Jamaica Carpet Mills Ltd v First Valley Bank

COURT OF APPEAL OF JAMAICA
ROWE P, CAREY and WHITE JJA
17th to 19th MARCH, 5th, 6th JUNE, 22nd SEPTEMBER 1986

Order – Judgment debt – Calculation in foreign currency – Conversion to currency of jurisdiction – Date at which currency to be converted – Date of payment of debt

Stare decisis – Privy Council decision – Precedent binding on national court – Privy Council decision overturned by subsequent decision of House of Lords – National court able to follow decision of House of Lords

Where a party successfully sues in the courts of Jamaica for a debt and a foreign currency is the currency of the contract giving rise to that party's claim, the proper date for converting the money debt into Jamaican currency is the date of payment rather than the date at which such payment fell due (the "breach date").

Miliangos v George Frank (Textiles) Ltd [1975] 3 All ER 801 followed.

Syndic in Bankruptcy of Salim Nasrallah Khoury v Khayat [1943] AC 507 and *Re United Railways of Havana and Regla Warehouses Ltd* [1961] AC 1007 not followed.

Except where by reason of custom or statute or for reasons peculiar to the jurisdiction in which the dispute arose the applicable law is not English law, the Privy Council will follow a decision of the House of Lords which covers the point in issue. Accordingly, where a decision of the Privy Council conflicts with a later decision of the House of Lords in which the error of the earlier decision is expressly stated, a court which is itself obliged to follow the decisions of the Privy Council may in the circumstances follow the decision of the House of Lords instead.

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1985] 2 All ER 947 followed.

Will v Bank of Montreal [1931] 3 DLR 526 and *Corbett v Social Security Commission* [1962] NZLR 878 applied.

Per Carey JA. An appellate court in respect of which the Privy Council is the court of last resort may decline to follow a decision of that body which is in conflict with a later decision of the House of Lords where the following pre-conditions exist: (i) a point of positive law (i.e the common law) has been settled by the decision; (ii) the House of Lords has adverted to and indicated wherein lay the error of the earlier decision; and (iii) if the matter were to come up before the Privy Council, it would be bound to respect the later decision of some of its members sitting in another place.

Cases referred to in the judgments

Archer v Cutler [1980] 1 NZLR 386.
Australian Consolidated Press Ltd v Uren [1969] 1 AC 590, [1967] 3 All ER 523, [1967] 3 WLR 1338, PC.
Baker v R (1975) 23 WIR 463, [1975] AC 774, [1975] 3 All ER 55, [1975] 3 WLR 113, PC.
Bowen v Douglas (unreported), Rowe J.
Cassell & Co Ltd v Broome [1972] AC 1027, [1972] 1 All ER 801, [1972] 2 WLR 645, HL.
Colonial Bank of Australasia Ltd v Marshall [1906] AC 559, 75 LJPC 76, 95 LT 310, PC.
Corbett v Social Security Commission [1962] NZLR 878, New Zealand CA.
Douglas v Bowen (1974) 22 WIR 333, 12 Jamaica LR 1544, Jamaica CA.
Eshugbayi Eleko v Nigeria Government Officer Administering [1928] AC 459, 97 LJPC 97, 139 LT 527, PC.
Fatuma Binti Mohammed Bin Salim Bakhshuwen v Mohammed Bin Salim Bakhshuwen [1952] AC 1, PC.
Greenwood v Martins Bank Ltd [1933] AC 51, [1932] All ER Rep 318, HL.
Hart v O'Connor [1985] AC 1000, [1985] 2 All ER 880, [1985] 3 WLR 214, PC.
Lasala (de) v de Lasala [1980] AC 546, [1979] 2 All ER 1146, [1979] 3 WLR 390, PC.
London Joint Stock Bank v Macmillan and Arthur [1918] AC 777, [1918-19] All ER Rep 30, HL.
Miliangos v George Frank (Textiles) Ltd [1976] AC 443, [1975] 3 All ER 801, [1975] 3 WLR 758, HL.
R v Barbar (1973) 21 WIR 343, 12 Jamaica LR 1127, Jamaica CA.
R v Commissioner of Police, ex parte Cephas (No 2) (1976) 24 WIR 500, 15 Jamaica LR 3, Jamaica Full Court.
Robins v National Trust Co Ltd [1927] AC 515, [1927] 2 DLR 97, 96 LJPC 84, 137 LT 1, PC.
Rookes v Barnard [1964] AC 1129, [1964] 1 All ER 367, [1964] 2 WLR 269, HL.
Salim Nasrallah Khoury (Syndic in Bankruptcy of) v Khayat [1943] AC 507, [1943] 2 All ER 406, PC.

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80, [1985] 2 All ER 947, [1985] 3 WLR 317, PC.
United Railways of Havana and Regla Warehouses Ltd, Re [1961] AC 1007, [1960] 2 All ER 332, [1960] 2 WLR 969, HL.
Will v Bank of Montreal [1931] 2 WWR 364, [1931] 3 DLR 526, Ford J.

Appeal

Jamaica Carpet Mills Ltd appealed to the Court of Appeal of Jamaica (civil appeal 79 of 1984) against an order of Alexander J that a judgment debt of (US)$100,000 which it was required to pay to First Valley Bank (the respondent) should for the purposes of payment be converted into Jamaican currency at the date of payment. The court dismissed the appeal but reserved its reasons. The facts are set out in the judgment of Rowe P.

W. K. Chin See QC and *John Vassell* (instructed by Dunn, Cox & Orrett) for the appellant.
Allan Wood (instructed by Livingston, Alexander & Levy) for the respondent.

The court reserved its reasons.

Rowe P. By specially-indorsed writ issuing out of the Supreme Court the respondent claimed against the appellant as debt due by the appellant the sum of (US) $201,166.60 with interest thereon at 10 per cent from January 1979 to 31st August 1983 amounting to (US) $93,877.74, making the total claim (US) $295,044.34. Then the US currency was converted to the Jamaican currency at the parallel market rate then existing at (J) $2.60 to (US) $1, and the resulting sum was (J) $767,115.28.

Vicart Inc of Pennsylvania, U S A, was in the 1970s an associated trading partner of the appellant. Attempts at unscrambling the several business relationships between these two parties foundered and led to a suit being filed by Vicart Inc against the appellant in the Supreme Court which proceeded as far as the defence and was not further prosecuted. Vicart Inc had previously obtained judgment against the appellant in Pennsylvania, USA, in the sum of (US) $201,166.60 and it appears that this judgment was the basis of the Jamaican action. On 13th April 1983, Vicart Inc assigned to First Valley Bank (the respondent) –

"all the rights, interest and privileges, (a) which assignor had and may have in the accounts (as the term is defined in the Pennsylvania Uniform Commercial Code (UCC) now existing or hereafter made) arising out of goods sold or services performed to, or for the benefit of Jamaica Carpet Mills [the appellant] of Spanish Town, Jamaica . . ."

On the basis of this assignment the present action was brought.

In an affidavit of 29th February 1984, the managing director of the appellant company admitted its readiness and willingness to pay the Jamaican dollar equivalent of (US) $100,000. Summons for summary judgment came on before the master on 21st March 1984, when the appellant admitted a debt of (US) $100,000 for which sum judgment was entered against it. When the matter came on before Alexander J, on 15th November 1984, the following note was made by him at the commencement of the proceedings:

"Judgment entered – converting that to Jamaican dollars at rate of (J) $1.75 to (US) $1 but preserving the right to argue whether greater amount due owing to fluctuating rate of Jamaican dollar against US dollar. By agreement between the parties – only issue is rate of exchange."

At the end of the hearing Alexander J made two orders. The second gave liberty to the appellant to file a defence in relation to the respondent's claim in excess of (US) $100,000 and from that order there is no appeal. The first order was that the sum of (US) $100,000 was to be converted into Jamaican dollars at the rate of exchange in force at the date of payment and not at the rate of (J) $1.78 to (US) $1 referred to in the consent order before the master on 21st March 1984. The short point taken on appeal was that the trial judge erred in law in determining that the relevant date for conversion into Jamaican dollars was the date of payment rather than the date on which the debt became due. We listened carefully to the extensive arguments presented on both sides and were persuaded by the respondent's attorney that there was no error in the order made by Alexander J. Consequently, we dismissed the appeal with costs to the respondent to be agreed or taxed and promised to give written reasons for that decision. My reasons are contained herein.

The indorsement to the writ stated that the debt fell due in January 1979. If the breach date rule for conversion is applicable, the relationship between the Jamaican and the US dollar is fixed as at that date. In June 1978, according to the appellant it did all that it could within the law of Jamaica governing exchange control to pay its debt, that is to say it deposited with Citibank a sum equivalent to (US) $145,000 at the then rate of (US) $1 to (J) $0.9125, and the appellant in proof thereof exhibited Bank of Jamaica, Exchange Control Act, deposit advice Nos 1/07489 and 1/07491. Foreign exchange was not then available and the sum deposited was returned to the appellant.

Five law lords gave reasoned judgments in *Re United Railways of Havana and Regla Warehouses Ltd* [1961] AC 1007, in which one of the questions for determination was framed by Viscount Simonds thus (at page 1043):

"The question, summarily stated, is what sum in sterling is recoverable by a plaintiff suing in the courts of this country, for a sum of money payable

in foreign currency in a foreign country under an instrument of which the proper law is a foreign law."

The instant case proceeded on the basis that the proper law of this debt is the law of Pennsylvania. Therefore Viscount Simonds's answer to his question is relevant when he continued:

"Admittedly, the claim must be for a sterling sum and the judgment must be in sterling. It is established by authority binding on this House that a claim for damages for breach of contract or for tort in terms of a foreign currency must be converted into sterling at the rate prevailing at the date of breach or tortious act."

Viscount Simonds concluded this part of his speech by saying (at page 1046):

"I am content to accept as a correct statement of law, whichever way the conclusion is reached, the propositions in rule 177 at page 914 of *Dicey's Conflict of Laws* (7th Edn) as follows: (1) An English court cannot give judgment for the payment of an amount in foreign currency . . . (2) For the purpose of litigation in England (a) a debt expressed in a foreign currency must be converted into sterling with reference to the rate of exchange prevailing on the day when the debt was payable."

Lord Reid considered alternative and competing dates for the time of converting the foreign currency into sterling and came down firmly on the view that only one date was practicable. He said (at page 1053):

"So even if this were still an open question, I would have to come to the conclusion that in every case where a plaintiff sues for a debt due in a foreign currency, that debt should be converted into sterling at the rate of exchange current when the debt fell due. That rule may in some cases be artificial, it may even be unjust, but it has been accepted for a long time, it is clear and certain, and no other rule could be relied on to produce a more just result: indeed, no other rule is really practicable."

Lord Denning found the law clear that judgment could only be given in England in sterling. He considered the convenient date for conversion and, in an instructive passage of his speech, he said (at pages 1068 to 1070):

"Now the trust company comes to the courts in England to recover the sums in arrear and unpaid. And if there is one thing clear in our law, it is that the claim must be made in sterling and the judgment given in sterling. We do not give judgments in dollars any more than the United States courts give judgments in sterling. But the question is, at what date is the rate of exchange to be taken? Is it to be the date when the rentals fell due, or the date of the winding-up?

"If the trust company had sought to recover judgment in the United States, it would, I presume, have been able to sue there for a debt in dollars. But it cannot sue here in debt. There is no sterling debt. Its claim must be in damages. It must claim damages for breach of contract because of non-payment of dollars in the United States. As such, the claim is indistinguishable in principle from any claim for breach of contract. The rate of exchange is to be taken at the time when the breach took place. This is, I think, a rule of positive law established by decisions of this House and of the Judicial Committee of the Privy Council; but as it has been subject to some criticism, I would like to attempt some explanation of it.

"The origin of the rule, as I understand it, lies in the fact that for long years sterling was regarded as a stable currency 'of whose true-fixed and resting quality there is no fellow in the firmament'. Sterling is the constant unit of value by which, in the eye of the law, everything else is measured. So long as sterling is regarded as stable whilst other currencies go up and down, it would seem that justice is best done by taking the rate of exchange at the date of the breach. The creditor is entitled to be put into as good a position as if the debtor had done his duty and paid the debt on the due date; and he is only truly put into such a position if the debt is converted into sterling at that date; rather than at a later date when the foreign currency has depreciated or appreciated.

"The question is whether the rule is still to apply when sterling loses the value which it once had. We have seen in recent years how it has depreciated. It has departed from the gold standard: the pound has been devalued; and there has been much inflation. It may be said that in these conditions the rule is apt to produce an injustice to a creditor in the United States who is owned money in dollars: because, if he comes to our courts after devaluation, he does not recover sufficient sterling to compensate him for his loss. But I am afraid that, if he chooses to sue in our courts instead of his own, he must put up with the consequences. Our courts here must still treat sterling as if it were of the same value as before: for it is the basis on which all our monetary transactions are founded. Thus, within this country itself, a man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time. Just as an English creditor in this country suffers from the depreciation of the pound, so also does a foreign creditor who comes to this country seeking payment in sterling. He must take it that in England we have always looked upon a pound as a pound whatever its value in other countries: and if we award him damages calculated in sterling at the time of the breach, we are awarding him what in the eye of the law is full compensation for the breach."

Viscount Simonds quoted extensively from the speech of Lord Wright in the Privy Council decision, *Syndic in Bankruptcy of Salim Nasrallah Khoury v Khayat* [1943] AC 507, which posed a question as to the rate at which a quantity of Turkish gold coins payable at Haifa should be converted into

sterling. Lord Wright identified four different rules which might be applicable as being (i) the date at which payment was due, (ii) the date of actual payment, (iii) the date of the commencement of proceedings to enforce payment, and (iv) the date of judgment, and stated clearly that English law had adopted the first rule, that is conversion at the date on which the payment fell due.

The law on this point was considered settled. Schedule VIII to the Judicature (Civil Procedure Code) Law provides forms of judgment, and the indication is that judgment must be delivered in sterling or, since 1969, in Jamaican dollars. Provision is made in section 4(3) of the Judgments (Foreign) (Reciprocal Enforcement) Act that:

> "Where the sum payable *under a judgment* which is to be registered is expressed in currency other than the *currency of* Jamaica, the judgment shall be registered as if it were a judgment for such sum in the currency of *Jamaica as, on the basis of the rate of exchange prevailing at the date of the judgment of the original court, is equivalent to the sum so payable", [emphasis supplied]*

the effect of which is that there is no room there for the application of a date of conversion later than the date of the judgment in the foreign court.

Another statutory provision in relation to the appropriate date for the determination of the applicable rate of exchange is to be found in section 72 of the Bills of Exchange Act. This part of the Act has the sub-title "Conflict of Laws", and the seventh paragraph of section 72 provides that:

> "Where a bill is drawn out of, but payable in, this Island, and the sum payable is not expressed in the currency of this Island, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for *sight drafts at the place of payment on the day the bill is payable." [emphasis supplied]*

In the cases to which this section applies the court is obliged to apply the breach date rule.

Mr Chin See argued that the courts in Jamaica are bound by the decision in the *United Railways of Havana* case and the decision of the Privy Council in *Khoury v Khayat* and that the statutory provisions referred to above indicate that the Parliament of Jamaica adopted the breach date rule as the one applicable to Jamaica.

In England things have not stood still since the decision in *United Railways of Havana* in 1960, and the latest expression of the House of Lords on this issue is to be found in the decision of that House in *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801. It was decided that the rules laid down in 1960 in the *United Railways of Havana* case should no longer be followed and that, as a consequence, judgment could be entered in England in a foreign currency and, if it became necessary to enforce that judgment, the amount should be converted into sterling at the date when leave was given to enforce the judgment.

Lord Simon of Glaisdale dissented in an eloquent judgment which Mr Chin See readily adopted for purposes of his argument. Lord Simon would have followed the decision in the *United Railways of Havana* case and pleaded that if the drastic departure proposed by other members of the House were to be adopted that course was the province of Parliament. He was a lone voice and Lord Wilberforce led the majority into doubting whether prompt and comprehensive legislative reform in the field of foreign currency obligation was practicable. Lord Wilberforce explained that in commercial transactions of the type with which he was dealing, the creditor had certain rights and he said (at page 811):

> "There is, unfortunately, as Lord Radcliffe pointed out in the *Havana Railways* case, a good deal of confusion in English cases as to what the creditor's rights are. Appeal has been made to the principle of nominalism, so as to say that the creditor must take the pound sterling as he finds it. Lord Denning said so in the *Havana Railways* case and I can safely and firmly disagree with him in that because he has himself, since then, come to hold another view. The creditor has no concern with pounds sterling; for him what matters is that a Swiss franc for good or ill should remain a Swiss franc. This is substantially the reasoning of Holmes J in the important judgment of the US Supreme Court in *Deutsche Bank v Humphrey*. Another argument is that the 'breach date' makes for certainty whereas to choose a later date makes the claim depend on currency fluctuations. But this is only a partial truth. The only certainty achieved is certainty in the sterling amount – but that is not in point since sterling does not enter into the bargain.. The relevant certainty which the rule ought to achieve is that which gives the creditor neither more nor less than he bargained for. He bargained for 415,522.45 Swiss francs; whatever this means in (unstipulated) foreign currencies, whichever way the exchange into those currencies may go, he should get 415,522.45 Swiss francs or as nearly as can be brought about. That such a solution, if practicable, is just, and adherence to the 'breach date' in such a case is unjust in the circumstances of today, adds greatly to the strength of the argument for revising the rule or, putting it more technically, it adds strength to the case for awarding delivery *in specie* rather than giving damages."

In the instant case the appellant agrees that he owes (US) $100,000 to the respondent. Is there any obstacle in the path of this court saying to him: give the respondent a sufficient sum of Jamaican currency to enable him to purchase the (US) $100,000 which is owed? The obstacle is said to be the decision in the *United Railways of Havana* case.

I have to consider briefly the relationship between the courts in Jamaica on the one hand and the Judicial Committee of the Privy Council on the

other hand. In *Baker v R* (1975) 23 WIR 463 Lord Diplock in delivering the decision of the majority of the Board said (at page 471):

> "Although the Judicial Committee is not itself strictly bound by the *ratio decidendi* of its own previous decisions, courts in Jamaica are bound as a general rule to follow every part of the *ratio decidendi* of a decision of this Board in an appeal from Jamaica that bears the authority of the Board itself."

It has been argued before us that the binding authority of the decisions of the Privy Council on courts of Jamaica only applies to decisions in appeals from Jamaica and the authority for such a proposition is said to be *Baker v R* (above). I do not share that view. I was a member of the court in *R v Commissioner of Police, ex parte Cephas (No 2)* (1976) 24 WIR 500, in which Henry J in delivering the judgment of the Full Court referred to the decision of the Privy Council, *Eshugbayi Eleko v Nigeria Government Officer Administering* [1928] AC 459, and said (at page 502):

> "That judgment is binding on this court because although it was given in a case coming from another territory the issue of law in both cases is the same."

And he relied upon *Fatuma Binti Mohammed Bin Salim Bakhshuwen v Mohammed Bin Salim Bakhshuwen* [1952] AC 1. It was decided in that case that on the assumption that the rights of the parties were to be determined without reference to any Ordinance dealing specifically with wakfs, that the interpretation of Mohamedan law given by the Judicial Committee of the Privy Council in a series of cases was not confined to that law as applied or administered in India and that decisions of the Board given in appeals which came from India were binding on the Court of Appeal for Eastern Africa in appeals to that court from the Supreme Court of Kenya.

In *R v Barbar* (1973) 21 WIR 343 the court was concerned with the interpretation of the Customs Act of Jamaica, and Luckhoo acting P in considering the relationship between Jamaican courts and the English appellate courts had this to say (at page 350):

> "I think the true position is that where a Colonial legislature passes a law *in pari materia* with an English Act the Colonial appellate court is not bound to follow decisions of the English appellate courts construing the English enactment but such decisions are of course entitled to great respect."

Sitting as the trial judge in *Bowen v Douglas* (unreported) (on appeal as *Douglas v Bowen* (1974) 22 WIR 333), I awarded the plaintiff a sum of $5000 for compensation and $7500 as exemplary damages for what I then described as –

> "the most outrageous trespass, the most cold-blooded disregard of anyone's rights, the most calculated misuse of personal power, the most cruel onslaught on a defenceless woman and her children without rhyme or reason that I have ever seen in these courts."

The matter reached the Court of Appeal and it was held (Graham-Perkins JA dissenting) that the court had no power to award exemplary damages in a case of trespass; see *Douglas v Bowen*. Luckhoo acting P considered the decisions in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801, *Australian Consolidated Press Ltd v Uren* [1967] 3 All ER 523 and *Rookes v Barnard* [1964] 1 All ER 367 and said (at page 338):

> "It cannot, however, be said that in Jamaica the common law relating to the award of damages, inherited as it was from England in 1664, has been shown to have developed in any way different from the way it has in England."

The court held that the categories of cases in which exemplary damages might be awarded and which were enumerated in *Rookes v Barnard* and explained in *Cassell & Co Ltd v Broome* should be adopted and applied in Jamaica. In coming to this decision the court had in mind the decision of the Privy Council in *Robins v National Trust Co Ltd* [1927] AC 515 where it was said that the House of Lords is the Supreme tribunal to settle English law.

Archer v Cutler [1980] 1 NZLR 386 was considered by the Privy Council in *Hart v O'Connor* [1985] 2 All ER 880. In the former case, the point was as to the capacity of a person of unsound mind to enter into a contract and the correctness of that decision, accepted on both sides of the Bar when *Hart v O'Connor* was litigated in New Zealand, arose for determination in *Hart v O'Connor*.

Lord Brightman set out the Board's approach thus (at page 886):

> "If *Archer v Cutler* is properly to be regarded as a decision based on considerations peculiar to New Zealand, it is highly improbable that their lordships would think it right to impose their own interpretation of the law, thereby contradicting the unanimous conclusions of the High Court and the Court of Appeal of New Zealand on a matter of local significance. If however the principle of *Archer v Cutler*, if it be correct, must be regarded as having general application throughout all jurisdictions based on the common law, because it does not depend on local considerations, their lordships could not properly treat the unanimous view of the courts of New Zealand as being necessarily decisive. In their lordships' opinion the latter is the correct view of the decision."

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1985] 2 All ER 947 was heard in advance of *Hart v O'Connor* but judgment was delayed to 3rd

July 1985. Lord Scarman and Lord Brightman were members of the Board which sat in the two cases and it is not, therefore, surprising that a similar attitude should be manifested in both cases as to the general interpretation of the common law. The *Tai Hing* case involved the extent of a customer's duty to his bank and, where there is a forgery by the customer's employee, whether the customer is under a duty to take reasonable precautions in the management of his business to prevent such frauds. The law on the matter was concluded in England by the decisions in *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777 and *Greenwood v Martins Bank Ltd* [1932] All ER Rep 318.

The Privy Council treated a submission that even if the English courts were bound by the decision of the House of Lords, the Privy Council was not and could therefore formulate a different rule. Lord Scarman replied in this manner (at pages 957, 958):

> "For these reasons their lordships answer the general question by accepting the submission of the appellant company that in the absence of express terms to the contrary the customer's duty is in English law as laid down in *Macmillan* and *Greenwood*. The customer's duty in relation to forged cheques is, therefore, twofold: he must exercise due care in drawing his cheques so as not to facilitate fraud or forgery and he must inform his bank at once of any unauthorised cheques of which he becomes aware.
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> "Their lordships cannot leave the general question without making some comment on a matter of some importance which was discussed in argument before them.
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> "It was suggested, although only faintly, that even if English courts are bound to follow the decision in *Macmillan's* case the Judicial Committee is not so constrained. This is a misapprehension. Once it is accepted, as in this case it is, that the applicable law is English, their lordships of the Judicial Committee will follow a House of Lords' decision which covers the point in issue. The Judicial Committee is not the final judicial authority for the determination of English law. That is the responsibility of the House of Lords in its judicial capacity. Although the Judicial Committee enjoys a greater freedom from the binding effect of precedent than does the House of Lords, it is in no position on a question of English law to invoke the *Practice Statement* of July 1966 pursuant to which the House has assumed the power to depart in certain circumstances from a previous decision of the House (see [1966] 3 All ER 77). And their lordships note, in passing, the statement's warning against the danger of disturbing retrospectively the basis on which contracts have been entered into. It is, of course, open to the Judicial Committee to depart from a House of Lords' decision in a case where, by reason of custom or statute or for other reasons peculiar to the jurisdiction where the matter in dispute arose, the Judicial Committee is required to determine whether English law should or should not apply. Only if it be decided or accepted (as in this case) that English law is the law to be applied will the Judicial Committee consider itself bound to follow a House of Lords' decision. An illustration of the principle in operation is afforded by the recent New Zealand appeal, *Hart v O'Connor* [1985] 2 All ER 880, in which the Board reversed a very learned judgment of the New Zealand Court of Appeal as to the contractual capacity of a mentally-disabled person, holding that, because English law applied, the duty of the New Zealand Court of Appeal was not to depart from what the Board was satisfied was the settled principle of that law."

Mr Wood adverted to a Canadian and a New Zealand case, in both of which the court preferred a decision of the House of Lords to an earlier decision of the Privy Council. In 1931, in *Will v Bank of Montreal* [1931] 3 DLR 526 Ford J held that where a Canadian court in attempting to apply English law discovers that a decision of the Privy Council is in conflict with a later decision of the House of Lords in which the error of the earlier decision is expressly stated it must apply the law as enunciated in the later decision. Ford J foreshadowed what the Privy Council itself would do in the *Tai Hing* case by following *London Joint Stock Bank v Macmillan* rather than the Privy Council decision in *Colonial Bank of Australasia Ltd v Marshall* [1906] AC 559.

The Court of Appeal in New Zealand in *Corbett v Social Security Commission* [1962] NZLR 878 held that in very exceptional circumstances the New Zealand Court of Appeal would be justified in following a later decision of the House of Lords in preference to an earlier conflicting decision of the Privy Council where the House pointed out in what respects the Board had erred. Even so, the New Zealand court would only be justified in following that course if the case involved only principles of English law which were admittedly part of the law of New Zealand and there were no relevant differentiating local circumstances.

Mr Chin See argued that the breach date rule had by virtue of the provisions of the Judicature (Civil Procedure Code) Law, the Bills of Exchange Act and the Judgments (Foreign) (Reciprocal Enforcement) Act become an integral part of Jamaican law and could not be said to be English law. He argued further that, not to apply the breach date test, would be to upset several areas of Jamaican law and would create an anomaly especially in relation to enforcement of foreign judgments. I am of the view that the twin principles, *viz.* that judgments 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 were received as part of the English common law and have not been modified by any Jamaican statute or judgments of the court. As Luckhoo acting P said of the common law relating to the award of damages in *Douglas v Bowen* (1974) 22 WIR 333, I am equally of the view that it has not been shown that the breach date has developed in Jamaica in any way different from the way it has developed in England. I am, therefore, of the view that the Privy Council would now

decide that the decision in *Syndic in Bankruptcy of Salim Nasrallah Khoury v Khayat* [1943] AC 507 ought not to be followed in the light of the decision of the House of Lords in the *Miliangos* case [1975] 3 All ER 801 and that it is open to this court to adopt the decision and reasoning of the House of Lords in the *Miliangos* case and to apply that decision to the instant appeal. It was for these reasons that I concurred in the decision to dismiss the appeal.

Carey JA. The question raised in this appeal is of great importance to those Jamaican debtors sued with respect to foreign debts, particularly where their creditors are US concerns or persons. From the perspective of the Jamaican debtor, he is more than concerned as respects the date at which the conversion must be made, seeing that he must find the Jamaican currency equivalent of his US debt. We are, like so many other countries, no matter whether third world or developed, gravely affected by the fluctuations in exchange rates. We are plainly unable to say, as at one time was claimed for sterling, that the Jamaican dollar is "a stable currency of whose true fixed and resting quality there is no fellow in the firmament"; *per* Lord Denning in *Re United Railways of Havana and Regla Warehouses Ltd* [1960] 2 All ER 332 at page 356. Our dollar is much buffeted and at the mercy of weekly "auctions", which determine its value as against the US dollar from time to time.

In the instant case, the appellants who were the defendants in the court below, incurred liability to the extent of (US) $201,166.60 to a company called Vicart Inc which, in turn, assigned the debt to the present respondents, a bank incorporated in Pennsylvania, USA. By their writ, the respondents stated the sum owed plus interest, as amounting to $295,044.34. They claimed the Jamaican dollar equivalent at the rate of exchange existing at the date of their writ, *viz.* 5th August 1983 and which was (J)$2.60 to (US)$1. When the respondents applied to enter summary judgment, the appellants consented to judgment being entered for (US)$100,000 but for that sum to be converted at the rate of exchange in existence at the date of the hearing, *viz.* (J)$1.78 to (US)$1. The true date of conversion thus became a live issue. In the event, the parties agreed that the sole question for the determination of the judge was the proper date of conversion.

The trial judge, having heard submissions from counsel made the following order:

> "The sum of (US)$100,000 adjudged by the consent order of the master dated 21st March 1984 be converted into Jamaican dollars at the rate of exchange in force at the date of payment of the said sum, rather than at the rate of (US)$1 to (J)$1.78 referred to in the said order."

The consequence of that order was to make the *date of payment* the operative date at which the conversion should be made. This court has not hitherto, so far as I am aware, been required to consider the question which arises for determination in this appeal, which may be thus stated: where a party

successfully sues in our courts for a debt where a foreign currency is the currency of the contract giving rise to the claim and the money of payment thereunder, what is the proper date to take for the purpose of converting into Jamaican currency, the amount of foreign currency found due from the defendant?

Prior to 1975 when the House of Lords decided in *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 that, if it was necessary to enforce a judgment expressed in the currency of a foreign country, the amount was to be converted at the date when leave was given to enforce that judgment, the rule was that the rate of exchange was to be calculated at the rate prevailing when the sum fell due (i.e. the breach date). The authority for that positive rule of English law was a case decided in 1960, *Re United Railways of Havana and Regla Warehouses Ltd.*

Mr Chin See, who appeared before us for the appellants, argued that this court was bound by the "breach date rule" articulated in *Re United Railways of Havana* because the rule, which was of long standing, had been enunciated by Lord Wright who delivered the opinion of the Privy Council in *Syndic in Bankruptcy of Salim Nasrallah Khoury v Khayat* [1943] 2 All ER 406. Further, where there was conflict between those two eminent bodies, this court was obliged loyally to follow the decision of the Privy Council. For his part, Mr Wood contended that this court was not bound by the Privy Council decision since the Judicial Committee was not then sitting as the final court for Jamaica but rather as the final court for Palestine. Doubtless appreciating that the members of the court were not impressed by that submission, he argued in the alternative that, where there existed such a conflict as indicated by Mr Chin See, the attitude of this court should be governed by two Commonwealth decisions, the first from a comparatively near neighbour to the north, Canada, and the other from the far distant Antipodes, New Zealand. He assured us that the result of this court following those decisions, would be that the decision of the House of Lords would prevail. In their reply, the appellants pointed out that *Miliangos* overruled no principle of English law but changed policy by judicial edict.

I must confess that I found this riposte curious, seeing that the appellants had argued *ex hypothesi* that the "breach date rule" was a rule of English law. If the two cases, *Re United Railways of Havana* and *Miliangos,* are not concerned with a rule of English law, the matter is *res integra,* and this court would be free to come to its own decision unfettered by those cases. But there can be little doubt that in the instant case we are concerned with a rule of positive law. Viscount Simonds in *Re United Railways of Havana* observed (at page 343): "We are engaged in settling the law on a question in which any rule is artificial and to some extent arbitrary". Lord Denning said (at page 356):

> "This [i.e. the breach date rule] is, I think, a rule of positive law established by decisions of this House and of the Judicial Committee of the Privy Council . . ."

Lord Reid and Lord Radcliffe who also delivered opinions expressed themselves to the like intent. To dissent from the considered view of such an illustrious company, is not bravery but eccentricity.

In *Will v Bank of Montreal* [1931] 3 DLR 526, the Supreme Court of Alberta, in attempting to apply a principle of English law, discovered that a conflict existed between the House of Lords and the Privy Council. Ford J basing himself on an opinion of Viscount Dunedin in *Robins v National Trust Co Ltd* [1927] 2 DLR 97, had this to say (at pages 536, 537):

> "In my humble opinion the logical result of what Lord Dunedin says is that the 'Colonial courts', in which term, I take it, he includes the courts of the self-governing Dominions because he was there dealing with an appeal from Ontario, have as their primary duty to find out how the law has been 'settled' and then to apply it as so settled. If the House of Lords as 'the supreme tribunal to settle English law' has settled it in a way differing from that other tribunal by whom 'equally . . . the point of difference may be settled', the House of Lords in doing so pointing out in express terms in what respect the other has erred, I, for my part feel it my duty to apply the law as I find it rightly settled. In doing so I am not in any way refusing to be bound by the judgment of the Privy Council. There is a great difference between a subordinate court saying that the Privy Council is wrong and refusing to follow its decisions and in following the law as laid down by the House of Lords because the court has said that the Privy Council has taken a wrong view of English law."

The matter of conflict was also debated in the Court of Appeal of New Zealand in *Corbett v Social Security Commission* [1962] NZLR 878. North J said (at page 901):

> "At the same time, I think that it may safely be recognised that in very exceptional circumstances, this court would be justified in following a later decision of the House of Lords in preference to an earlier conflicting decision of the Privy Council, and particularly so if the House had discussed the Privy Council decision and had pointed out in what respects it was of opinion that the Board had erred. But even so, that course would only be justified if, as Sir John Latham CJ put it in *Piro's* case, the case involved only principles of English law which admittedly are part of the law of New Zealand and there are no relevant differentiating local circumstances. In such a case I would think that the Board would expect the Court of Appeal in New Zealand not to be too timorous but to act in a common-sense way and not put litigants to the very considerable expense of proceeding to England to have the matter put right, for it is unthinkable that the Privy Council, which is not bound by its earlier decisions, would lend any encouragement to an interpretation in other parts of the Commonwealth, of English law contrary to the clearly expressed view of the supreme tribunal for settling English law."

From these cases, it is readily apparent that an appellate court in respect of which the Judicial Committee of the Privy Council is the court of last resort, may decline to follow a decision of that body which is in conflict with a later decision of the House of Lords where the following pre-conditions exist: (i) a point of positive law (i.e. the common law) has been settled by the decision; (ii) the House of Lords has adverted to, and indicated wherein lay the error of the earlier decision; and (iii) if the matter were to come up before the Board, it would be bound to respect the later decision of some of its members sitting in another place.

In so far as the instant appeal is concerned, pre-condition (i) is undoubtedly present. As to pre-condition (ii), all their lordships adverted to the earlier decision of *Re United Railways of Havana and Regla Warehouses Ltd* [1960] 2 All ER 332 which was in keeping with the Privy Council case, *Syndic in Bankruptcy of Salim Nasrallah Khoury v Khayat* [1943] 2 All ER 406. Lord Simon of Glaisdale who delivered a dissenting opinion (in *Miliangos* [1975] 3 All ER 801) was in no doubt that the majority of their lordships were overruling the earlier decision. He plainly eschewed technical niceties, for in felicitous terms he asserted (at page 816):

> "I say overruled expressly: it is better to avoid euphemisms like 'departed from', a wise decision is more likely to be achieved if the reality is faced."

The majority of the law lords in *Miliangos* were not, however, troubled by Lord Simon's strictures for they "declined to follow" *Re United Railways of Havana*. Lord Wilberforce was plainly of the view that there was no error in the earlier decision. He said as much (at page 806):

> "My lords, even if I were inclined to question some of the arguments used in the speeches, I should find it inappropriate and unnecessary to say that, in the circumstances of the time and on the arguments and authorities presented, the decision was wrong or is open to distinction or explanation."

But the basis for no longer considering *Re United Railways of Havana* as binding, was that there had "emerged fresh considerations". The fresh considerations were clearly identified by Lord Edmund-Davies in the following extract (at page 838):

> "I agree with Lord Wilberforce that the change which has come over the 'foreign exchange' situation generally and the position of sterling in particular in the course of the last fifteen years justifies us in answering that question in the affirmative."

Lord Cross stands out in saying that he felt no enthusiasm for the earlier decision and indeed observed (at page 837), "Indeed, to speak bluntly, I think it [i.e. the *Havana* case] was wrong on both points". The learned law

lord himself entertained no illusions but that the changed circumstances justified the House in declaring that the breach date rule ought to be considered as no longer an existing rule of law. In the light of these statements from their lordships, I would have little hesitation in saying that, if the matter were to come before the Judicial Committee, their lordships would assert the validity of the *date of payment* rule as being the settled and positive rule of English law which had always existed. I am confident in this view of the Boards's attitude by the comforting words of Lord Diplock in the Privy Council decision of *de Lasala v de Lasala* [1979] 2 All ER 1146 at page 1153 where he declared:

> "This Board is unlikely to diverge from a decision which its members have reached in their alternative capacity, unless the decision is in a field of law in which the circumstances of the Colony or its inhabitants make it inappropriate that the common law in that field should have developed on the same lines in Hong Kong as in England."

As recently as 1985, in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947, Lord Scarman took the opportunity to restate the principle. He explained (at page 958):

> "Once it is accepted, as in this case it is, that the applicable law is English, their lordships of the Judicial Committee will follow a House of Lords' decision which covers the point in issue. The Judicial Committee is not the final judicial authority for the determination of English law"

and later he added:

> "It is, of course, open to the Judicial Committee to depart from a House of Lords' decision in a case where, by reason of custom or statute or for other reasons peculiar to the jurisdiction where the matter in dispute arose, the Judicial Committee is required to determine whether English law should or should not apply."

It has not been suggested that there is involved in this case, any custom or statute peculiar to our jurisdiction, which would make the rule inapplicable. Mr Chin See was not, I believe, so bold.

In the circumstances, this court can therefore have no fear of being accused of failing to abide loyally by the decision of a court higher in the curial order. So in accepting *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 as binding on us, we breach no rule of precedent. The result of all this, is that the order of the trial judge cannot be disturbed.

It was for these reasons that I agreed with my brethren, that the appeal be dismissed with costs.

White JA. I have had the advantage of reading the drafts of the reasons for judgment in this case, which were prepared by Rowe P and Carey JA.

Those reasons accord with policy and convenience and enunciate the law in accordance with the realities of the modern day. I therefore agree with the reasoning of my brethren.

Appeal dismissed.