IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. G-017 OF 1992

BETWEEN	GUYANA REFRIGERATORS LIMITED	PLAINTIFF
A N D	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	DEFENDANT

Dennis Morrison Q.C. and John Givans instructed by Dunn, Cox & Orrett for Plaintiff.

Michael Hylton and P. Fisher instructed by Myers, Fletcher & Gordon for the Defendant.

Heard: July 12 & 13, & October 7, 1994

LANGRIN, J.

The plaintiff carries on the business of manufacturing refrigerators in Guyana for sale. The plaintiff sold refrigerators to a Jamaican Company and issued two Bills of Exchange. The first dated 14th December, 1989 and the second dated 31st January 1990 for the amount US$35,445.40 and US$58,239.60 respectively. The plaintiff through its bankers, The Guyana Bank of Trade and Industry engaged the services of the Defendant bank for the collection of the sums set out in the bills of Exchange. The plaintiff's bankers on the 4th January, 1990 and the 19th March, 1990 for each respective bill, gave to the defendant special instructions. These were inter alia that the defendant should upon collection of the monies remit it in U.S. dollars to credit account in Miami and New York, and advise the plaintiff's banker immediately by authenticated telex.

Due to the Foreign Exchange Control Regulations governing the Bank of Jamaica the defendant was unable to comply with the instructions in so far as it relates to transferring money in U.S. dollars. Payment instead had to be made in Guyanese dollars. On the 14th June the defendant purchased the foreign currency from the Bank of Jamaica at Guy$33.00 = $1.00 evidenced by drafts dated 21st June. On the 15th June the Defendant sent the drafts by air mail to the plaintiff's bank. The plaintiff did not receive the money until

25th July almost 6 weeks later. By that time there were a series of devaluations but of importance is the one that took place on the 15th June. The Guyanese dollar was devalued to G$65.00 = US$1.00. The main issue is who should bear the cost of the devaluation.

PLAINTIFF'S SUBMISSION

(a) The sums on the drafts should have been calculated at an exchange rate of Guy$65.00 = US$1.00.

(b) That the sending of the proceeds of the sale by air mail and his action otherwise constituted a breach of contract.

(c) By reason of the breach the plaintiff suffered damages equaling the difference between the sum owing at a higher and lower exchange rate.

DEFENDANT'S SUBMISSIONS

(a) The drafts bear the correct sums.

(b) The terms of the contracts did not unequivocally state that transfer of funds should be by telex so there was no breach of contract.

(c) Even if there was a breach of contract the only damages that the plaintiff is entitled to is by way of interest for the period of delay.

THE QUESTIONS TO BE DETERMINED

(1) Were the proceeds properly converted at the exchange rate of Guy$33.00 = US$1.00.

(2) Whether on the facts as found and on examination and the true construction of the terms of the contracts the Defendant could be found to be in breach.

If yes, what measure of damages is the plaintiff entitled?

EXCHANGE RATE

It was a factual allegation which was proved, that a devaluation of the Guyanese currency occurred on the 15th June. The plaintiff submitted that the drafts bore the date of 21st June and therefore should be calculated at Guy$65.00 = US$1.00.

The evidence as presented before the Court which was found to be the practice of Bankers, reveals that a draft is usually

dated 2 - 4 working days subsequent to the actual date of its transaction. This date is known as the value date. It is indicative of the date when the parties' accounts are actually debited and credited. This date however is not the date on which the exchange rate is fixed for conversion purposes. The relevant date for such purposes is the contract date, that is the date on which the Central Bank and the Purchasing Bank make a contract to obtain foreign currency. The 14th June would therefore represent such a date in the present case. It is therefore, conclusive that the proper rate of exchange was used.

BREACH OF CONTRACT

A contract by its terms imposes certain obligations to be carried out by the parties to the contract. The extent of the duty to perform depends primarily on the terms of the contract. Performance must therefore be exactly in accordance with the terms. If a party is alleged to be in breach then it must be shown that there was a failure to perform the duties imposed by the contract. Therefore the duties of the defendant under the contract needs to be ascertained.

The plaintiff contends that the defendant was not only obliged to advise them immediately by Telex but also transfer the proceeds by Telex. The Defendant denied the breach and stated that any mention of Telex transfer was strictly in relation to advising the plaintiff and it could not be taken as an instruction to remit proceeds by Telex. The defendant also argues that when the contract was varied by the policy of the Bank of Jamaica the plaintiff's, banker should have given new instructions.

The relevant instructions as set out by the Bills are:

> "Kindly deal with the enclosed documents in accordance with the following unless varied by any special instructions - Remit proceeds by Air Mail."

Special instructions Clause 2 reads:

> In reimbursement Credit Account No.005 1005 32 in the name of Guyana Bank PLC Miami and advise us by Authenticated Telex date and amount credited."

Similar instructions were inserted on the collection bill dated 12th March 1990. In construing the contracts, bearing in mind the nature of the transaction and giving the words their plain and ordinary meaning, the contract did not clearly direct the defendant to remit proceeds by Telex. The document is to be construed contra preferentum. That is, it is construed more forcibly against the party who authorised it. A man is said to be responsible for the uncertainties in his own expression. Looking at the documents, the special instructions override the general instructions. However, in so far as the special instructions are deficient then the general instructions will govern the performance of the contract. Therefore on a true construction of the contracts it seems that the special instructions was deficient in relation to the mode of transfer. It did not express that the appropriate method of transferring the proceeds was by Telex transfer therefore in accordance with the terms of the contract the defendants was under a duty to send the monies by air mail. Airmail was the proper method of transfer under the contract.

This position is strengthened further by the fact that on Exhibit 6A "Remit proceeds by Telex transfer" was crossed out. The only conclusion the defendant could draw is that the general instructions governed the contract. The defendant could not have known the instructions of the plaintiff to their Bankers. Furthermore, one could not draw an inference that "advise by authenticated Telex" could extend to transferring money by the same means. To do so would mean giving the phrase a very strained construction which would do violence to the plain and ordinary meaning of the words.

The defendant was however in breach by failing to advise the plaintiff immediately as they were instructed to do. The instructions as originally given was varied only in so far as the inability of the defendant to send money in U.S Dollars. All the other instructions remained unchanged. By Telex dated 17th July to the Defendant it reads.

> "The captioned bills are overdue. Our instructions were to advise us by Telex of date and amount paid."

Had the Defendants carried out the instructions in this regard it would have been apparent that wrong instructions were given to the defendants. It would have been corrected and the resulting lengthy delay could have been avoided.

DAMAGES

The claim is for damages which the plaintiff allegedly suffered because of the Defendants' breach. In support of the claim the plaintiff cited the loss suffered from the devaluation and the failure to meet its obligation with overseas suppliers. Counsel for the defence argued that the plaintiff is entitled to interest only on the money that was owing because it is a contract to pay money. The crux of the matter is, in law what quantum of damages if any is the plaintiff entitled to for the breach?

The general rule is that in the case of a breach of contract the contract breaker is responsible for the resultant damage which he ought to have foreseen or contemplated when the contract was made as being liable to result from his breach; or of which there was a serious possibility or real danger. This is the rule that was stated in the Locus classious on damages Hadley v. Baxindale which was applied in Victoria Laundry Windsor Ltd. v. Newman Industries [1942] 2 KB 528 at 539. In other words what is recoverable is foreseeable loss either because

(a) The damage is such as may fairly and reasonably be regarded as arising naturally that is according to the usual course of things from the breach or

(b) of special knowledge which he had at the time of making the contract.

Losses from fluctuations in the foreign currencies market may be recovered only if they were foreseeable at the time of making the contract. This is so because they do not arise naturally in the usual course of things, and must be claimed as special damages. In other words they must be specifically alleged and proved. In Acuna Mills v. Dhanrajmal Gobindram [1968] 1 QBD 665 at p.669 Donaldson J stated:

> "[It was submitted that] there is special rule that losses resulting from revaluation of currencies are always too remote in law to be recoverable. I do not think that there is any such rule. The true rule is that changes in the relative value of currencies are irrelevant if they occur after the date as at which damages fall to be assessed and are usually to be disregarded if they occur on or before that date, either because of the loss flowing from the revaluation has no causal connection with the breach of the contract or because such a loss is not within the assumed contemplation of parties."

The plaintiff had established that the defendant failed to advise them immediately on the 15th June that is when the money was sent. The devaluation took place on the same day. So if the plaintiff is to recover damages, either a causal connection must be established or that such a loss was within the assumed contemplation of the parties. In the President of India v. Lips Maritime Corp [1987] 1 ALL ER 957 which affirmed the judgment of Hobhouse J in International Mineral and Chemical Corp. v. Karl O. Helm AG. [1986] 1 Lloyds Rep. 81 at p.6 104, it was stated as under:

> "It follows that a Plaintiff, where he is seeking to recover damages for the late payment of money, must prove not only that he has suffered the alleged additional special loss and that it was caused by the Defendant's fault, but also that the Defendant has knowledge of the facts or circumstances which make such a loss a not unlikely consequence of such a default. In the eyes of the law, those facts or circumstances are deemed to be special, whether in truth they are or not, and knowledge of them must be proved. Where, as in the present case the relevant facts or circumstances are commonplace, the burden of proof will be easy to discharge and the courts may well be willing to draw inferences of knowledge; in other cases there may have had to be dealt with under the second rule in Hadley v. Baxendale and then the burden of proof will be more significant."

Did the plaintiff prove that the loss was reasonably within the contemplation of the parties at the time of contracting? In drawing inferences as to the parties actual or imputed knowledge, the Court

is not obliged to ignore facts or circumstances of which other people doing similar business would have been aware. In the International Minerals and Corp. case, (supra) given the nationality and business residence of the plaintiff, the international house of the transaction; the fact that currency of the contract was not the currency of the plaintiff; and the value of Belgian Francs in terms of U.S. dollar fluctuation it was reasonable to hold that it was within the contemplation of the parties at the time of contract that any default pertaining to payment of money could cause the plaintiff to suffer loss. In the President of India v. Lips (supra) the findings of fact was that it was the general expectation among businessmen that sterling would decline against the U.S. dollar. Secondly, a clause in the contract was indicative that devaluation of sterling was contemplated.

In the present case, the plaintiff has failed to show that a devaluation was contemplated and therefore the loss was foreseeable. The plaintiff did not present any facts/evidence to the Court to establish the economic climate of Guyana at the time of contract, that is to say that a devaluation is imminent, therefore the Court cannot impute any such knowledge to the defendants. Also, there is no clause in the contract to suggest that a devaluation was contemplated. Of much importance, is that by the terms of the contract the correct mode of transfer was used and therefore any delay in advising the plaintiff by telex could not establish the causal connection between the loss caused by the devaluation.

So what is the plaintiff entitled to? The Court under the Law Reform Miscellaneous Provision Act can award interest on the debt for the failure to inform for the period 15th June to 25th July, 1990. Since there were provisions in the contracts for interest in the event of delay, 23% on the 1st Bill and 25% on the second, the Court would award interest at the higher rate of 25% for the period.

Accordingly, there is judgment for the plaintiff on its claim which is limited to the loss of interest at the rate of 25% on the Bills of Exchange for the period 15th June to 25th July, 1990.

The final result is as follows:

US.$93676.00 x 25% x 41 days = US$2630.62.

Reduced to Guyana dollars 2630.62 x 33 = $86810.00.

Costs awarded to the plaintiff to be agreed or taxed.