IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. C.L. C-165/2002

BETWEEN	*CLARENDON CO-OPERATIVE CREDIT UNION*	*CLAIMANT*
A N D	*ALPHA SECURITY SERVICES (1984) LIMITED*	*1ST DEFENDANT*
A N D	*GILBERT MORRISON*	*2ND DEFENDANT*
A N D	*ROYDEL DIXON*	*3rd DEFENDANT*

Appearances:

Miss J. Crossbourne instructed by Scott, Bhoorasingh and Bonnick for the Claimant.

Miss T. Watkins instructed by Vaccianna and Whittingham for the 1st defendant.

Miss. S. Jarrett instructed by KLAC for the 2nd defendant.

Third defendant not served.

Heard: November 6th and 7th, 2007

Williams, J.

This is one of those rare cases where the salient facts are not in dispute.

Clarendon Co-operative Credit Union, the claimant, had engaged the services of Alpha Security Services (1984) Limited the 1st defendant whereby they were to call for sealed shipments of money and deliver to designated consignees. The 2nd defendant Gilbert Morrison was employed with the security company as a security guard. The 3rd defendant seemed to have been similarly so employed.

The Claimant in its amended statement of claim asserted that they had in fact entered into a contract with the 1st defendant for the purpose outlined above.

It is not disputed that there existed a written contract which was not signed by either party but which governed their relationship. The claimant went on to define it as an oral contract but as was urged on behalf of the 1st defendant, their behaviour indicated an acceptance of the contract – and their subsequent conduct pointed to the existence of it. In any event the argument on behalf of the claimant was not towards denying the existence of the contract or refuting that they were operating under its terms – rather it urged a particular interpretation of it.

There is no dispute that on the 29th of September, 2000 monies were collected on behalf of the claimant by the 1st defendant through its employees – Morrison and Dixon. Although the now seventy-four (74) year old Morrison is unable to recall the amount collected; it was accepted the amount was in fact $2.9 million.

It is further undisputed that the monies collected were never delivered and the 2nd defendant has sought to explain the non-delivery by asserting there was a robbery – in circumstances he felt that Dixon was involved. No other evidence was introduced to counter or challenge Mr. Morrison's account and although under cross-examination an attempt was made to show that this account may seem strange in light of his not seeing his assailant before entering the vehicle – this without more cannot lead to the inevitable conclusion he was involved.

The 1st defendant has not sought to deny ultimately they are liable for the acts of their employee that resulted in the non-delivery of the monies.

The claimant now seeks to recover the $2.9 million with interest.

The 1st defendant points to the contract and assert their liability is to a limit of $900,000.00. The claimant's witness Clarissa Wellington sought to deny knowledge of any limit but her witness statement/evidence-in-chief indicates otherwise and her subsequent denials were unconvincing.

The claimant now urges the Court to consider whether on a proper construction of this contract, clause 5 operates to limit liability or whether claimant is entitled to recover the full amount.

Their argument is that the words used in clause 5 are so wide and so general in its terms that to apply them literally would be to defeat the main purpose of this contract – this main purpose being the safe delivery of sums collected on behalf of the claimant.

The law as urged by counsel from the relevant cases was useful but ultimately it is the leading authority of Photo Production Limited v. Securicor Transport Limited 1980 All ER 556 that provides the guidance necessary in dealing with this instant case.

The headnotes adequately summarize the position of the House of Lords and is instructive. It was held as follows:

(i) There was no rule of law by which an exception clause in a contract could be eliminated from a consideration of the parties' position when there was a breach of contract (whether fundamental of not) or by which an exception clause could be deprived of effect regardless of the terms of the contract, because the parties were free to agree to whatever exclusion or modification of their obligations they choose and therefore the question whether an exception clause applied when there was a fundamental breach, breach of a fundamental term or any other breach turned on the

> construction of the whole of the contract, including any exception clause, and because (per Lord Diplock) the parties were free to reject or modify by express words both their primary obligations to do that which they had promised and also any secondary obligations to pay damages arising on breach of a primary obligation.

The words of Lord Diplock at page 566 cd is also useful.

"A basic principle of the common law contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which otherwise be so incorporated, they are fully at liberty to do so by express words".

It is with this pronouncement of the law in mind that the contract will be reviewed.

The clause in issue clause 5(a) speaks to liability "arising whether under the express or implied terms of this contract, or at common law, or any loss or damage of whatever nature arising out of or connected with the provision of or purported provision of or a failure of provision of services covered by the contract."

I must pause here to say the words of this clause as indeed the entire contract, to my mind, are clear and unambiguous – there is no need for any rules of interpretation nor is it necessary to construe the terms.

In the instant case the customer Clarendon Co-operative Credit Union had suffered a loss arising out of the failure in provision of the services covered by the contract.

The contract goes on to provide that the liability was limited to $900,000. 00 – strictly speaking this then is not an exclusion clause, but more of a limitation.

The limitation on liability however, is not without more, i.e the contract provides for the variation by written agreement of the parties.

The contract clearly expresses that this limit of liability has been freely negotiated between the parties.

The claimant points to the fact that larger amounts were previously collected and delivered. The contract provides that such acceptance is not to amount to a waiver of clause 5(a).

The contract places responsibility on the customer to indicate when a shipment is to be made which will exceed the value of $900,000.00 and the parties shall then be free to negotiate a higher limit.

The contract also covered the fact that Alpha would obtain and maintain at its own expense insurance in such amounts as to cover the limit of liability assumed under the contract whereas the customer was to bear the risk of any sum in excess of the limit of the liability.

The question arises as to whether the parties contemplated the possibility of the service provider themselves stealing the monies. However, it is apparent that the contract provided for the claimant to take steps to "protect" all monies to be delivered such that it could be covered for "loss or damage of whatever nature arising out of or connected with the provision of or purported provision of or a failure in provision of services covered by the contract".

The claimant accepted the risk of money being lost and failed to utilize the full terms of the contract to address the risk. They cannot now say the clause does not apply, it remains applicable and they are bound by it.

As against the 2nd defendant, as indicated before there is no evidence to challenge version he has given. Hence his assertion of non-involvement in the theft remains. He cannot be held liable for the theft if it means he is in fact being held liable for the acts of his fellow employee/co-agent.

There is therefore judgment for the 1st and 2nd defendants with cost to them to be taxed, if not agreed.

The claimant is entitled to the limit of $900,000.00 with interest at 14.25% from 24/9/2000 to the 23/2/2003.