November 1977.

*Judgment — whether judgment can be expressed in foreign currency — Order in Council of 9 August 1898.*

*Revised editions of the Laws — Consolidation of Laws Ordinance, 1934, ss. 4 and 11 — finality of revised edition.*

*Orders in Council — whether prerogative Orders in Council can be repealed by ordinances.*

The plaintiff company in an action in rem applied for judgment in U.S. dollars. The court having expressed doubts whether the law of Gibraltar permitted this, argument was heard on this question and the Attorney General was invited to appear as *amicus curiae*.

**Held:** (i) The court may look behind the 1935 Revised Edition of the Laws where an enactment contained in it is clearly substantially different from the original.

(ii) If it is reasonably arguable that an enactment was properly omitted from the Revised Edition, the court is precluded from considering the question.

(iii) There is nothing to prevent courts in Gibraltar giving judgments expressed in foreign currencies.

**Quaere.** Whether a prerogative Order in Council can be repealed by an ordinance.

**Note.** The observation at p. 389 that the Order in Council which applied the Coinage Act, 1870, was omitted from the Chronological Table, presumably by oversight, appears to have been made *per incuriam*, no Order in Council made under the authority of an Act of Parliament having been included in the Table, only the prerogative Orders.

**Cases referred to in the judgment.**

*Miliangos v George Frank (Textiles) Ltd.*, [1975] 3 All E.R. 801.

*Accountant-General v Marrache*, supra, p. 370.

*Manners v Pearson & Son*, [1898] 1 Ch. 581.

*Re United Railways of the Havana and Regla Warehouses Ltd.*, [1960] 2 All E.R. 332.

*de Culatto v Financial Secretary*, unreported.

A.B. Serfaty for the plaintiff.

The Attorney General (J.K. Havers Q.C.) amicus curiae.

**22 November 1977: The following judgment was read—**

The plaintiff claims, in an action in rem, against the owners of the Norfolk Multina, the amount due under a First Preferred Mortgage. On 28 October 1977, I adjudged the mortgage valid. I ordered a reference to the registrar as to the amount due, on account of an apparent discrepancy in the figures, and I reserved the question as to the currency in which judgment was to be given.

The mortgage, which was expressed to be made under the law of Liberia, was between a Liberian and an English company and secured a loan expressed to have been made in United States Dollars. It appears to have been executed in New York. It was made pursuant to a loan agreement between the same parties, which was to be governed by English law. There is no clear evidence where the loan was made or where it was to be repaid. There is no express provision as to the currency in which it was to be repaid but the reasonable inference is that it was to be repaid in United States dollars.

Mr. Serfaty, who appeared for the plaintiff and who had been advised of certain doubts entertained by the court, submitted various arguments for the proposition that the court had power, and ought, to follow the present practice of the English courts, as laid down in *Miliangos v George Frank (Textiles) Ltd.*<sup>1</sup>, which is to give judgment expressed in the appropriate currency "or the sterling equivalent at the time of payment". At an adjourned hearing, the Attorney General was good enough to appear as amicus curiae and I am most indebted to him and to Mr. Serfaty for their most helpful addresses.

<sup>1</sup> [1975] 3 All E.R. 801.

The doubts I entertained concerned an Order in Council made on 9 August 1898 and promulgated in Gibraltar on 1 October 1898, which, in s. 2 required that—

“in all proceedings, civil and criminal, in any Court in Gibraltar, the value of money shall be stated in the denominations of the lawful money of the United Kingdom.”

If that Order is still in force, it precludes this court from following the recent change of practice in England, where the matter was not governed by statute but only by judge-made law, which could be, and was, changed by a decision of the House of Lords.

Mr. Serfaty's arguments may be grouped under three main headings: that the use of the modern English formula would not offend against the 1898 Order; that the Order has been repealed, expressly or impliedly, or modified or overridden by subsequent legislation; and that the Order, if still in force, does not preclude the grant of a specific remedy in Admiralty proceedings.

The Attorney General's main submission was that the 1898 Order had been omitted from the 1935 Revised Edition of the Laws and was not saved by s. 6 of the Consolidation of Laws Ordinance, 1934; that the omission could not be described as an obvious error and must be assumed to have been made purposely; and that having regard to s. 11 of the Ordinance the omission must be treated as final and conclusive. Mr. Serfaty associated himself with this argument.

I begin with the question whether the 1898 Order is still in force. The researches made by the Attorney General and by myself have failed to disclose any express repeal. It was included in the Consolidated Laws of Gibraltar published in 1913. It was not included in the Revised Edition of the Laws of Gibraltar published in 1936.

The Latter Edition was published under the authority of the Consolidation of Laws Ordinance, 1934, s. 11 of which provided that the Governor might approve of the revised edition and order that it should come into force from such date as he should think fit and that as from that date it

“shall be deemed to be and shall be without any question in all courts of justice the sole and only proper Statute Book of the Colony in respect of all Ordinances, Orders in Council....”

The powers of the Commissioner for the revision of the laws were, however, very precisely defined in s. 4 of the Ordinance, and the proviso to that section stipulated that those powers were not to be taken to imply any power

“to make any alteration or amendment in the matter or substance of any Ordinance, Order in Council or part thereof”.

If the Commissioner inadvertently or for any reason purported to make a substantial change in the law, it would appear that his act would be a nullity. So it would seem that there is a conflict between s. 11 and s.4. Courts

always try to find an interpretation which avoids a conflict between one section and another but I find it impossible to do so in the present instance, although the extent of the conflict may be narrowed.

Where there is such a conflict, two principles may be invoked. One is that the later section prevails over the earlier; the other is that a general provision does not oust a specific one. I do not think the first is appropriate here.

I think it is quite clear that the intention of the Legislature was to achieve finality. The very purpose of a revised edition would be defeated if every litigant were to go behind it. But it would be quite wrong if an act of a Commissioner were to result in the repeal of an enactment made by Her Majesty in Council or one which had passed the Legislature and received the Royal Assent.

In a recent case, *Accountant-General v Marrache*<sup>1</sup>, I held that I could look behind a revised edition, but that was a case where a provision as it appeared in the revised edition was entirely inappropriate and made no sense. In those circumstances, the matter was an ordinary one of interpretation.

In the same way, where there has been a clerical or printer's error, such as the wrongful inclusion or omission of the word "not", and the result is manifestly contrary to the intention of the enactment, I think it must be possible to go behind a revised edition.

But I would go further and say that where an ordinance as it appears in a revised edition is clearly substantially different in effect from the ordinance as enacted, the court is entitled, and indeed under a duty, to say that the Commissioner acted ultra vires and that the general approval of the revised edition cannot validate the particular invalid act. It is a power to be exercised, I think, only in clear cases and only with the greatest caution. The same principle must apply to omissions, but the exercise of the discretion will be even more difficult, because it will sometimes be difficult or even impossible to ascertain the reason for the omission.

The omission of the 1898 Order from the 1935 Revised Edition presents a number of problems. In the first place, the Order was omitted from the Chronological Table of the Ordinances of Gibraltar 1705-1935 which appears in Volume IV, although there is a reference to it in the Table as revoking the Currency (Amendment) Order of 1897. The Order in Council, also of 9 August 1898, which applied the Coinage Act, 1870, is also omitted from the Table, although it was set out in Volume III. The Table was clearly intended to be comprehensive, and the omission of these two Orders from it must, I think, have been an oversight.

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<sup>1</sup> Supra, p. 370.

That might suggest that the omission of the 1898 Order from the body of Ordinances was also an oversight, but I am inclined to think it was a deliberate act. (I should perhaps mention that the system adopted by the Commissioner was to include prerogative Orders in Council among the Ordinances which appear in Volumes I and II, but to treat Orders in Council made under the authority of Acts of the Imperial Parliament separately. They appear in Volume IV.) I have arrived at my conclusion from extrinsic evidence, at which I think, for this purpose, I am entitled to look.

That the 1898 Order must have been in the mind of the Commissioner appears from two facts. First, it was shown as being in force in Gibraltar on 1 January 1934 in an index to the Laws of Gibraltar compiled by Sir Ralph Hone (the Commissioner for the 1935 Revised Edition) and published officially. Secondly, there is the reference to it, to which I have already referred, in the Chronological Table against the Currency (Amendment) Order of 1897.

Then, in his preface to the Revised Edition, the Commissioner said—

“In the general process of revision, the policy has been to revoke and replace most of the prerogative Orders in Council passed exclusively for Gibraltar...”

It is perhaps significant that the long title of the Currency Note Ordinance, 1934, is—

“An Ordinance to consolidate and amend the Law relating to the issue of Government Currency Notes”.

Although the Ordinance expressly repeals the Bank Notes Ordinance, 1914, and the Currency Notes Ordinance, 1927, it makes no mention of the 1898 Order. Nevertheless, I think the Commissioner must have been of the opinion, rightly or wrongly, that the Ordinance impliedly repealed that Order. It seems an irresistible conclusion when the Index, the 1934 Ordinance and the 1935 Revised Edition are looked at together. I think he must have considered that the entire monetary law of Gibraltar was contained in the Currency Note Ordinance, 1934, as regards notes, and the applied Coinage Act, 1870, as amended, as regards coins.

It will be appreciated that when the 1898 Order was enacted, there was no doubt whatever that in England judgments had to be expressed in English currency. This had been clearly stated by the Court of Appeal (and a particularly strong Bench) only five months before, in *Manners v Pearson & Son*<sup>1</sup>. This was equally true when the Revised Edition was being prepared in or about 1935; indeed it was still unquestioned law when *Re United Railways of the Havana and Regla Warehouses Ltd.*<sup>2</sup> was decided in 1960. So far, therefore, as s. 2 of the 1898 Order required the value of money to be stated, in judicial proceedings, in sterling, the draftsman of the Order would

<sup>1</sup> [1898] 1 Ch. 581.

<sup>2</sup> [1960] 2 All E.R. 332.

have regarded its inclusion as a formal recognition of existing law and the Commissioner in 1935 would probably have regarded its omission as leaving the law unchanged. The difference between sterling and Gibraltar notes is hardly more than nominal, since they are by statute interchangeable at par.

I felt at first some doubt whether as a matter of law the 1934 Ordinance could have repealed a prerogative Order in Council and this is important, because, if it were not legally possible, the omission of the 1898 Order from the Revised Edition would seem clearly wrong. Some guidance is to be found in *de Culatto and another v Financial Secretary*<sup>1</sup>. The issues in that case were quite different from those in the present case, but in the course of his judgment, Bacon, C.J., considered the various Letters Patent and Royal Instructions issued to Governors of Gibraltar. In particular, the Royal Instructions of 1876 precluded the promulgation of any Ordinance repugnant to the Letters Patent, or the Instructions or any Act of Parliament or Order in Council in force in Gibraltar and decreed that any such Ordinance should be null and void. (I am relying on the judgment, as no copy of the 1876 Instructions is presently available.) Subsequently, fresh instructions were issued in 1921 from which the reference to repugnancy to any Order in Council was omitted, as was the provision that any offending Ordinance would be null and void. The Chief Justice summed up—

“The whole material period is divisible into two parts: that from the 22nd June, 1876 down to the 3rd March, 1921, and that from the 4th March, 1921 down to the present day [that is, 1950]. Throughout the earlier part the Governor’s powers were more restricted. Throughout the latter, his powers were greater in two respects: first, he was no longer prohibited from promulgating an Ordinance which was repugnant to an existing Order in Council; secondly, even if he promulgated an Ordinance which was repugnant to the current Letters Patent or Royal Instructions, or even to an Act of Parliament applicable to Gibraltar, his Ordinance would not now be a nullity *ab initio*; but of course the ultimate validity of any and every Ordinance was still governed by the Sovereign’s reservations as to the power of disallowance”.

I think, with respect, that these conclusions go too far as regards Acts of Parliament and Orders in Council made under the authority of Acts of Parliament, because they appear to ignore the provisions of s. 2 of the Colonial Laws Validity Act, 1865, but I think they may very well be valid as regards prerogative Orders in Council. I do not propose to go any further, as this aspect of the matter has not been fully argued. (That a change was intentional appears from the covering despatch from the Secretary of State dated 30 March 1921, in which it was stated that the effect of the new provision was

“to leave the validity of any local Ordinance repugnant to any Order in Council extending to or in force in Gibraltar to be determined by the Colonial Laws Validity Act.”)

<sup>1</sup> Unreported

Also, since matters affecting the currency of Gibraltar or relating to the issue of Bank Notes are among the reserved subjects under section XVIII (3) of the Royal Instructions of 12 September 1922, it must be assumed that the prior permission of the Sovereign was specifically obtained prior to the enactment of the Currency Note Ordinance, 1934.

If then, as I believe, the 1898 Order was deliberately omitted from the 1935 Revised Edition by the Commissioner, on the ground either that it was spent or that it had impliedly been repealed by the Currency Note Ordinance, 1934, and if, as I think, that is a proposition which is reasonably arguable, I think I am precluded from considering it by s. 11(2) of the Consolidation of Laws Ordinance, 1934, and must treat the 1898 Order as no longer part of the statute law of Gibraltar.

On that basis, there is nothing to prevent me from giving judgment in a foreign currency and, in the present case, I am satisfied that it would be proper, applying the principles laid down in the *Miliangos* case, to give judgment in what was the money of account in the present transaction, that is to say in United States dollars.

Having so found, I do not think any useful purpose would be served by pursuing the other lines of argument developed by Mr. Serfaty.