

11/12/05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
CONSOLIDATED SUITS NOS. C.L.1997/F30 AND C.L.1997/F029

BETWEEN	FIRST INTERNATIONAL BANK AND TRUST LIMITED	CLAIMANT
AND	KEY MOTORS LIMITED	DEFENDANT
AND	EXECUTIVE MOTORS LIMITED	DEFENDANT

HEARD: 19, 20, 21, 22, 23, April 2004., 10, 11, 12, 13, 14 May 2004, 28 May 2004, 28 May 2004 and 7th February 2005

Mr. K. Bishop for Claimant

Miss Carol Davis for Key and Executive Motors Limited

REASONS FOR JUDGMENT

M. McIntosh, J.

The Claimant, First Trade International Bank and Trust Limited (In liquidation) brought these suits which have been consolidated against Key Motors Limited and Executive Motors Limited claiming sums of money and interest thereon advanced for and on behalf of the Defendants and not repaid by them.

In the case of Executive Motors the sum of eighty-nine thousand, eight hundred and seventy-six dollars, sixty-nine cents (US\$89,876.69) is being claimed by the Claimant and while no particulars are supplied in the Statement of Claim the statement of Miss. Cheryl Simms sets out the amounts as fifty-one thousand, eight hundred and seven dollars and fifty cents (US\$51, 807.50) and eight thousand, one hundred and thirty-six dollars (\$US8,136.00) as principle and interest respectively on Letters of Credit two thousand and eighty-eight (2088) and twenty-seven thousand, nine hundred and eight-four dollars and fifty cents (US\$27,984.50) principal and one thousand, nine hundred and forty-seven dollars and ninety-seven cent (\$US1,947.97) interest.

In its defence and counterclaim Executive Motors denies being indebted to the Claimant and counterclaims that the Claimant failed to open letters of credit and or failed to make payment to the beneficiaries as agreed and counterclaims on three (3) Letters of credit as follows:

On letter of Credit 2747 the sum of	US\$10,286.13,
Letter of Credit 2307 the sum of	US\$68,606.00 and
Letter of Credit 2748 the sum of	US\$52,103.00

The amounts claimed from Key Motors are not set out in the particulars but the witness statement of Anthony Kikivakarlis sets out the claim as follows:

PRINCIPAL	INTEREST ACCRUED TO 28 FEBRUARY, 1997	RELATED LETTERS OF CREDIT
US\$69,690.89	US\$9,282.44	2108
US\$90,537.97	US\$14,668.04	2108
US\$15,162.36	US\$2,631.89	1869
<u>US\$27,026.91</u>	<u>US\$4,074.87</u>	2288
US\$202,418.13	US\$30,657.24	2288

In the amended defence and counterclaim the Defendant denies the indebtedness and Counterclaims for the amounts of two hundred and fourteen thousand, eight hundred and thirty-six dollars (US\$214,836.00) relating to letter of credit 2288 and ninety-four thousand, three hundred and eighty-four (USD\$94,384.00) relating to letter of credit 2753.

These amounts the defendant claim were payments made towards their contribution to the letters of credit for which the Claimant failed to establish letters of credit and or failed to make payments to beneficiaries.

The Court has to determine the following: -

1. has the Claimant satisfied the Court on a balance of probabilities that there is a balance on loans to Executive Motors on Letter of Credit 2088.
2. Is the claim for overdraft due from Executive Motors proper claim in the context of the pleading and the evidence.
3. Has Executive Motors satisfied the Court that it made payments to the Claimant with regard to Letters of Credit 2747, 2307 and 2748 and that he Claimant has made no disbursements from the payments made to it.

In respect of KEY MOTORS LIMITED.

1. Has the Claimant proved that there is a balance on loans to the Defendant Key Motors on Letters of Credit 2108, 1869 and 2288.
2. On the Counterclaim has the Defendant satisfied the Court that it made payments to the Claimant with regard to Letters of Card 2288 and 2753 and that the Claimant has made no payments from the amounts deposited.

Key and Executive Motors established an arrangement with First Trade by which it was agreed that First Trade would open Letters of Credit (L/C) at the request of Key and Executive Motors.

This was done on or about December 1994. The purpose of the arrangement was to make payment to the suppliers of vehicles to Key and Executive.

Key and Executive would deposit fifty percent (50%) of the amount required for the Letters of Credit with First Trade and upon receipt by First Trade of this fifty percent (50%) advance by Key and Executive, First Trade would open Letters of Credit.

The system was that First Trade would advance on behalf of Key Executive the remaining fifty percent (50%) of the Letters of Credit and make payments to the beneficiaries of the Letters of Credit for the full amount of the Letters of Credit based on the suppliers' invoices and shipping documents (including the Bill of Lading) presented by the beneficiaries. First Trade would finance the fifty percent (50%) for 120 days from the date of the Bill of Lading and this would be repaid by Key and Executive.

First Trade in support of its claim has produced and introduced into evidence print outs of Fed Wires.

There is no evidence before the Court as to how these print outs came into existence, there is no evidence to support or authenticate them and no confirmation of payment, as a result the Court ruled that these print outs do not provide proof of payment of the amounts set out therein. Loans by the Claimant can only be proven if the Claimant provides evidence that it made a payment to the beneficiary bank, in the absence of such proof the Claimant would not be able to satisfy the Court that it made any loan to the Defendant.

In keeping with the system Letters of Credit would be opened after the Defendant made an application to the Claimant.

The Defendant would supply to the Claimant fifty percent (50%) of the amount requested for the Letter of Credits and the Letter of Credit would then be opened in favour of a beneficiary bank.

Witness Mr. Pierrie Loubeau described it as "financial institutions acting as intermediaries."

When the supplier was ready to ship the goods all the documents would be sent to his bank and his bank would pay the beneficiary. The beneficiary bank would then send the shipping documents to First Trade, that being the system it seems that by the time the documents reached First Trade, the goods would already have been shipped (would be intransit) or arrived. First Trade would then check to make sure that the documents were in order and in accordance with the Letter of Credit. If they were, then payment would be made to the beneficiary bank.

Payments to intermediary banks were made from First Trade's operational account which was at First Union Bank of Jacksonville and First Trade would "book a 120 day loan for the remaining fifty percent (50%) of the Letter of Credit value." A loan would only arise if First Trade made a payment - no loan would exist if no payment was made by First Trade.

First Trade began to have severe liquidity problems in 1995.

Evidence from Mr. Prerrie Loubeau was that Mr. Manuel Valera, the president of the bank had meetings with the bank's shareholders when these problems arose and they terminated Mr. Valera's services. Investigations were carried out to ascertain what caused the problems but, the witness Loubeau said these investigations were launched "not necessarily because the shareholders knew that there was fraud" - it was in fact normal action in that type of situation. It was his view that the severe liquidity problems arose because of "mismanagement"

After Mr. Valera's services had been terminated in August 1995 Mr. Loubeau was appointed General Manager of First Trade on 9th August, 1995 and had no contact with Mr. Valera.

Two other employees Maggie Beguristain, acting Manager and Claris Price, were no longer working at the Bank when Mr. Loubeau took up duties there.

KEY MOTORS.

The Claimant allege that four (4) payments were made to Key Motors on three (3) Letters of Credit numbered 2108, 1869 and 2288 and these amounted to US\$202,418.13 - principal and US\$30,657.24 Interest

In a letter from Mr. Pierrie Loubeau, the Claimant referred to an audit by Peat Marwick which showed that First Trade owed Key Motors US\$157,543.45.

Mr. Loubeau confirmed that all the available documents were handed over to Peat Marwick for the purpose of carrying out the audit and further that within the first week after he took over as General Manager, First Trade was instructed by the Central Bank of the Bahamas not to accept any new deposits or to make any further loans.

LETTER OF CREDIT 2108

The analysis prepared by Miss Cheryl Simms shows two amounts claimed as loans to Key Motors on this Letter of Credit as US\$69,690.89 and US\$90,537.97 which amounts were not paid by Key.

First Trade, in order to prove this debt has to establish that it made payments of these amounts to the beneficiary banks. First Trade is asserting that the loan of US\$69,690.89 arises from a payment it made of US\$201,807.01 (US\$100,916 was provided by Key and the remaining 50% financed by First Trade).

The only document produced to support this payment by First Trade is document Number (3) in Exhibit 1 which is a print out - a Fed Wire and this document the Court does not regard as sufficient to prove a payment to the beneficiary bank.

The position in relation to the payment of US\$181,000.75 which gave rise to the loan of \$90,537.97 is the same as First Trade has provided the Court with no proof of payment to the beneficiary bank - the only document presented being the unauthenticated fed wire. The Claimant has not proved on a balance of probabilities that any loan existed.

Mrs. Lyn Shue, witness on behalf of Key Motors accounts for the full US\$415,000 of this Letter of Credit and in her analysis accounts for the total amount being paid off by Key Motors and insists that US\$60,000.00 was not outstanding as the cheque drawn on 31st May 1995 for that amount was not included in the statement of account.

LETTER OF CREDIT 1869

A loan of US\$15,162.36 to Key Motors arising from a payment by First Trade of US\$30,239.72.

Again in this instance the only proof of payment presented to the Court is a fed wire and the Court has already ruled that this is not sufficient evidence of payment and this claim also fails.

LETTER OF CREDIT 2288

The amount of Twenty Seven Thousand and Twenty Six Dollars and Ninety One Cents (US\$27,026.91) is being claimed from Key Motors being fifty percent (50%) of payment of Fifty Three Thousand Nine Hundred and Forty Three Dollars and Eighty Three Cents (US\$53,943.83) allegedly paid by First Trade. The only evidence in support of this payment is document 26 in Exhibit 1 and is in fact an unauthenticated unconfirmed fed wire. In the light of the ruling made by this Court there is total absence of proof of payment and this claim also fails.

It is significant to note that the amount of Fifty Three Thousand Nine Hundred and Forty Three Dollars and Eighty Three Cents (US\$53,943.83) was allegedly paid by First Trade and the amount due under this letter of credit is Fifty Four Thousand and Fifty Three Dollars and Eighty Three Cents (US\$54,053.83).

THE COUNTERCLAIM

KEY MOTORS :

In respect of Two Hundred and Fourteen Thousand, Eight Hundred and Thirty Five Dollars and Eighty Two Cents (\$214,835.82) all the cheques in support of the amounts paid by Key Motors are set out at "SLS 2" pages 63-68 of the Green Bundle :

26 th April, 1995	\$20,000.00
20 th April, 1995	\$12,835.82
3 rd May, 1995	\$22,000.00
13 th June, 1995	\$ 8,000.00
13 th June, 1995	\$12,000.00
13 th June, 1995	\$10,000.00
28 th June, 1995	\$48,000.00
18 th August, 1995	\$50,000.00
13 th June, 1995	\$ 5,000.00
19 th June, 1995	\$35,000.00

and there is no dispute that this amount was paid. All the cheques in support of the amounts paid are exhibited to Miss Lyn Shue's witness statement and set out at "SLS 2" pages 63 – 68 Green Bundle.

There is a major conflict in respect to the alleged payment of One Hundred and Seventy One Thousand, Four Hundred and Sixty One Dollars and Twelve Cents (US\$171,461.12). The Claimants have sought to use the two documents attached to Miss Lyn Shue's affidavit as proof that First Trade paid this amount.

The difficulty with this is that these documents refer to a payment of One Hundred and Seventy One Thousand, Three Hundred and One Dollars and Twelve Cents (US\$171,301.12) and in Miss Simms analysis she refers to an amount of One Hundred and Seventy One Thousand, Four Hundred and Sixty One Dollars and Twelve Cents (US\$171,461.12) and no explanation has been offered for the difference in amounts.

Secondly Mr. Loubeau in his witness statement states that First Trade maintained its main operating account at First Union Bank at Miami, Florida. When effecting payment to the beneficiary First Trade would request from First Union that it debit its account and transfer the funds minus any applicable charges to the intermediary bank in Korea for final payment to the beneficiary. First Trade would always request and receive from First Union evidence (copy of transmitted fed wire) that transfer was effected."

The document would begin "Welcome to First Union." The only document which begins in this manner is that which was submitted by Miss Lyn Shue. This document was not received by First Trade from First Union in confirmation of payment it is a document exhibited to Miss Lyn Hue's witness statement as one obtained from first Union by Messers McKenney Bancroft and Hughes, Attorneys-at-Law for the Defendants and is not a confirmation that money was actually paid with respect to L/C 2288 but was merely a repetition of the request made by First Trade.

Confirmation that an amount was paid by "fed wire" should properly confirm a fed wire Reserve or from First Union Bank by means of a bank statement with regard to, First Trade's account at First Union or by a letter from First Union confirming that the amount was deducted from First Trade's account.

In any event a copy document in these circumstances cannot be regarded as sufficient confirmation of a payment.

Mr. Loubeau's evidence that they received from First Union a document headed "Welcome to First Union" but the top was cut off in not credible.

There is no evidence that One Hundred and Seventy One Thousand, Four Hundred and Sixty One Dollars and Twenty-One Cents (US\$171,461.21) was debited from Key's account at First Trade.

Miss Simms evidence was that the last entry to the account was on 4th October, 1995, and there is no debit entry for an alleged payment of One Hundred and Seventy One Thousand, Four Hundred and Sixty One Dollars and Twelve Cents (US\$171,461.12), however there is an entry on the 6th October, 1995 entitled "Loan Cancellation" and this was to reverse a previous incorrect entry made on 18th July giving a loan of One Hundred and Seventy One Thousand, Four Hundred and Sixty One Dollars and Twenty Two Cents (US\$171,461.22) on this transaction.

Miss Simms admitted that this loan was never made and that error had been corrected by the cancellation of the loan. Miss Simms also stated that the system was that if a payment was made on 6th October 1995 it would be reflected in the account but admitted that although it should have been reflected it was not. Miss Simms revealed that the account attached to her witness statement was incomplete and Deloitte and Touche reconciled the account after they took over by adding this payment.

This adjustment or reconciliation was never included in the document.

On the basis of this evidence the Court is of the view that the amount of One Hundred and Seventy One Thousand, Four Hundred and Sixty One Dollars and Twelve Cents (US\$171,461.12) was not paid by the Claimant and the full amount of Two Hundred and Fourteen Thousand, Eight Hundred and Thirty Five Dollars and Eighty Two Cents (US\$214,835.82) which was paid to L/C 2288 is refundable to Key Motors.

L/C 2573

Key Motors also counterclaims with regard to L/C 2753. Both the Claimants' witnesses say this L/C was never identified at First Trade. Mrs. Lyn Shue refers to three payments of Twenty Five Thousand Dollars (US\$25,000.00), Thirty Thousand Dollars (US\$30,000.00) and Thirty Nine Thousand Three Hundred and Eighty One Dollars and Seventeen Cents (\$US39,381.17) from the cheque for Fifty Thousand Dollars US\$50,000.00 dated 1st August, 1995. The cheques with accompanying letters are exhibited by Miss Lyn Shue and Miss Simms in cross-examination admits that the cheques referred to were received. She admits receiving One Hundred and Five Thousand Dollars (US\$105,000.00). Ninety Four Thousand, Three Hundred and Eighty Four Dollars and Seventeen Cents (US\$94,384.17) of that amount was to be applied to L/C 2753 and in the light of the Claimants denial that that L/C was identified at First Trade it seems that no payments were made from the amount tendered.

The Claimants say they did not receive any original documents with regard to this L/C but this is difficult to understand if the Defendants have originals of letters sent to the Defendant and banker's cheques for which the original go back to the respective banks.

The Claimant admit they got the cheques which were sent with the letters and it seems reasonable to infer that they must have got the letters. The L/C was never in fact established so the money ought to be returned to Key Motors.

Key Motors has on a balance of probabilities proved its counterclaim in the sum of Three Hundred and Nine Thousand, Three Hundred and Twenty Dollars (US\$309,320.00) being Two Hundred and Fourteen Thousand, Eight Hundred and Thirty Six Dollars (US\$214,836.00) on L/C 2288 and Ninety Four Thousand, Three Hundred and Eighty Four Dollars (\$US94,384.00) on L/C 2753.

The payments which were made by First Trade can be confirmed by the Statement of Account, Miss Simms testified. However she admits that this statement contained errors. There is reason to believe it still contains errors as it is not complete. There is an alleged payment of Three Hundred and Forty Two Thousand, Three Hundred and Twenty Four Dollars and Thirty Seven Cents with respect to L/C 2288 and the words "payment not effected" is written on the document in handwriting. In her analysis Miss Simms confirms that such a payment was not made.

With reference to L/C 2288 there is also another amount of Nine Hundred and Thirty Two Dollars and Thirty One Cents (US\$932.31), which must also be an error as L/C 2288, was not negotiated.

There is nothing to suggest that these amounts were credited back to Key's Accounts and although Miss Simms in her affidavit states that the amount of Three Hundred and Forty Two Thousand, Three Hundred and Twenty Four Dollars and Seventy Two Cents (\$US342,324.72) was credited back to Key Accounts. This is not reflected in the document.

The statement therefore cannot be accepted as proof of payment of any sum by First Trade as it obviously contains errors and in any event was generated by First Trade,

The cars were shipped and were received by the Defendants but one has to look at this, that is the context of the system of opening and paying Letters of Credit. The fact that the cars were shipped and the shipping documents given the First Trade does not provide proof of payments made by First Trade.

The evidence reveals the cars would have been shipped and the shipping documents given to First Trade before they made any payments on negotiating the Letters of Credit. L/C 2747 – Miss Simms analysis reveals that this L/C is the sum of Twenty Thousand, Five Hundred and Seventy Two Dollars and Twenty-Six Cents (\$US20,572.26) was "unpaid" by First Trade.

Application letters of credit was made and the cars were shipped – the documents relating to this L/C are on page 92-104 of the Beige Bundle. In respect to other L/C's where First Trade admitted only partial payment the cars were nevertheless shipped and received by the Defendants.

The Defendants have provided evidence that they paid for their cars.

EXECUTIVE MOTORS

All the documents on which the Claimant rely to show payments made subsequent to their letter to Crown, Key and Executive Motors dated 21st February, 1996 are documents which form Exhibit and consist of fed wires which this Court has ruled do not constitute proof of payment of the amounts stated in these fed wires to the relevant corporations or banks.

The evidence relating to any amount due from Executive Motors to the Claimants comes from two sources.

Firstly, from the letter of 21st February, 1996 (three months after liquidation) from First Trade that stating that "as per the Bank's records" the amount of Ninety Six Thousand, Two Hundred and Twenty Dollars and Seventy Six Cents (US\$96,220.76) was due from the Claimant to the Defendant Executive Motors.

Secondly there is evidence from the witnesses Mr. Anthony Kikivakaris and Miss Cheryl Simms that in the "reconciliation process" completed by their firm Deloitte and Touche had located documentation to support further payments of One Hundred and Twenty Thousand, Six Hundred and Sixty One Dollars (US\$120,661.00) a payment of Fifty Two Thousand, One Hundred and Five Dollars (US\$52,105.00) plus had charge of Twenty Five Dollars (US\$25.00) – this would amount to U.S. Fifty Two Thousand, One Hundred and Thirty Dollars (US\$52,130.00) on L/C 2748 and a further payment of Sixty Eight Thousand, Five Hundred and Fifty Six Dollars (US\$68,556.00) on L/C 2307.

The documentation was fed wire and the first for Fifty Two Thousand, One Hundred and Five Dollars (US\$52,105.00) (document of Exhibit 1) is the only document located and there is none to support the payment of US Sixty Eight Thousand, Five Hundred and Fifty Six Dollars (US \$68,556.00) on L/C 2307.

There is no evidence that First Trade made payment to a beneficiary bank pursuant to any L/C – the Claimants have failed to provide any proof of payment of Sixty Eight Thousand, Five Hundred and Fifty Six Dollars (US\$68,556.00) on L/C 2307 and this claim against Executive Motors fails.

The Claimant has failed to present evidence to this court to prove on a balance of probabilities that Key Motors Limited and Executive Motors Limited are indebted to the Claimant for the amounts claimed or any amounts at all. The Claimant therefore fails.

JUDGMENT

Judgment for the Defendants on the Claim.

Judgment for the Defendant, Key Motors on the Counter Claim in the sum of US\$309,320.00 from 1st August 1995 with interest at 33% per annum and judgment for the defendant, Executive Motors on the counter Claim in the sum of US\$130,995.13 with interest at 33% from 14th June 1995

Costs to the Defendant to be agreed or taxed.