IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. A. 007/1984

BETWEEN	ASSOCIATES COMMERCIAL CORPORATION	PLAINTIFF
A N D	CENTRAL FIRE & GENERAL INSURANCE COMPANY LIMITED	DEFENDANT

Edward Ashenheim instructed by Millholland, Ashenheim and Stone for the Plaintiff.

Crafton Miller and Mrs. Monica Earle-Brown for the Defendant.

Hearing on June 19, 20, 21 and July 26, 1989

JUDGMENT

BINGHAM J:

The Plaintiff, Associates Commercial Corporation, hereinafter referred to as "The Corporation" is a Corporation carrying on the business of a Finance Corporation in the United States of America.

The defendant Central Fire and General Insurance Company Limited, hereinafter referred to as "Central Fire" is a company registered under the Companies Act of Jamaica, carrying on business of General Insurers, and having its registered office at 57 Laws Street in Kingston, Jamaica.

In 1979 the defendant company Central Fire had with the written approval of the Bank of Jamaica extended the field of its operations to the United States of America where it transacted insurance business in various states of that country through certain recognised agencies. One of these agencies, Auto Dealers Agency was based in Houston, Texas.

Sometime in 1981 the plaintiff company financed the purchase of a truck for one H and H Truck and Equipment which vehicle was insured by the defendant under a written Policy of Insurance No. C.F.G. 00171-0381 (hereinafter referred to as the "H and H Policy" which was issued by Auto Dealers Agency in Houston, Texas. The effective date of the policy was 13th July, 1981 and it was stated to remain in force until 10th March, 1982. Under the terms of the said policy entered into between H & H Truck and Equipment and Central Fire it was expressly stated that Loss or damage (if any, under this insurance) shall be payable as interest may appear to Associates Commercial Corporation, Houston Texas." (Emphasis supplied).

On or about 5th December, 1981, the truck was stolen and by the terms of the said policy the sum of US26,000 being the amount of the coverage became due and payable by the insurers Central Fire to the plaintiff Corporation by virtue of the Loss Payable Clause previously referred to above.

The plaintiff Corporation also financed the purchase of a trailer for one Raul Garcia which was also insured by Central Fire through their Houston Agency, Auto Dealers Agency by a written policy of Insurance No. C.F.G. 00418-1081 (hereinafter called "The Garcia Policy"). This policy took effect from 2nd December, 1981 and was stated to remain in force until 14th October, 1982. The plaintiff corporation was the loss payee named in the Loss Payable Clause and under the clause which was expressed in similar terms to that set out in the H & H Policy any loss or damage arising from that policy also became payable to the plaintiff corporation.

On or about 3rd January, 1982 the trailer was damaged and repaired at a cost of US$3764.28¢ which when the excess of US$500 payable by the insured Raul Garcia was deducted and taken into account, this left a balance of US$3264.28¢ as due and payable by the insurers Central Fire to the plaintiff corporation under the Loss Payable Clause in the said policy.

The plaintiff corporation through its head office in Chicago, Illinois made repeated requests for the settlement of these claims without any success.

By 1982, however, the defendant's agent Auto Dealers Agency in Houston, Texas had ceased underwriting business on their behalf, no doubt due to:-

1. Their poor performance record for the prompt settlement of claims.
2. The adverse publicity which the defendant Central Fire was getting from the effect of a Conservation Order made against its assets in the state of New York.

The correspondence Exhibits 3 - 5 addressed by the local Attorneys-at-Law on behalf of the plaintiff corporation to the defendant Central Fire at their head office in Kingston and their total inaction in replying to this correspondence resulted in the filing of this action, the writ being filed on 20th January 1984.

The Statement of Claim which accompanies the writ repeats the catalogue of events which has already been referred to. An Appearance was entered by the defendant's Attorneys-at-Law and served on the plaintiff's attorney on 27th January, 1984. This was followed by the defence which was served on the plaintiff's attorneys on 9th February and which in so far as it sought to raise a number of complex issues needs to be set out in its entirety for the sake of completeness.

It avers that:-

"1. The defendant makes no admission to paragraph 1 of the Statement of Claim.

2. The defendant admits paragraph 2 of the Statement of Claim

3. Save that the defendant has knowledge that one Robert A, Hampton and O.H. Hayes Trading as H & H Truck and Equipment Company had a policy of insurance with its associated company in Texas of the United States of America the defendant makes no admission to paragraph 3 of the Statement of Claim.

4. Further the defendant says that as far as H & H Truck and Equipment is concerned the defendant received notification from one R.R. Foster District Clerk of the District Court of Waller County, Texas, U.S.A. dated 15th February, 1983 showing that "Default Judgment under Clause No. 8965 has been entered against the defenant in a Suit brought by Robert A. Hampton and O.H. Hayes /Central Fire and General /against Insurance Company Limited.

5. That the settlement of any Claim arising in Texas by H & H Truck and Equipment must be made in that state and settled in the United States where arrangement have been made by the Texas Company for such settlement.

6. The defendant makes no admission to paragraph 4 of the Statement of Claim but say and which is not admitted that an attempt to settle a claim arising out of Texas by way of payment of United States Currency or otherwise to the plaintiff would be illegal and null and void and in breach of the Exchange Control Act of Jamaica.

7. The defendant makes no admission to paragraph 6 of the Statement of Claim and joins issue with the plaintiff thereon.

8. The defendant makes no admission to paragraph 6 of the Statement of Claim and joins issue with the plaintiff thereon.

9. The defendant admits that the plaintiff had written to it by themselves their servants and or agents requesting settlement of the sums purported to be payable to it under the loss payable clause of the policies herein before referred to in the Statement of Claim whereupon the defendant requested from the plaintiff the following:

   a. A copy of the mortgate deed for each vehicle certified by a Notary Public.

   b. Declaration from the plaintiff saying that its legal representative is duly authorised to issue a release on its behalf for the total claim in each case notwithstanding what is the balance owing by their clients.

c. Two separate release with a greed wording between the plaintiff's local legal representatives and the defendant's attorneys-at-law towards the above agreement totally discharging the defendant from any claim whatsoever.

10. That the plaintiff has not responded to (a) (b) and (c) in paragraph 9 of the Defence.

11. Furthermore, the defendant has no instruction from H & H Truck and Equipment or Garcia to make any payment to the plaintiff arising out of any claim by them in Texas against the defendant although such a claim against the defendant in Jamaica would be null and void."

The Defence then ended by seeking relief by way of an order for costs.

From the Pleadings the following issues are identifiable:

1. Was the plaintiff by virtue of the Loss Payable Clause an assignee of any benefit resulting from loss or damage incurred by the insured under the policies of insurance in respect to both vehicles?
2. If so, what was the legal effect of such an assignment vis a vis the plaintiff and the defendant?
3. If the effect of the Loss Payable Clause created the assignment in favour of the plaintiff did the plaintiff corporation by virtue thereof have the capacity to launch the present proceedings on its own?
4. Was the illegality raised in the defence in relation to the policy contracts sustainable?

Although from the pleadings the Defence sought to join issue in almost every material area of the claim, it was admitted that these were two valid claims made by H & H Truck and Equipment and Raul Garcia in respect of the sums as set out in the Statement of Claim.

It is further admitted by the defendant's attorneys in their letter of July 31, 1985 addressed to the plaintiff's local attorneys (enclosure 17 of the Record) that the policies of insurance relating to the two claims were underwritten by the defendants representative Kenneth Goree of Auto Dealers Agency, 811 North Loop West P.O., Box 7339, Houston, Texas 77008.

The photostat copies of both policies, Exhibits 1 and 2 in the section headed, "Loss Payable Clause" recited that:

1. These policies were underwritten by Auto Dealers Agency in Houston, Texas. The signature of the duly authorised representative is not quite legible,. but there is no evidence suggesting that the representative who prepared these policies was not duly authorised to do so.
2. More importantly both policies sought in the abovementioned clause to state that "Loss or damage, if any, under this insurance shall be payable as interest may appear to Associates Commercial Corporation, Box 20668, Houston, T.X. 77025." (Emphasis supplied).

As the policies were prepared by the authorised agent of the defendant theeffect of this provision in the Loss Payable Clause, therefore amounted to actual notice to the agency and their principals Central Fire that in event of any claim, resulting from loss or damage to these vehicles that the plaintiff corporation had been assigned the benefit of such sums as would accrue under the policies and directed that such sums payable in settlement of any claim "shall be payable etc" to the plaintiff corporation on the basis of the evidence contained in Exhibits 1 and 2, therefore one can conclude without more that the plaintiff corporation was the party entitled to the benefit under both policies. As there is no evidence that up to the present date they have been paid any sum either in full or, partial settlement of these two claims, they had a right and an entitlement to bring the present action.

The laws governing assignees is clear in this regard. Although in practice the assignor or principal creditor is usually the proper plaintiff there is nothing to preclude the assignee from suing in his own name having regard to the nature of the assignment, as in this case where the benefit of the policies in event of a loss was from the outset assigned to the plaintiff corporation and this fact was one of which the defendants, Central Fire had actual notice. In my opinion, this is sufficient to operate as an out and out transfer of the benefit accruing from the policies as the ownership in the subject matter to which the two policies related remained vested in the plaintiff corporation until the sums borrowed to acquire the vehicles in question had been fully repaid. This aspect of the matter is of

importance as it puts paid to the various allegations faised in the pleadings as to:

1. The unsatisfied default judgment obtained by H & H Truck and Equipment against the defendant company in Texas.
2. The claim made by Raul Garcia upon the defendant company for settlement.

It is my considered opinion that on the basis of the evidence contained in the Loss Payable Clauses of both policies, the defendant company Central Fire was thereby estopped from any conduct on its part in seeking to negotiate a settlement with anyone other than the plaintiff's having regard to the conditions so fully set out in the Loss Payable Clause in both policies. It clearly made them aware of the fact that:-

1. The plaintiff corporation had a vested interest in the two vehicles and in like manner any benefit accruing from the policies of insurance.
2. That they could not safely deal with anyone else in relation to settling any claims resulting from loss or damage other than the plaintiff.

In so far as the question of illegality raised in the defence is concerned in my opinion this argument is totally without merit and is partially answered by the defendants own correspondence of 31st July, 1985, as well as by the letter from Bank of Jamaica setting out the terms under which the defendant Central Fire was permitted to extend their operations abroad to the United States of America (Exhibit 6). In answering the rewritten request for further and better particulars in the letter of 31st July, 1985, the defendant's attorneys had this to say in referring to the two policies at paragraph 2.

"2. Under Paragraph 6

> No Exchange Control approval was sought and given in respect of this transaction as the understanding between the Texas Agency was that all claims arising out of any policy issued from Texas would be settled in the U.S.A. where all arrangements were in place."

In this regard, therefore, it was clear that the two contracts in their entirety, had a substantial foreign element as not only were both negotiated in a foreign state between insured persons residing there

and with an agency also situated in that state, but it had no substantial connection with the principal company Central Fire in Jamaica, that is apart from such benefits that would flow from foreign exchange remittances resulting from any profits that might have come from the operations being conducted in the particular foreign state.

In so far as there is an allegation at paragraph 6 of the defence as to an illegality making the said contracts entered into void, one needs to be reminded that the provisions of the Exchange Control Act are not intended to strike down contracts entered into between parties resident in Jamaica and those resident abroad, or to render for that matter such contracts void or unenforceable. The policy mechanism of the Act is one aimed at controlling the movement of foreign exchange outflows lest the flood gates if left unchecked may result in causing untold disaster and ruin on the economy of this country. Such penal provisions as were referred to by Learned Counsel for the defendant namely Sections 7 and 8 of the said Act, are directed not at formation of such contracts but at their performance. There is a wealth of authority in support of this statement of which it is only necessary to refer to two cases:-

1. Watkins vs. Roblin [1964[8 J.L.R. 444 per dictum of Douglas J. at page 446 H - J and page 447 F - G.

2. Barbara Grant vs. Derrick Williams Civil Appeal 20/85 unreported judgment of Court of Appeal of Jamaica (Kerr, Carberry and White, JJA) delivered on 25th June, 1987.

Needless to say, there is nothing in this claim to even remotely suggest that the plaintiff was seeking to breach the terms of the letter of authority from the Bank of Jamaica. Indeed, the Telex of 7th June, 1983 (Exhibit 4) sent from the plaintiff's corporation head office in Chicago, Illinois to the defendant Central Fire in Jamaica was most explicit in stating at paragraph 2 that:

> "If you wish to pay in Jamaican currency, we will accept such monies for use in Jamaica at the parallel market rate of $2.70 Exchange. If you wish to pay in U.S. Currency, it is necessary for you toapply to the Bank of Jamaica for consent to obtain the currency as Mr. Ashenheim has instructed." (Emphasis supplied).

It is difficult to see in the light of the above that any basis existed for the defence to contend that there was illegality arising out of the negotiations at a settlement of the claims or in what the Statement of Claim sought to allege in the pleadings.

This leaves for determination only two remaining issues both of which do not present much difficulty. Granted that these contracts were entered into abroad and that the claims contemplated that settlement would have been made in the United States of America in American currency can the plaintiff now seek recovery by way of a suit launched in the Jamaican Courts? The answer to this question must clearly be in the affirmative and needs only common-sense for its understanding as if this were otherwise then every deafulting debtor would seek to obtain a benefit and then transfer their assets or themselves to some other locality than where the contract was performed or the debt incurred beyond the reach of their creditors. As Learned Counsel for the plaintiff contended in his opening remarks and in my view quite rightly so, a creditor has the right to seek out his debtor wherever he may be located and to bring an action in the state where he may be found, to recover the debt due to him. Counsel for the defendant has not sought to argue to the contrary.

The evidence here is that Jamaica is where the defendant company resides and carries on business and in my opinion that is sufficient evidence to found jurisdiction for the claim to be launched here. Moreover, there is further evidence that the defendant company has assets situated here against which execution can be levied if there is no settlement of the debt. This in my view is sufficient to dispose of that question.

I now need to mention in passing that the argument raised by Learned Counsel for the defendant in relation to the Conservation Order (Exhibit 8) is in my view of no relevance to this present proceedings. Even if I am wrong in so concluding, in any event the effect of the Order is a question of foreign law, which falls to be determined as a question of fact to be proven like any other issue of fact. The onus of proof here rests upon the party introducing this issue to adduce such evidence to establish the meaning and effect of the said Order, in this case the defendant. They having failed to produce such proof the document (Exhibit 8) even if relevant has in the absence of such proof no evidential value.

In conclusion and for the reasons that I have sought to set out above I hold that the plaintiff had the capacity to bring the present action. That the Court had the jurisdiction to hear and determine the matter, and that the evidence adduced on behalf of the plaintiff corporation and in

particular the reliance which I have placed upon the Loss Payable Clauses in Exhibits 1 and 2, the plaintiff is entitled to succeed on their claim and judgment is accordingly entered in their favour.

This leaves me with one final question and that is the sum which is to be awarded to the plaintiff. In this regard, there is no difficulty as to the principal sum as when the two amounts relating to the claims made on the defendant company are quantified this realised a sum of US$29,264.28.

There is a further claim for interest on the sum recoverable under each policy claim calculated at the rate of 17% from the date of the respective claims made on the defendant company to the date of the filing of the writ. This when calculated amounted to US$10,531.16. When both these amounts are quantified it results in a total sum recoverable under the claim of US$39,795.44. The matter does not however, end there as the Statement of claim also sought an award of interest at the same commercial rate of 17% on the total claim as from the date of filing of the writ to judgment or payment. Learned Counsel for the defendant has not sought to challenge this head of the claim. As it is a commercial transaction had the respective claims been settled promptly the plaintiff corporation would have been able to reinvest these sums earning attractive rates of interest in the region of 17% as is the unchallenged evidence of the office Manager at the Houston Office, Rick Stautmeister. Such a rate appears to be reasonable and is allowed.

The only remaining question left for determination is as to in what currency ought the Judgment to be awardéd? The plaintiff corporation having elected to launch their claim in the Jamaican Courts it would at the outset appear to me that any award ought to be in Jamaican Dollars following a conversion from US dollars having regard to the prevailing exchange rate as at the date of the judgment.

Learned Counsel for the plaintiff has contended that the award ought to be made in US dollars that being the currency which governed the contracts entered into by the insured persons and that currency being the currency in which the plaintiff generally operated and with which they had the closest connection, the award ought to be made in that currency. He cited in support of his argument two authorities namely:-

1. The Despina R and Folias [1979] 1 AER page 421.

2. Societe Francaise Bunge S.A. vs. Belcan N. The Federal Hurion [1985] 3 AER 379.

The first of these cases, a judgment of the House of Lords, as well as the second, both support Counsel's argument for an award to be made in United States currency on the basis othat on the evidence:

1. That currency was the currency by which the contract was governed.

2. That currency had the closest connection to the contract.

In the light of the above, it follows that once this is established following the dictum of the House of Lords in the Despina R (to which the headnote at page 422 (c - e) refers), a English Court has jurisdiction to make an award in a currency other than sterling.

As both cases sought to apply Common Law principles to the respective claims, it follows therefore that these principles are of equal application to this caseand judgment is accordingly entered for the plaintiff in United States Dollars, such sum being the amount of $39,795.44¢ with interest at 17% calculated on $29,264.28¢ from the date of service of the Writ to today and costs to the plaintiff to be agreed or taxed.

Usual stay of execution granted for six weeks.