JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 44/88

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	CHASE MERCHANT BANK JAMAICA LIMITED	APPELLANTS
AND	INSURANCE COMPANY OF THE WEST INDIES	RESPONDENTS

Mr. R.N.A. Henriques, Q.C. and Mr. David Batts for appellants

Dr. Lloyd Barnett for respondents

May 3 and June 6, 1989

Morgan, J.A.:

This is an appeal from the Order of Malcolm, J. on an Originating Notice of Motion made on the 17th June, 1988, whereby he set aside with costs a supplemental award of interest made to the appellants, Chase Merchant Bank Jamaica Limited, by the sole arbitrator, Mr. David Muirhead, Q.C. on the hearing of a dispute between the appellants and the respondents, the Insurance Company of the West Indies. On the 3rd May, 1989, this appeal was allowed, the Order set aside and the supplemental award of the arbitrator was reinstated. As promised, the reasons for judgment are now put in writing.

On the 4th September, 1974, the respondents as insurers entered into a Policy of Insurance called a Contractor's All Risks Policy with the appellants as

mortgagees in the sum of $3,891,200 against loss, damage or destruction subject to the terms, exceptions and conditions contained in the said policy of insurance.

The property insured was described as 388 dwelling houses at Meadowvale part of Cumberland Pen in the parish of St. Catherine. Difficulties arose on the site and as a result the appellants claimed on the policy the sum of $462,565.00. The respondents disputed the claim and the matter was referred to arbitration. The arbitrator heard the parties, found that the appellants succeeded and directed the respondents to pay to them the sum of $348,535.00.

The arbitrator expressly reserved the question of costs and interest as the sixth paragraph of the award shows:

> "The issue of costs generally and of interest, if any, on the award I have reserved in order to have the benefit of submissions by the parties."

The arbitrator had a further hearing limited to costs and interest and made a supplemental award of two parts. The part relevant to these proceedings reads:

> "I award that the Second Plaintiff (Respondent) is entitled to interest on the said sum of $348,535.00 at the rate of 15% per annum from the 15th day of May 1979, to the date of publication of my award, namely, March 31, 1986, and I direct the Defendant to pay such interest accordingly to the Second Plaintiff."

This is the award which was set aside by Malcolm, J. and it is from his order that this appeal lies.

Six grounds were filed as follows:

> "1. The learned Trial Judge erred as a matter of law when he set aside that part of the supplemental award of the Arbitrator related to the award of interest as a consequence of Clause 6 (a) of

the insurance policy.

(2) The Learned Trial Judge misconstrued Clause 6 (a) of the insurance policy when he came to the conclusion that on an interpretation thereof the Plaintiff Appellant was not entitled to the award of interest by the Arbitrator.

(3) The learned Trial Judge erred as a matter of law in construing Clause 6 (a) of the insurance policy in that whilst the clause expressly provided under exceptions 'that consequential loss or damage of any kind including penalties under the contract for delaying or non-completion,' that on a proper construction of the policy such consequential damage as was excluded was limited to consequential damage directly or indirectly related to the risk insured and erred when he held that the clause related to damages totally unconnected with the risk insured against.

(4) The learned Trial Judge erred as a matter of law when he failed to appreciate that although the clause exempted consequential loss or damage of 'any kind', that the use of the words of 'any kind' did not enlarge the clause to cover damage which was wholly unconnected or related to the risk insured, and that properly construed the words 'any kind' related to consequential damages in connection with or related to the risk insured against.

(5) The learned Trial Judge erred as a matter of law when he failed to appreciate that the award made by the Arbitrator for interest was done pursuant to a statutory power, namely the Law Reform (Miscellaneous Provisions) Act, and which is totally unrelated to the policy of insurance and that this power of the Arbitrator or the Court could not be taken away save and except by express provision in the policy and that the exception clause in the policy did not so provide.

"(6) The learned Trial Judge erred when he failed to appreciate that the award of interest by the Arbitrator did not arise as a consequence of anything related to the risk insured against and was wholly unconnected with the Defendant Respondent's liability under the insurance policy but was awarded for the delay in making payment pursuant to the statutory provision."

Clause 6(a) of the Insurance Policy is an exception clause and states that:

"The company shall not be liable in respect of consequential loss or damage of any kind including penalties under contract for delay or non-completion."

Mr. Henriques for the appellants argued that in construing clause 6 under the well established rules of the Law of Insurance, "interest" is not to be interpreted as including consequential loss hence the award ought not to have been set aside.

Dr. Barnett for the respondents in answer, submitted that under the general principles of the Law of Contract, which is the correct law to be applied, "interest" must be construed as "consequential loss" and the learned trial judge had not erred.

It is not disputed that "consequential loss" in Insurance Law is not covered by a policy of insurance, insuring named risks, unless the policy so provides or the particular loss is specifically insured. Thus a simple insurance on property does not cover loss of rent, occupancy, business profits, wages of servants or workmen rendered idle or other consequential damage. It is usually said that such losses are too remote to be recoverable since they are not proximately caused by the peril insured against. (MacGillivray & Parkington on Insurance Law 6th Edition paragraph 1761). Mr. Henriques puts it

this way - there must be some cause or connection with the risk covered. He submitted that consequential loss must be something relevant to the risk or connected with it, and if that is correct it would be inconceivable to say that "interest", in this instance, is relevant to the risk and must be construed as consequential damage.

Dr. Barnett argued that general principles of law and not Insurance Law should apply in construing "consequential damage"; that a Policy of Insurance is a contract between insurer and insured which provides that on the happening of certain events the insurer should indemnify the insured by paying monetary value of his loss suffered directly or indirectly and this, therefore, includes 'consequential". Consequential loss, he said, is "anything beyond the normal measure such as profits lost or expenses incurred through the breach and are recoverable if not too remote" - (McGregor on Damages 13th Edition paragraph 2021). He argued that payment of interest in this case was made on the basis of compensation for the loss of use of money not having been paid in time which would include "profits lost" hence an award of interest would constitute consequential loss.

Historically, interest could not be awarded on insurance claims but this has been changed since the passing of the Law Reform (Miscellaneous Provisions) Act. Section 3 states:

> "In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

In examining the provisions of this statute and that of the provisions of Interest (Allowance by Jury) Act, 1908, Smith, C.J. in Raymond International (Ja.) Ltd. et al vs. The Government of Jamaica (unreported) S.C.C.A. No. M60 of 1974 and the Court of Appeal per Downer, J.A. in Marley & Plant Ltd. vs. Mutual Housing Services Ltd. (unreported) S.C.C.A. No. 3, 4, 5 of 1987, held that an award of interest is now part of the general law of contract and that since an arbitrator must apply the general law, then he is empowered to award interest. But, argued Dr. Barnett, this power is jurisdictional, of a general nature and was not intended to take away basic rights. In support he cited Allen vs. Thorn Electric Industries Ltd. (1967) 3 W.L.R. 858 at page 870 as establishing that where there is ambiguity in a statute it is to be resolved in such a way as to make the statute less onerous for the public so as to cause less interference with rights and liberties as exist in contractual obligations than a stringent interpretation would.

I would find no difficulty with this argument were it not for the fact that the matter being dealt with is one which concerns an Insurance Policy. To have a proper interpretation it must, in my view, rest in the law of the subject, its customs and its usages. Where the specific applicable law is silent or admits of ambiguity then the general law will be brought in for aid. I am of the opinion that the law of insurance is the proper law to be used and it is neither silent nor ambiguous on the issue to be decided here.

One can take insurance coverage for consequential loss, e.g. for loss of profits, but it was never suggested that one could insure against non-payment of interest which interest became due by virtue of non-payment of a

just claim. In my judgment interest in those circumstances is not "consequential loss" within the meaning of clause 6(a) of the policy and is therefore not excluded under the policy.

The remaining question is whether interest is payable in this case. It is accepted that the law makes an order for payment of interest discretionary. In Webster vs. British Empire Mutual Life Assurance Co. (1880) 15 Ch. Div. page 169, the insurance company withheld payment on the death of the assured because the claimant did not have the consent of the legal representative of the deceased. On the claimant's death his executors successfully brought an action against the company, and the Court upheld the non-payment and ordered payment with interest. The Court of Appeal had to consider whether interest had been properly given. It was held that the case was brought to remove mere technical liability. The interest was disallowed and James, L.J. made the following points:

1. Interest is awarded for the wrongful detention of money which ought to have been paid.

2. If the company is not in default and is always ready and willing to pay on demand, it is unreasonable and unjust to award interest.

It seems to me that one must look at the circumstances of the case to be able properly to exercise a discretion. Dr. Barnett in urging that there was no basis for payment in this case, pointed out that the appellants succeeded by way of subrogation and the claim was disallowed to the extent of $100,000 which shows that the company's objection to the claim was not without merit. However, exhibited in the affidavit of Jennifer Cox dated 25th December, 1987 is a letter marked "JC 6" which says inter alia:

> "We have decided to repudiate liability on the grounds that the losses were not notified or their particulars supplied with promptitude."

The only meaning to be ascribed to this letter is that there was no intention on the part of the company to pay any sum at all to the insured. No offer was made nor was any part payment made in escrow. In fact the language clearly indicates the inapplicability of this step. Whatever the basis for the arbitrator's finding therefore, on these two points there remains the uncontradicted fact that the appellant's moneys were being wrongfully detained.

It was further submitted that the arbitrator did not consider the award of interest on a discretionary basis but dealt with it as automatic. The arbitrator made his award on the 31st March, 1986, heard the parties further submissions as to interest and costs on April 22, 1987, and made the supplemental award on September 29. He did not set out the submissions nor what he accepted but the only inference to be drawn from this is that he came to his decision on the basis of those submissions. It could, perhaps, fairly have been said that the decision was automatic had he not requested and heard further submissions on "interest", inter alia, but having done that it cannot now be said that he dealt with interest in an automatic manner.

It was then submitted that there was no basis for concluding that payment was improperly withheld and that the arbitrator did not say so. It is correct that he did not write in the award that he found it was improperly withheld but it is obvious from his outline of the facts that he must have had that in mind as he indicated in his outline that the moneys had not been paid. It is to be observed that he gave no reasons for any of his awards so

any omission to spell this out cannot be said to be unawareness on his part to state this finding. The law is that, except in an award on a special case, an arbitrator need not give any reason for his award.

Lastly, the respondents submitted that interest was ordered to be paid from the date of the submission of the claim whereas interest should only have begun to run from the date it was "improperly withheld" - if so found. The date of submission of the claim, in my view, might properly be the date of withholding, if the claim is refuted.

The principle was re-stated in Business Computers vs. Anglo-African Leasing (1977) W.L.R. 578 at page 587 by Templeton, J. Speaking in a case in relation to an award of interest under the Law Reform (Miscellaneous Provisions) Act, 1934 and adopting a principle first stated by Lord Herschell, L.C. in 1893, said:

> "In my judgment the judicial discretion is not so narrowly confined. The principle is that:
>
> > 'When money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding that money from the other ought not in justice to benefit by having the money in his possession and enjoying the use of it'."

The defendants here were asked to pay the claim when the appellants submitted it on the 15th May, 1979, but they did not pay. It does not lie in the mouth of the respondents then to complain that the date of payment of interest should not commence on the date of the claim when the appellants have been kept out of all moneys since then. A payment into Court might have had the effect contended for by Dr. Barnett. Instead the respondents chose to

assert that the appellants were entitled to nothing.

In the event, in my judgment, the arbitrator exercised his discretion judicially, and the judge, therefore, erred in law in setting aside the order for interest. The appellants have succeeded on all their grounds.

ROWE, P.:

I agree.

WRIGHT, J.A.:

I am in complete agreement with the reasoning and conclusion of Morgan, J.A. There is nothing that I can usefully add.