IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. A051 OF 1981

BETWEEN	~~Amar~~ Ammar & Azar Ltd.	Plaintiff
AND	Brinks Jamaica Limited	First Defendant
AND	The Bank of Nova Scotia Jamaica Ltd.	Second Defendant

D. ~~Scharsmidt~~ Scharschmidt instructed by Livingston, Alexander and Levy for Plaintiff
D. Goffe instructed by Myers, Fletcher and Gordon, Manton and Hart for First Defendant
C. Miller and with him Miss Pauline Miller instructed by Crafton Miller & Co. for the Second Defendant.

Heard: April 9, 10, 11, 1984; June 25, 26, 27, 1984; October 16, 17, 1984.

8th November, 1985

MALCOLM, J:

On the 17th October, 1984 I gave a judgment in this matter and promised at that time to give my fuller reasons in writing at a future date. This is a fulfilment of that promise.

The Statement of Claim reads in part:-

> "(1) The plaintiff is and was at all material times a trading company registered under the Companies Act and having its registered office at 70B King Street, Kingston.
>
> (2) The first defendant is and was at all material times a carrier engaged in the business of carrying people's valuables by the use of armoured cars and armed guards. It is and was at all material times a company registered under the Companies Act with registered office at 3 - 5 South Camp Road, Kingston."

I pause here to say that on the fourth day of the trial, to be more precise at the end of the case for the first defendant I dismissed the second named defendant - The Bank of Nova Scotia, from the action as none of the allegations made against it either by the Plaintiff or the first defendant had been established. I will therefore omit paragraphs 3 - 7 which deals with the second defendant.

The Statement of Claim continues:-

"8. By a contract in writing dated 16th July, 1976 between the plaintiff on the one hand and the first defendant on the other, it was agreed that the first defendant would for reward call for and receive sealed shipments containing moneys, cheques and/or securities at the plaintiff's said business location on each Tuesday, Thursday, Friday and Saturday and to deliver same in like condition to a designated Bank in Kingston on the same day or on the next banking day.

The plaintiff shall at the trial herein refer to the said contract, etc.

9. On Friday the 21st December, 1979, the plaintiff prepared two lodgments . . . for transmission to the second defendant's said branch. These two lodgments were placed in two canvas bags together with the requisite lodgment slips and both bags were then locked. One of the two bags contained $20,607.29 and the other $17,500 a total of $38,107.29. The said bags were numbered 35722 and 13762 respectively."

Paragraph 10 recites matters which are not in dispute - namely that the first defendant received from the plaintiff the two locked bags mentioned above for transmission to the bank.

Paragraph 15 reads:-

"By reason of the matters aforesaid the Plaintiff claims that the first defendant, in breach of the said written contract dated 16th July, has failed or refused to deliver to the second defendant the two bags containing the said lodgments in like condition as it received them on the 21st December, 1979 or at all."

The Statement of Claim further alleged, in the alternative, negligence by the first defendant in the care and custody of the said bags. There was a further claim by the Plaintiff's company that the first defendant had wrongfully detained or converted the said bags and their contents.

The contract mentioned above was tendered by consent as Exhibit 1. Its importance cannot be two highly stressed. It is an agreement, between the first named defendant and the plaintiff entered into on the 16th July, 1976. Clause 3 reads:

"First party agrees to assume entire liability for any loss of any shipment up to the amount of Twenty Thousand Dollars ($20,000.00). Said liability shall commence when said shipments have been received into its possession and shall terminate when same have been delivered to the designated consignee; provided, however, that in case any shipment is delivered to first party not distinctively and securely sealed said first party shall in no event be liable for any shortage claimed in any such shipment."

Clause 4 reads as follows:-

> "First party shall not be liable for non-performance or delays not caused by its fault or neglect (the emphasis is mine) nor for non-performance or delays caused by strikes, lockouts or other labour disturbances, riots, authority of law, acts of God or means beyond its control; but first party agrees to be liable for the safety of any of money, cheques and/or securities received into its possession at any time up to the amount stated in section three (3) hereof."

An Amended Defence was filed by the first named defendant and again subsequently amended by leave on the 25th June, 1984. As the issue eventually turned on the narrow point as to whether the first defendant's liability was limited to the sum of $20,000 only and not any larger amount, I will only refer to paragraphs 11 and 11A of the said Amended Defence. Paragraph 11 reads:-

> "If the first defendant is liable to the plaintiff, which is denied, such liability is, by Clauses 3 and 4 of the contract, limited to the sum of $20,000.00."

Paragraph 11A as amended and inserted reads:-

> "The First Defendant further says that the Plaintiff warranted that it would require the first defendant to carry no more than $20,000.00; that the plaintiff breached that warranty and that the first defendant is not liable for any loss sustained by the plaintiff as a result of that breach."

For the purpose of this Judgment, Mrs. Phyliss Ammar's evidence on behalf of the plaintiff need not be dealt with in any detail. A Director of the plaintiff company, she related that on the 21st December, 1979 having satisfied herself as to the amounts, she put the lodgments - money and cheques - into the two canvas bags provided by the second named defendant. The total amount was $38,107.29. Each bag had a zipper and a special kind of lock which has to be opened by a key. She stated that the zippers were closed, the locks secured and the keys removed.

On the abovementioned date she made an entry of the lodgments in Brinks Customer's Receipt Book. The two bags were signed for in the said book (entry Exhibit 3) by a Mr. Morrison an employee of the first defendant - she testified that she knew him before. It is beyond dispute that the money never reached the second named defendant ergo the amount, the subject matter of the suit, was never credited to the Plaintiff's account.

At the end of Mrs. Ammar's evidence Mr. ~~Seharsmidt~~ Scharschmidt closed the Plaintiff's case.

Mr. Goffe opened for the first named defendant and explained that because of the death of Mr. Orville Bernard who was an officer of Brinks Jamaica Ltd. he would have to adopt the unusual course of calling Mr. Michael Ammar. This he did.

Michael Ammar, Managing Director of the plaintiff company speaking of the contract Exhibit 1 said -

> "I negotiated the contract and Mr. Orville Bernard negotiated for Brinks - he died subsequently."

He was shown a document (tendered as Exhibit 4) which he said was a letter from Mr. Bernard to himself. It enclosed the contract which was signed by him and returned.

Mr. Goffe later submitted that, this letter represented a Warranty by the plaintiff that the maximum amount which Brinks would be required to take would not exceed $20,000.00. The letter reads:-

> "July 12, 1976
> Mr. Michael Ammar,
> Managing Director,
> Ammar's Ltd.,
> 70S King Street,
> Kingston.
>
> Dear Sir:
>
> Re: Lodgment Service
>
> Further to our meeting on Friday 9th instant regarding lodgments for your locations at the above address, and the Mall on Constant Spring Road, we wish to confirm that we will undertake the service at these locations effective 13th instant as under:-
>
> King Street Branch, etc.
> Mall Branch, etc.
>
> It is our understanding that these pick-ups will be at a time mutually agreed upon and that the liability in respect of each location will be an average of $9,000 daily with a maximum of $20,000.00.
>
> The rates for performing this service is $110.25 per location. The weekly charge delivery to your King Street branch will be $10.00 per delivery.
>
> Please find attached our formal contract for your perusal, signature and return to us for completion.
>
> Yours faithfully,
> Orville F. Bernard
> Managing Director"

On careful reading of Exhibit 4, I am persuaded to the view and agree with Mr. ~~Scharsmidt~~ Scherschmidt that this letter cannot be relied on as amounting to a Warranty by the plaintiff company. To do so would be to strain construction, common sense and imagination to unwarranted limits. This contention cannot be acceded to.

I quote verbatim a part of Mr. Goffe's submission put with commendable force and emphasis (the commendation stands notwithstanding my inability to accede to it) he said -

> "The plaintiff states that the first named defendant is not entitled to rely on the limitation of liability claimed in the contract referred to, if as the plaintiff alleges the loss was due to the negligence of the first defendant, its servants or agents or wrongful detention or conversion of the said bags or their contents . . . . On the state of the evidence there is nothing that could justify a finding of fact that the first named defendant converted the bags or its contents - Court would have to proceed by way of inference which cannot be possibly drawn."

He continued -

> "There is no evidence in the instant case that the servants or agents of Brinks did anything dishonest or fraudulent in relation to those bags."

He added that there could be no finding that the loss occurred outside the four corners of the contract.

Mr. Goffe touched on the doctrine of res ipsa and said that the inference is clear that through nogligence the bags did not reach their destination and stated that when a Bailee cannot account for items entrusted to him it creates an inference of negligence. What cannot be inferred is that the Bailee, his servants or agents has done something dishonest.

Mr. Goffe cited several cases during his submissions before me. I will refer to only a few as I did not find the others of comfort or great assistance.

In Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd. and Another (1983) 1 ALL E.R. 101 it was held that the issue of whether a condition in a contract limiting liability was effective depended on the construction of the condition in the context of the contract as a whole. Furthermore, although a limitation clause had to be clearly and

unambiguously expressed in order to be effective and was to be construed contra proferentem the relevant words were, if possible, to be given their natural plain meaning.

Mr. Goffe cited also Alderslade v. Hendon Laundry Ltd. (1945) 1 ALL E.R. 244. The facts are not entirely similar to the instant case but I will briefly recount them to see what guidance can be had as to suggested tests the courts should follow in dealing with these types of cases requiring interpretation of limitation clauses.

The appellant laundry company lost certain articles received by it from the respondent for laundering. The terms upon which the Company accepted its customer's goods included a clause in the following terms:

> "The maximum amount allowed for lost or damaged articles is 20 times the charge made for laundering."

In an action by the respondent for damages, the appellant company sought to limit its liability by relying on this clause. The County Court found that as the loss arose out of the negligent manner of carrying on its business, the clause limiting liability did not apply. It was contended for the appellant company that as the damage in respect of which limitation of liability was sought to be imposed by the clause was one which rested on negligence and nothing else the clause must be construed as referring to negligence because if it were not so construed it would lack a subject matter. On behalf of the respondent it was contended that the loss of the respondent's property might take place either by negligence or by mere breach of contract, and therefore in the absence of clear words referring to negligence, loss through negligence could not be taken to be covered by the clause:- It was held (i) the primary obligation of the laundry company being to launder, it must be performed according to its terms and no question of taking due care entered into it . . . . . (ii) the necessity for limiting liability for goods lost could arise only in a case where the goods were lost by negligence and therefore, the limitation clause applied to the claim of the respondent.

Mr. Goffe submitted and here I quote him -

> "Ammars was taking a calculated risk by sending sums in excess of $20,000.00. The contract provides that notwithstanding any amount that Brinks is asked to carry they will only be answerable up to a maximum of $20,000.00. When more is carried the Plaintiff is taking the risk as to the excess."

In my view this contention reduces the matter to a state of simplicity which it surely does not deserve.

If Defence Counsel's interpretation of Brinks' liability under Clauses 3 and 4 of the contract is maintainable it must surely lead to some alarming results. In the instant case the first defendant undeniably picked up "sealed shipments containing moneys, cheques, etc." Its obligation was to pick up and deliver the shipments at a designated Bank. It is beyond dispute that there was a total failure to deliver even one cent to the second named defendant. The contract speaks of liability "not caused by its fault or neglect" - the loss is peculiarly in the knowledge of the proferens, and yet not one word by way of explanation has been offered.

If I understand Mr. Goffe's argument correctly if Brinks received one million dollars for delivery, even if there is negligence or conversion all Brinks could be asked to account for is $20,000.00.

It is a proposition that is completely out of character with Counsel's accustomed logic. Such limitations and exemptions as a party seeks to rely on must be clearly and unambiguously stated in any contract that the party relies on.

The Law as to construction of exemption, exclusion and limitation of liability clauses is an admittedly difficult area of the Law and was comprehensively dealt with in the main judgment of Carberry J.A. in Kaiser Bauxite Co. V. Consolidated Engineers Ltd. (Supreme Court Civil Appeal No. 24/77: Judgment 29th March 1985). He referred to the Alderslade Case (supra) where Lord Greene said at page 245:

> "Where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause, the clause must be construed as extending to that head of damage, because it would otherwise lack subject-matter. Where on the other hand, the head of damage may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss occurring through that other cause to the exclusion of loss arising through negligence. The reasons is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence."

Carberry J.A. also touched lightly on Harbour Cold Stores Ltd. v, Chas E. Ramson Ltd. et al. (Supreme Court Civil Appeal 57/78: Judgment 22nd January, 1982). I will merely state that in this case a limitation clause in the following terms was relied on. "Clause 4. The Company shall not be liable in any circumstances whatever to pay by way of compensation or damage in respect of the goods or their storage . . . . " The emphasis is mine.

Mr. Scharschmidt's contention was that the first named defendant was fully liable for the loss suffered by the Plaintiff Company. He submitted that such limitation as a party seeks to rely on must be clearly and unambiguously stated in the contract relied on. In my view this submission accords entirely with the law as it stands.

It is my view that on a consideration of the facts, the submissions and the authorities herein and on a proper construction of Clauses3 and 4 of the contract (Exhibit 1) the first defendant cannot limit its liability to the sum of $20,000.00 but is liable for the full amount entrusted to it.

I accordingly gave Judgment for the Plaintiff Company against the first named defendant for $38,107.29 with costs to be agreed or taxed.

Judgment for the second named defendant against the Plaintiff Company with costs to be agreed or taxed such costs to be recovered by the Plaintiff Company from the first defendant.

I awarded interest at 10% from 21st December, 1979 (date of delivery of shipment) to date of Judgment.

A stay of Execution for six (6) weeks was granted except as to the $20,000.00 paid into Court.

An order was made for the payment out of Court of the said sum of $20,000.00 to the plaintiff's Attorneys-At-Law.