IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.C. 470 of 1986

BETWEEN	COMPTOIR PANAMERICAN SIDERURGIQUE S.A.	PLAINTIFF
A N D	REGINALD AITKEN LIMITED	DEFENDANT

Allan Wood instructed by G. Anthony Levy and Company for the Plaintiff.

John Lord and John Givans instructed by Dunn, Cox and Orrett for the Defendant.

July 23, and September 2, 1987

CLARKE J: (Ag.)

Pursuant to Section 79 of the Judicature (Civil Procedure Code) Law the plaintiff applies by summons for an order from this Court to enter judgment without trial for the sum of B.F. 4,855,902.22 (Belgian francs) and interest thereon at the rate of 20 per cent per annum from the 20th November 1986 to the date of judgment.

Let me go back a little. By a specially endorsed writ dated 20th November, 1986 issuing out of the Supreme Court the plaintiff claimed against the defendant to recover the sum of 6,483,226 Belgian francs comprising:

> "(a) the balance of the purchase price due and owing by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant B.F. 4,855,902.22; and
>
> (b) interest at the rate of twenty per cent (20%) per annum on the outstanding and over due balance of the purchase price of the said goods as evidenced by five bills of exchange drawn by the plaintiff and accepted by the defendant from the respective due dates thereof to the 20th day of November, 1986 amounting to B.F. 1,627,324.76 and
>
> (c) losses in the exchange rate between the Belgian franc and the U.S. dollar as a consequence of the failure of the defendant to pay to the plaintiff the agreed prices for the said goods on the due dates agreed whereby the amount due in U.S. dollars became converted to and payable in Belgian francs at the rate of exchange valid on the due date of payment;
>
> agreed to be paid by the defendant to the plaintiff pursuant to an agreement in writing made between the plaintiff and the defendant and dated the 6th April, 1984."

The plaintiff supplied particulars including those in respect of the movement of the rate of exchange for the purchase of Belgian francs with United States dollars on the relevant dates for payments due and payments received.

The defendant entered an appearance to the writ and promptly filed and served a defence. It was thereafter that the plaintiff took out the summons for summary judgment supported by affidavit verifying both the cause of action and the amount claimed and stating that in the belief of the deponent there is no defence to the action and exhibiting the said agreement in writing of 6th April, 1984.

By that agreement upon which the action is predicated the plaintiff, a Belgian company, agreed to sell, and the defendant, a Jamaican company, agreed to buy, a quantity of steel hardware. The proper law of the contract, as ascertained by the intention of the parties expressed in the agreement, is Belgian law. The contract nominates as the currency of payment United States dollars but also endorsed on the face of the contract is this stipulation:

> "In the case of delay in payment or transfer the debt is automatically converted into Belgian francs on due date of payment and will be subject to interest of 20% per annum."

The plaintiff contends that the goods were duly shipped and delivered to the defendant and that the defendant made certain payments on account as set out in the particulars to the claim. The plaintiff also contends that the aforesaid balance of the price in Belgian currency is due and owing together with interest thereon over the period specified in the summons.

Once I am satisfied that the plaintiff has proven its claim in a context where the facts are not in dispute and the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried, then I may make an order empowering the plaintiff to enter judgment. As Jessel M. R. put it in Anglo Italian Bank v. Wells 38 L.T. 197 at pp. 201 and 202.

". . . when the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff."

If on the other hand I find that the defence is reasonably arguable then the summons ought to be dismissed.

Of course, I bear in mind that both on principle and on authority the application may be granted even where a defence is filed - see Stewart Gregg v. Albert McCulloch 12 JLR 749.

It is therefore critical that I examine the defence to see whether there is at least "an arguable point to be argued on behalf of the defendant."

First of all I set out the pleaded defence:

1. "No admission is made as to the amount claimed or as to any amount at all.

2. The defendant says that the plaintiff drew on the defendant's bills of exchange payable in United States currency which bills of exchange were accepted by the defendant and the plaintiff converted such amounts into Belgian francs at its own risk and the defendant contends that it is not liable for any such loss suffered as a result of such conversion or conversions.

3. The defendant further says that the said contracts are illegal void and unenforceable by virtue of the provisions of the Exchange Control Act.

Particulars

(a) At the dates of the formation of the contracts for the sale of goods and at all material times the plaintiff was a resident of Belgium;

(b) the said contracts which were made in Jamaica stipulated for payments in United States currency outside Jamaica to the plaintiff;

(c) no approval was given by the Minister of Finance as to the formation of the contracts."

Now, there is no dispute of fact drawn between the parties. There is no traverse of the allegations of fact set out in the plaintiff's claim. The defendant in pleading that it makes no admission as to the amount claimed has not denied the computation as to the balance due.

Two issues arise on the pleadings. The first is whether on the contract (which is not in dispute) the plaintiff is entitled to recover losses flowing from the conversion to Belgian francs from United States dollars or whether the plaintiff

has to bear that risk or that loss. The second issue is whether the contract by not having the approval of the Minister is rendered illegal and void as a consequence of the Exchange Control Act.

Mr. Wood submitted that the law on both those issues is now well settled in the plaintiff's favour and that therefore it cannot be said that the defendant has a reasonable or arguable defence.

Mr. Lord did not challenge the plaintiff's contention on the first issue and in argument conceded that, were that the only issue, the Court would be at liberty to order that judgment be entered in the currency that best expresses the plaintiff's loss. I will return to this aspect of the matter later on in this judgment but I find it convenient to turn at this stage to the second issue, so extensively argued on both sides.

To facilitate reference and discussion it is appropriate to set out the relevant sections of the Exchange Control Act:

Section 7: (without proviso) "Except with the permission of the Minister, no person shall do any of the following things in the Island, that is to say -

(a) make any payment to or for the credit of a person resident outside of the scheduled territories;

(b) make any payment to or for the credit of a person resident in the scheduled territories by order or on behalf of a person resident outside the scheduled territories;

(c) place any sum to the credit of any person resident outside the scheduled territories."

Section 8:

"(1) Except with the permission of the Minister no person, resident in the scheduled territories shall, ... in the Island do any act which involves, is in association with, or is preparatory to, the making of any payment outside the Island to or for the credit of a person resident outside the scheduled territories.

(2) . . ."

Section 36: Contracts, legal proceedings etc.

"(1) It shall be an implied condition in any contract that, where by virtue of this Act the permission or consent of the Minister

> is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:
>
> Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason.
>
> "(2) . . ."
>
> "(3) The provisions of the Fourth Schedule shall have effect with respect to legal proceedings . . ."

The Fourth Schedule stipulates in effect that judgments given by any Court while they can be paid into Court, will require permission of the Minister for payment out to any person resident out of the jurisdiction etc.

What I must decide is whether or not it is reasonably or fairly arguable that the agreement as formed without the prior approval of the Minister is rendered illegal by the Act.

Mr. Lord submitted that not only should that question be answered in the affirmative but that the terms of Section 8 of the Act render the contract, the subject of these proceedings, illegal as no permission was given by the Minister for its formation. For Mr. Lord, where the proviso to Section 36(1) does not apply, that subsection saves from illegality only those contracts which had ministerial sanction or permission for their formation but require ministerial permission for performance.

That argument, is, in my view, unsound in law, if not in logic. It is at variance with authority, both Jamaican and English, and with the scheme and legislative intent of the Exchange Control Act: see Watkis v. Roblin (1964) 8 JLR 444; Bank of London and Montreal v. Sale (1967) 10 JLR 319 at pp. 335 letter I to 336 letter A; Barbara Grant v. Derrick Williams (unreported) Supreme Court Civil Appeal No. 20/85 - judgment delivered 25th June, 1987) Cummings v. London Bullion Company Limited [1952] 1 KB 327, 334; Contract and Trading Co. (Southern) Ltd. v. Barbey [1960] A.C. 244.

It is to be observed that neither Section 7 nor Section 8 in express or clear language, in this penal statute, prohibits

the making of a contract for the sale of goods or any other contract which will eventually result in a foreign exchange payment. Rather the sections go to the actual performance by payment without ministerial permission. Unless ministerial permission is obtained, Section 8(1) prohibits (a) the payment of currency out of the island by someone resident here to or for the credit of a person resident outside our shores and (b) acts done, preparatory to or in association with effecting such payments.

In any case, on an analysis of the authorities, it is clear that where the implied condition in Section 36 (1) applies to contracts requiring when they are formed the permission of the Minister for the performance of any particular term, the effect of the statute is to strike at performance where there is no ministerial permission and not at the formation of such contracts at all. So, while in the instant case performance by payment to or for the credit of the plaintiff of the price under the contract of sale is proscribed because of the absence so far of ministerial permission, Section 36 (1) operates to preserve the contract, unless it is shown that both parties intend to pursue their agreement regardless of what the Act provides.

In the recent case of Barbara Grant v. Derrick Williams (supra), a most helpful case, the Court of Appeal (Kerr, Carberry and White JJA) in affirming the judgment of Downer J., pronounced on the ambit of Section 36 (1). The opportunity for so doing arose because the learned judges of appeal were required to consider the impact of Section 36 (1) on ... transactions falling within the provisions of Section 33 restricting the sale of real property.

Downer J. had held that contracts as formed for the sale of real property which were caught by Section 33 (1) would not, even if there were no provisions for ministerial validation under Section 20 (2) and (3), be struck down as illegal, since, unless a contrary intention was shown by the parties, the implied condition imposed by Section 36 (1) operated when the contracts were formed.

Kerr J. A. noted that Downer J., in so correctly concluding, drew support from dicta in Bank of London and Montreal v. Sale (supra) and Watkis v. Roblin (supra). In the latter case, approved by the Court of Appeal in the Barbara Grant case Douglas J. in holding that where applicable the effect of the statute was to strike at performance and not at formation of contracts said at page 447F of the Report:

> "Where the subsection applies therefore, contracts in breach of this law are on a footing entirely different from that upon which contracts in breach of the Local Improvements Law rest. Thus where the agreement is not caught by the proviso in Section 35(1) [Now Section 36(1)] the Exchange Control Law goes to performance of the contract and not to its formation."

In the Barbara Grant case at page 22 Kerr J. A. declared the scope of Section 36(1) in this wise:

> "By Section 36(1) in every contract in which the performance of any term required the consent of the Minister in the absence of any evidence to the contrary it is an implied term that before performance the requisite consent would be first obtained. In that sub-section the phrase 'at the time of the contract' indicates unarguably that the legislative intent was to render valid executory agreements in which for valid performance the consent of the Minister would be required. Emphasis supplied.

In so pronouncing on the range of Section 36(1) Kerr J. A. accepted this opinion of Downer J., at first instance as to the scope and purpose of the Exchange Control Act:

> "To my mind," said Downer J., "the purpose was to permit the Government to use monetary policy to manage and control the economy of the country ... It was to control monies which a vendor may wish to move from the shores of Jamaica or to prevent monies being paid to the credit of a non-resident and the provisions in the Third Schedule relating to blocked accounts and those in the Fourth Schedule for payment of money into Court emphasises the control of currency movements and reinforces the view that the purpose was not to prohibit agreement for sale as such."

That opinion was informed by dicta from cases such as Bank of London and Montreal v. Sale (supra) at pp. 335 - 336 of the Report (per Waddington J. A.) and from the following apposite passage from the speech of Viscount Simmonds in Contract Trading Co. (Southern) Ltd. v. Barbey and Others. [1960] A.C. 244 at page 253 pertaining to the effect of the English Exchange Control Act:

> "The only previous case in which the construction of this part of the Act has been considered by the Courts is Cummings v. London Bullion Co. Ltd. [1952] 1K.B. 327. In that case it was not perhaps necessary for the Court to determine the precise question that now arises, but I am happy to find that Sommervell L.J. did think fit to consider it and used language with which I am in agreement. 'The person', he says 'entitled to payment issues a writ. The fact that permission has not been obtained is not a defence to the action. On the one hand the plaintiff can obtain judgment, the money due under the judgment being subject to Part 2 of the Act and the rules to which I have referred. The defendant assuming that he is admitting liability apart from the provisions of the Act, can make payment into Court. The Act is not to be used to enable the defendant to retain money in his pocket, but to control its reaching its destination, namely the plaintiff'."

Carberry J. A. also made it clear at page 36 that:

> "Section 36 indicates an overall approach aimed at preserving the enforceability of such contracts. There is to be an implied term or condition that terms requiring the permission or consent of the Minister are not to be performed till such consent is obtained . . ."
>
> "The statutory protection will not however, apply where it is clear that the parties mean to pursue their agreement regardless of what the Act provides."

That learned judge after citing the quoted passage from the judgment of Sommervell L. J. in Cummings v. London Bullion Co. Ltd. (supra) concluded at page 39 thus:

> "In short then our Section 36 (the English Section 33) contracts legal proceedings etc., with its provision of an implied condition that terms requiring the permission or consent of the Minister (or Treasury) shall not be performed except permission is given, unless it has been clearly excluded by the parties, will preserve the contract, and the absence of permission while it may prevent the party from collecting out of the scheduled territories does not provide in itself a defence or answer to the obligation."

It is clear beyond a peradventure that the contract in the case before me is preserved by the saving provision in Section 36 (1), there being nothing before me to show that both parties by their contract intended or contemplated illegal payments or, at all events, that they intended to pursue their agreement regardless of what the Act provides.

As Mr. Wood pointed out, the terms of the contract show that the parties contemplated performance by lawful means and by Clause 15 of the contract liberal power was conferred on the

seller to change the terms of payment to adapt to any order or law that might come into effect.

The instant case is unlike such cases as Bigos v. Boustead [1951] 1 All E.R. 92 where the parties had clearly shown that their intention was inconsistent with the obtaining of Treasury permission with the result that Section 36 could not avail the plaintiff.

It is plain then that illegality of contract is unarguably no defence to the action in the instant case.

I now return to consider whether it is a reasonable or arguable defence that on the contract the plaintiff has to bear the losses flowing from converting United States currency into Belgian francs at the rate of exchange on the due dates of payment.

Now, it is not disputed that the defendant failed to pay to the plaintiff the agreed prices for the goods on the due dates. I have already adverted to the fact that the contract stipulated for automatic conversion of the debt from United States to Belgian currency once there was delay in payment or transfer under the contract of sale. In this connection Mr. Wood cited Miliangos v. George Frank (Textiles) Ltd. [1975] 3 All E.R. 801; Jamaica Carpet Mills v. First Valley Bank (unreported) Supreme Court Civil Appeal No. 79/84, and Services Europe Atlantique Sud. v. Stockholms [1978] 3 W.L.R. 804. The cumulative effect of these cases, he submitted, fortifies his contention that on this aspect of the matter the law is also well settled in the plaintiff's favour and that therefore it cannot be said that the defendant has a reasonable or arguable defence.

In the light of the terms of the contract and the effect of the cited authorities (which are briefly discussed below) Mr. Lord, in my view, properly conceded that on this aspect of the matter the Court would, without more, be at liberty to order that judgment be entered in the currency that best expresses the plaintiff's loss.

In Jamaica Carpet Mills v. First Valley Bank (supra) the Court of Appeal (Rowe P., Carey and White J J.A.) applied the principles laid down by the House of Lords in Miliangos v. George Frank (Textiles) Ltd. (supra) as the settled and positive rule of English Law, namely, that where a plaintiff brings an action for a sum of money due under a contract governed by foreign law and nominates as the currency for payment of the debt a foreign currency then the Court will award judgment in that currency and that if it becomes necessary to enforce the judgment, that amount is to be converted into sterling at the date of payment that is to say, in effect, when the court authorises enforcement of the judgment in terms of sterling.

The twin principles that judgment could only be rendered in sterling and that the conversion of the foreign currency into Jamaican currency should be calculated at the date of breach (which had hitherto operated in Jamaica and had had the same common law genesis and development as the corresponding principles in England and had not been modified by any Jamaican statute or judgment of the Court) gave away in the First Valley Bank case to the aforesaid settled and positive rule of English law enunciated in the Miliangos case by the House of Lords, the final judicial authority for the determination of English law.

In Services Europe Atlantique Sud v. Stockholm (supra) the House of Lords gave further consideration to the matter and held (see the leading speech by Lord Wilberforce) that the real principle behind the rule was the normal principle for the award of damages, that is, restitutio in integrum, and that therefore in awarding damages a Court is obliged to give judgment expressed in the currency that best reflects the plaintiff's loss flowing from the breach of contract provided that such loss was in the contemplation of the parties at the time of making the contract.

As indicated by Lord Wilberforce, of important concern are the terms of the individual agreement. For instance, does the contract expressly stipulate what shall be the currency of the loss in the event of the breach of contract? In the instant case it is plain that it does: on the face of the contract the plaintiff is a Belgian company and the contract while stipulating for payment in United States dollars provides that if there is delay in payment or transfer the debt is automatically converted into Belgian francs on the due date of payment with interest at 20% per annum.

As Mr. Wood submitted, it is therefore clear that within the principles enunciated by Lord Wilberforce the parties nominated Belgian francs as the applicable currency if payment was not made on the due date and that they had in their contemplation that currency as the currency of breach when they made the contract.

It is plain, therefore, that the defendant cannot now reasonably argue that it is not liable to submit to a judgment expressed in Belgian francs.

In the result I order that judgment be entered in terms of the summons, with costs to the plaintiff to be agreed or taxed. I further order that the total sum of the judgment expressed in Belgian francs be paid into Court. The total sum to be paid into Court is the amount realised when the amount of the judgment converts into Jamaican currency at the date of payment into Court.

By virtue of the provisions of paragraphs 1 and 2 of the Fourth Schedule of the Exchange Control Act, until ministerial permission is obtained, no payment can be made of that sum out of Court to, or for the credit of, the plaintiff, a company resident outside the scheduled territories. While the Act "is not

to be used to enable the defendant to retain money in his pocket", it certainly "controls its reaching its destination, namely the plaintiff."