Privy Council Appeal No. 121 *of* 1927.

LORD CHANCELLOR, VISCOUNT SUMNER & LORD ATKIN, 1928.

July 24.

THE BANK OF ATHENS *Appellants.*

v.

THE FIRM A. G. PILAVACHI *Respondents.*

THE FIRM A. G. PILAVACHI *Appellants.*

v.

THE BANK OF ATHENS *Respondents.*

(Consolidated Appeals from the Supreme Court of Cyprus.)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1928.

Present at the Hearing:

[THE LORD CHANCELLOR, VISCOUNT SUMNER, LORD ATKIN.]

(*Delivered by* VISCOUNT SUMNER.)

BY a contract in writing, dated the 23rd September, 1920. Messrs. William Holgate and Son of Liverpool, agreed to buy and Mr. G. T. Rossides agreed to sell a cargo of Cyprus locust beans, in bulk, of about 1,200 tons, per the ss. *Montcalm*, at 225*s.* per ton c.f. and i. Liverpool, to be shipped during October and/or November. Mr. Rossides represented the respondent firm, Messrs. Pilavachi and Co. of Limassol in Cyprus, and was intimately connected with them. When in Liverpool he had appointed the firm of Baty and Co., who brought about this contract as brokers between the parties, to act as the firm's selling brokers for twelve months. The contract provided for payment in cash against documents (viz., bill of lading, and/or delivery order, policy of insurance and/or letter of guarantee) on docking of the vessel in Liverpool, and it incorporated the rules of the Liverpool General Brokers' Association, particularly arbitration clauses of a usual character and a definition clause, by which the meaning of "about" was fixed as "within 5 per cent. over or under the quantity specified."

The *Montcalm* sailed from Cyprus on the 9th November, having previously loaded from the respondents a total quantity of 1,560 tons of locust beans under two separate bills of lading, one for 1,200 tons and the other for 360 tons.

The appellant bank have an office at Limassol in Cyprus, and another in London. They employ Messrs. Barclays Bank to do their Liverpool business. On the 10th November Messrs. Pilavachi and Co. discounted with

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the Limassol branch a sight draft on Messrs. Holgate and Son with the bill of lading for 1,200 tons attached, to be delivered against their payment of the draft, with instructions to receive from the London insurance agents of Mr. Rossides the corresponding policy and to present it with the bill of lading. The bill of lading for 360 tons was also delivered to them, with instructions to procure the corresponding policy, to send both to their Liverpool correspondents, and to direct them (in the absence of further instructions from Mr. Rossides before the ship's arrival) to take delivery of the 360 tons remaining after the 1,200 had been delivered to Messrs. Holgate and Co., and to store them for account of Mr. Rossides.

Before the *Montcalm* reached Liverpool the market for locust beans had fallen heavily. The price was down to £9 or less, the supply was excessive, and it was obvious that the 360 tons shipped to fill up the ship's capacity would be sold, if sold at all, with disappointing results. Furthermore, the "cargo" of the *Montcalm*, being in fact 1,560 tons—300 tons in excess of the limit fixed by the contract of sale—it might be confidently expected that the buyers would stand on their rights and endeavour to escape paying for a parcel of 1,200 tons at £11 5*s*. per ton, which on arrival would only be worth some 45*s*. less.

On the 29th November, 1920, Mr. Baty called on Mr. Holgate, and, with a view to arranging to sell the 360 tons to him, informed him that the *Montcalm*, then about to arrive, had on board 1,560 tons. Mr. Holgate at once took up the position that in that case he would not accept or pay for the 1,200 tons, as he had bought a cargo of 1,260 tons at the outside, and was offered either a parcel of 1,200 or a cargo of 1,560, and to this he adhered, though he was willing to arbitrate. Accordingly, an arbitration was held, Messrs. Pilavachi and Co. nominating their arbitrator. An award was made against them on the 16th December, 1920, and was affirmed by the appeal committee on the 21st January, 1921. No steps were ever taken to impugn it or to set it aside. It still stands.

This action was not begun till the 6th January, 1923, when the present respondents issued their writ of summons against the present appellants in the District Court of Limassol in Cyprus. The cause of action stated in the endorsement was extended orally on the settlement of the issues, and damages were claimed against the Bank of Athens for failing to make tender of the proper shipping documents at the proper time and "because, on

purpose or out of negligence or otherwise, you omitted to communicate to the plaintiffs the proposal of the buyers . . . about payment and taking delivery of the said cargo, and because . . . you acted in a way, which has prevented the plaintiffs from receiving timely knowledge of the made proposal of the buyers."

At the trial the president, erroneously thinking that a complete tender of documents had been made on the 29th November, gave judgment for the bank and dismissed the action.

On appeal this decision was reversed by the Supreme Court and on the 9th February, 1927, judgment was entered for the plaintiffs for £5,080, together with interest and costs, as damages for the alleged breach of duty to make a proper presentation of the documents. This sum was made up of loss by the fall in the market and of expenditure in connection with storage and charges on the rejected goods. They held also that there had been a breach of duty in failing to forward a certain proposal for a compromise, which sounded in damages to the extent of £1,018, but, as these consisted of part of the expenditure included in the above sum of £5,080, no further sum was adjudged. From this judgment cross appeals in this case have been presented by leave, the bank praying judgment on both issues, and Messrs. Pilavachi and Co. judgment for an additional sum of £1,018, but Messrs. Pilavachi and Co. have since abandoned their appeal under advice.

The details may be thus stated. When Barclays Bank in Liverpool made the first tender, which was on the 29th November, no policy of insurance nor any document relating to insurance was forthcoming. Messrs. Holgate and Son rejected the tender, not on any ground relating to the documents, but because the goods covered by them were not in compliance with the contract, and they told the messenger, who presented them, that they would not be accepted, the buyers having no interest in them. Subsequently on the 3rd December, Barclays Bank made a second tender. On this occasion, though there was no policy, there was tendered a certificate by the appellants' London branch, that they held the requisite policy. The Contract had provided for a letter of guarantee as an alternative to a policy, but the Supreme Court held that the certificate in question was not a letter of guarantee. How this may be it is not necessary to decide, for it is clear that the first tender was defecting, because, apart from the incompleteness of the documents, it was made a day too soon, while the second was made two days too

late. Neither was made " on docking," which took place on the 30th November or the 1st December. It is equally clear that these errors did no real harm. The plaintiffs examined Mr. Holgate as their witness on commission in Liverpool, and he said that he never considered the tender as to the documents, but rejected it simply because a parcel of 1,560 tons was tendered. He added that, but for this, he would not have troubled about these irregularities. Even so, the respondents claim that nominal damages should have been recovered, for although he had told Barclays Bank that he would not accept the parcel at all, there was still time to have made a correct tender of documents, and it was not for the bank to accept an anticipatory rejection, or to relieve themselves from their duty as collecting bankers by assuming that further presentation would do no good.

Thereafter Mr. Holgate and Mr. Baty had to consider what should be done. So far as there was any controversy, arbitration was the agreed remedy, but meantime the beans had to be discharged and stored, and Mr. Holgate suggested that, to save the cost of storage in the meantime and provided the arbitration was promptly proceeded with, he would take up the documents and pay the draft on an indemnity in regard to repayment of any balance subsequently found due by the award. This proposal, made rather vaguely but clearly in good faith, Mr. Holgate asked Mr. Baty to put before Barclays Bank. It is obvious that in spite of the words used by Mr. Baty in one of his letters that he had been " instructed by Mr. Holgate to see Barclays Bank," he was not acting on behalf of Mr. Holgate at all but, as both supposed, in the interest and on behalf of the plaintiffs. To save time, he wrote on the 3rd December, 1920, to the Bank of Athens in London, but, unfortunately, he does not seem also to have written to Messrs. Pilavachi and Co. at Limassol. From this letter is is plain that the indemnity asked for was Barclays' indemnity and that they had said that they could not move in the matter. On the previous day, however, Barclays had written to the Bank of Athens in London, that, on their guarantee, the documents would be taken up on the following day, but being a branch they could only do this with the sanction of their head office. They added " possibly your own guarantee would meet the case." On receiving this letter next morning the Bank of Athens in London telegraphed to Liverpool that they were unable to give an indemnity without the authority of their Limassol branch, and it was no doubt in view of this communication that

Mr. Baty concluded his letter to the London branch on the 3rd December by saying that he trusted they had taken the matter up with Limassol. This they failed to do, so the matter proceeded to arbitration. In London the view was taken, which was communicated to Barclays Bank at Liverpool on December the 3rd as follows:—" We do not feel disposed to give the guarantee requested by the drawee, a guarantee which would in the ultimate entail for us full responsibility for fulfilment of the contract."

As a matter of business, it is hard to see how anyone could be expected to take an interest in such a proposal except Messrs. Pilavachi and Co. themselves. The Supreme Court found as a fact that Messrs. Pilavachi and Co. had at that time, to the knowledge of the Limassol branch of the Bank of Athens, such credit and resources as would have enabled them to find some guarantee sufficient to satisfy Mr. Holgate if they had known of his offer, but that branch would have been entitled to refuse to authorise any guarantee by the London branch, and it is not easy to see how they can be liable, because the latter branch, thinking the business unattractive, as it was, took no steps in the matter. As the market then stood the whole 1,560 tons would not nearly be worth the amount of the sight draft, and the whole difficulty had arisen because Messrs. Pilavachi and Co. had not adhered to their contract. The guarantee suggested by Mr. Holgate was Barclays, and that had been refused. Very possibly a guarantee of the Bank of Athens would have suited him equally well, but it was not at his instance that their guarantee was suggested, while Messrs. Baty and Co. were in direct communication with Messrs. Pilavachi and Co. themselves. As to dealing, rightly or wrongly, with the original draft, and taking proper measures for the safety of the parcel, when rejected, the Bank of Athens at Limassol had exhausted their mandate. They had received no further instructions and had entered into no new contract. It is, however, on these facts that the respondents have succeeded in obtaining judgment for £5,080.

The case they made was in substance this. If a proper tender of documents had been made, they could have sued Messrs. Holgate and Co. successfully for the amount of the draft. It is true that, as the Supreme Court had found, the award would have been a complete bar to such an action unless and until set aside, and that even then a court of law would have held the goods tendered to have been in disconformity with the contract,

just as the Arbitration Appeal Committee did, but to this the respondents reply that, if the proposal for a guarantee had been forwarded to them, they could and would have made such arrangements as would have led to payment of the draft and have completely altered the issue in the arbitration.

An alternative case was made, which commended itself to the Supreme Court. It was said that, if Mr. Baty had brought forward all the facts which were within his knowledge, the umpire would have found, as the truth was, that the shipment of the extra 360 tons was made with such knowledge on Mr. Holgate's part as prevented him from taking the position which he did take, while the award could further have been impeached, in the circumstances in which it was made, on the grounds that the arbitration tribunal had been wrongfully kept from knowing the full material facts by the guilty suppression of them by Mr. Baty. Messrs. Pilavachi and Company's case, when fully developed, was that Mr. Baty encouraged and even urged the shipment of the additional 360 tons, promising that he would try to get Messrs. Holgate and Co. to buy them, and that the shipment was made in reliance upon these representations; but Messrs. Holgate and Co. either agreed to a variation of the original contract for a 1,200-ton cargo, or so far acquiesced in Mr. Baty's inducements as to waive the original limitations on the purchase and to estop themselves from relying on them, and that both acted in bad faith in falling back on the original contract when the goods arrived and in leaving out all reference to it when the arbitration took place. If the facts had been proved to be as alleged, Messrs. Pilavachi and Co. contended that they would have had an unanswerable cause of action against Messrs. Holgate and Co. for payment of the bill, but for the bank's failure to tender the documents in proper order, and that the award would either never have been made or would easily have been set aside. Alternatively, if the bank had forwarded Messrs. Holgate and Company's offer as was promised by the appellants' London branch, they could and would with funds of their own have found bankers to give the required guarantee, and so would have saved a heavy expenditure in storage charges. The Supreme Court, accepting these contentions, held that the bank, having undertaken to forward the communication, though they were under no prior duty to do so, had become responsible for the fulfilment of their undertaking and were liable for misfeasance as if they were gratuitous bailees.

Their Lordships have examined with care the evidence on which the Supreme Court arrived at their conclusion. It consisted mainly of letters and telegrams passing between Messrs. Baty and Co. and Messrs. Pilavachi and Co., many of which were admitted for the first time on the hearing of the appeal. It would be useless to set them out at length, but their Lordships cannot adopt the view of the Supreme Court. The evidence of Mr. Holgate's part in the matter rests on what Mr. Baty wrote about him, which, if evidence at all, is both indefinite and innocuous. It is extremely unlikely that he would have agreed to alter his position on a falling market and to give up the advantage, which the terms of the contract secured to him, nor would he have entertained the suggestion that Messrs. Pilavachi and Co. should be allowed to introduce into a port already glutted a further 360 tons with which to compete against the 1,200 tons that would come into his hands at the same time. In his case there was, in fact, neither variation of the contract nor waiver nor estoppel in connection with its terms. It follows that there was nothing to conceal from the arbitrators, nor was there any concealment in fact. It was the less reasonable for the Court to find the contrary in view of the fact that, on the commission in Liverpool, both Mr. Holgate and Mr. Baty were called by Messrs. Pilavachi and Co. as their own witnesses, and were given no opportunity of dealing with these allegations at all. This case was evidently an afterthought. The result is that no actual damage was caused by the bank's failure in the matter of the documents, since complete performance of their commission would have left matters exactly where they were. Their Lordships were asked at least to enter judgment for the plaintiffs for nominal damages, but this ought not to affect the costs. The action was not brought for any such purpose, and their Lordships do not doubt that if the Supreme Court had arrived at the conclusion, that no more than nominal damages had been sustained, they would have exercised their discretion under the rules of the Court of Cyprus, and have refused to allow this nominal success to affect the cost of a complicated litigation.

As regards the failure of the Bank of Athens to bring the suggestion for an indemnity before Messrs. Pilavachi and Co., the actual proposal made by Mr. Holgate had been refused by Barclays Bank, and to the substituted proposal he was no party. Their Lordships agree with the Supreme Court that, as holders of the draft, the appellants were under no obligation to Messrs. Pilavachi

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and Co. in this regard, but they are unable to agree that they had come under any further obligation by receiving the suggestion for an indemnity. There is no analogy between this case and *Coggs* v. *Bernard* (2 Ld. Raym. 909). No confidence was reposed in them by Messrs. Pilavachi and Co., who were not even aware of what was passing, and no promise of any kind was made. On this branch of the case, therefore, the plaintiffs failed.

In the result the appeal must be allowed and the judgment of the Supreme Court must be set aside. The judgment of the President of the District Court should be varied by entering judgment for the plaintiffs for a nominal sum without costs, and otherwise should be restored, and the respondents should be ordered to pay the whole costs of the action, of the appeal to the Supreme Court, and of this appeal. Their Lordships will humbly advise His Majesty to this effect.

BELCHER, C.J. & DICKINSON, P.J. 1927.

June 22.

[BELCHER, C.J. AND DICKINSON, P.J.]

POLICE

v.

ARAKLIDES HARALAMBO.

LAW 2 OF 1878, SECTIONS 64 (1), 66, 67, 68 69 AND 78.

CASE stated by Magisterial Court.

The question for the decision of this Court was whether the compensation ordered by a Magisterial Court to be paid in respect of injury done to properties by animals should be made payable direct to the owner of the damaged property or to the Police Group Commander under Section 68 of Law 2 of 1878, to be disposed of by him in accordance with the provision contained in Section 78 of the same Law, *i.e.*, that 15 per cent. out of the amount awarded by the Court should be paid to the Rural Police Fund, and the balance to the owner.

HELD: The whole of the compensation awarded is properly payable direct to the owner for his own use and not to the Police Group Commander.

Where compensation is awarded in criminal proceedings under Section 64 (1) of this Law there is no provision for payment to the Police Group Commander.