Privy Council Appeal No. 60 of 1997

National Commercial Bank Jamaica Limited *Appellant*

v.

Guyana Refrigerators Limited *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 25th February 1998, Delivered the 23rd March 1998

Present at the hearing:-

Lord Browne-Wilkinson
Lord Slynn of Hadley
Lord Steyn
Lord Hutton
Sir Christopher Staughton

*[Delivered by **Lord Steyn**]*

On this appeal from a decision of the Court of Appeal of Jamaica, given on 20th December 1995, the first question was the precise terms upon which the respondents as exporters engaged the appellants to act as the collecting bank of the proceeds of bills of exchange. After hearing argument on this issue only their Lordships concluded that it must be determined in favour of the appellants. They accordingly agreed humbly to advise Her Majesty that the appeal ought to be allowed and the judgment of Langrin J. restored. The respondents must pay the appellants' costs in the Court of Appeal and before their Lordships' Board. This judgment contains the reasons for their decision.

The facts are not in dispute. Guyana Refrigerators Limited, the respondents, carry on the business of manufacturing and exporting refrigerators in Guyana. In

December 1989 and January 1990 the respondents ("the sellers") sold two consignments of refrigerators to Homelectrix Limited, a company carrying on business in Jamaica. The transactions were financed by trade bills.

The sellers drew two bills of exchange: the first was dated 14th December 1989 for the amount of US$35,445.48 and the second was dated 31st January 1990 for the amount of US$58,239.60. The buyers were the drawees under each bill and they became the acceptors of the bills. On 4th January 1990 and on 19th March 1990 the sellers' bank in Guyana engaged the services of National Commercial Bank Jamaica Limited, the appellants, for the purposes of collecting the amounts due from the buyers in respect of the bills of exchange. The appellants ("the collecting bank") were on each occasion engaged on the terms of a standard form contract duly completed with details of the underlying transaction and special instructions. Each form contained, with reference to the enclosed bill, the following printed instructions:-

> "KINDLY DEAL WITH THE ENCLOSED DOCUMENTS IN ACCORDANCE WITH THE FOLLOWING, UNLESS VARIED BY ANY SPECIAL INSTRUCTIONS:
>
> - PRESENT WITHOUT DELAY
>
> - AIRMAIL FATE OF ALL PRESENTATIONS, QUOTING MATURITY DATE IF ACCEPTED OR DRAWEE'S REASON FOR DISHONOUR
>
> ...
>
> - REMIT PROCEEDS BY AIR MAIL"

In the case of the first bill under the heading Special Instructions the following typed provision appeared:-

> "IN REIMBURSEMENT, CREDIT ACCOUNT NO. 005 1005 32 IN THE NAME OF GUYANA BANK FOR TRADE & INDUSTRY LTD. HELD AT BARCLAYS BANK PLC, MIAMI AND ADVISE US BY AUTHENTICATED TELEX DATE AND AMOUNT CREDITED."

Subject to two differences the second bill contained a similar Special Instruction. The first difference is that in the case of

the second bill the Special Instruction were preceded by the words "REMIT PROCEEDS BY TELEX TRANSFER" which were then crossed out. Secondly, in the case of the second bill the Special Instruction was for the proceeds to be credited in a specified account of Barclays Bank PLC, New York, instead of Miami.

Due to Jamaican Foreign Exchange Control Regulations the collecting bank was unable to comply with the instructions to remit money in US dollars. On 11th May 1990 the collecting bank so advised the sellers' Guyanese bank. The latter bank responded by authorising remittance in Guyanese dollars. No formal variation of the written instructions reflecting this change was ever made.

On 14th June 1990 the collecting bank received the proceeds of the two bills of exchange. On the same day the collecting bank purchased Guyanese dollars from the Bank of Jamaica at a rate of G$33:US$1 and issued two drafts payable to the sellers' Guyanese bank. On 15th June 1990 the collecting bank sent the drafts to the sellers' Guyanese bank by air mail. The sellers' Guyanese bank received the drafts six weeks later, i.e. on 25th July. By that time the Guyanese dollar had been devalued several times. The material devaluation is the one that took place on 15th June. On that date the Guyanese dollar was devalued to G$65.00:US$1.00.

The sellers sued the collecting bank for breach of contract, claiming that the collecting bank ought to have transferred the proceeds by telex on 14th June 1990. The sellers alleged that as a result of this breach they suffered a loss represented by the devaluation of the Guyanese dollar. The collecting bank denied that there was a contractual obligation to transfer the proceeds by telex.

The trial judge upheld the collecting bank's argument that there was no term requiring the collecting bank to transfer the proceeds by telex. The claim as presented therefore failed. The sellers appealed. The Court of Appeal allowed the appeal. Carey J.A., giving the judgment of the Court of Appeal, observed that the Special Instructions did not expressly state how the funds should be remitted to New York or Miami. But he took the view that "the special instruction requiring crediting and advising by telex, imported the requirement of urgency and speed, and

necessarily transfer by wire". The context shows that Carey J.A. reached this conclusion not on the basis of a construction of the contract but on the basis of an implication of a term requiring transfer of proceeds by telex. Carey J.A. also held that the sellers were entitled to succeed on the remaining issues of causation and foreseeability. In the result the Court of Appeal assessed the damages in the sum of US$46,117.49.

Carey J.A. thought that his conclusion as to the contractual position could also be justified on another basis. He said:-

> "It may be that much less complex way to arrive at the same conclusion would be to regard the evidence given by the experienced officer of the respondent's bank, that she would have sent the remittance by wire as being that of banking practice."

This was a reference to the statement in evidence by Dolce Young, an experienced employee of the collecting bank, that "If I were personally involved I would have sent it by cable". Counsel for the sellers rightly conceded that this statement by the witness fell short of establishing a banking usage which was capable of impressing a special meaning on the language of the contracts.

Counsel for the sellers did, however, submit that either a businesslike construction of the contracts or a necessary implication would justify the conclusion that the collecting bank was obliged to transfer the funds by telex. The processes of construction and implication of terms are closely linked but as a matter of legal analysis they need to be kept separate. Looking at the matter from the point of view of construction, their Lordships are satisfied that the typed Special Instruction providing that the collecting bank must "immediately advise us by authenticated telex date and amount credited" is not capable of yielding the meaning "remit the proceeds by telex and immediately advise us by telex". Only if the Special Instruction is so read, can it be said expressly to vary the general instruction for transfer of funds by air mail. But that is not construction: it is rewriting the contract. There are simply no words capable of letting in such an extensive interpretation. It is true, as counsel submitted, that the court ought to approach the construction of commercial contracts in a practical and businesslike manner. On the other hand, the paramount principle to which all other principles of construction are subordinate

requires loyalty to the contractual text viewed in its relevant context. Loyalty to the text does not permit the construction counsel put forward. It is noteworthy that the Court of Appeal did not seek to justify their conclusion by an interpretation of the express words of the contract. But, so far as counsel tried to do so, their Lordships are satisfied that the argument must fail.

That brings their Lordships to the more formidable argument that there should be implied into the Special Instructions a term requiring the proceeds to be remitted by telex, thereby overriding the general provision requiring funds to be remitted by air mail. The implication put forward is not one that can be implied by law: it is not an incident to be annexed by law to a standardised contract. It is a term implied in fact: if it is sustainable, it must be derived from the particular terms of the Special Instructions. It is not enough that such an implied term would be a reasonable and sensible one. The touchstone requires no citation of authority: it is always strict necessity. Approaching the matter in this way, one starts with the general provision in the printed form for the transfer of proceeds by air mail. In other words, the standard form contemplates that the collecting bank will ordinarily transfer the proceeds of a bill by air mail. The sellers are therefore not able to say that *prima facie* a transfer by air mail rather than telex is in any way abnormal. But counsel for the sellers reminded their Lordships that at the trial Dolce Young, the employee of the collecting bank previously mentioned, conceded that the Special Instructions "are to credit by wire the amount in Miami". The approach must, however, be an objective one: the question is whether the strict test of necessity is satisfied. The court, of course, is entitled to enliven this test by asking how a reasonable banker would have viewed the matter. But on this point the witness' view is not helpful.

Counsel also invited their Lordships to attach more importance to the typed words than the printed provision. The proposition underlying this invitation is a reasonable one but it does not solve the concrete problem. Like Carey J.A. counsel found some support in the mere fact of the introduction of a requirement for telex advice: he said it introduced an element of urgency. There is force in this point. On the other hand, it is still the fact that a requirement of telex advice is not inconsistent with

remitting the proceeds by air mail. Moreover, the provision for telex advice is on either view meaningful since it modifies the general instruction requiring the collecting bank to "air mail fate of all presentations, quoting maturity date if accepted or drawee's reason for dishonour".

Counsel for the sellers had one further argument. The Guyanese bank instructed the collecting bank to "advise us by an authenticated telex date and amount credited". Dealing with the second contract, this meant advising the Guyanese bank immediately by telex of the date and amount credited in New York. Counsel for the sellers said that the collecting bank would not have this information available and would not be able to carry out this instruction in a literal sense. This is apparently conceded. There is thus a difficulty. But the argument proves too much: the difficulty arises whether the obligation is to remit by air mail or by telex. This point cannot therefore be the foundation for holding that there is an implied term requiring a remittance of proceeds by telex. In these circumstances further consideration of the difficulty would not advance the argument presented by the sellers.

Their Lordships have concluded that the Special Instructions do not give rise to an implied term overriding the general instructions. That was the case when in accordance with the original instructions the funds had to be transferred to the United States. And it is not suggested that the agreed change to provide for a transfer in Guyanese dollars could by itself justify the implication.

So far their Lordships have not commented on the relevance of the fact that in the second contract the words "REMIT PROCEEDS BY TELEX TRANSFER" originally formed part of the Special Instruction but were then crossed out. There is a conflict of authority as to whether it is permissible in construing a printed or written contract to take into account deleted words: see Chitty on Contracts, General Principles, 27th edn., para. 12-058. Their Lordships propose to make no contribution to this longstanding debate. But a similar point now arises in a different legal context, namely the implication of terms. Their Lordships venture to suggest that in deciding whether a term can be implied into a contract it would be contrary to the reasonable expectations of the parties to ignore irrefutable documentary evidence appearing on the face of the written contract, that the parties rejected the very term subsequently put forward as satisfying

the test of a necessary implication. After all, the deletion shows that the parties contracted on the basis that such a term would not be incorporated in their contract. That must logically be relevant to the question whether the objective test of necessity in respect of the implication of that particular term is satisfied. This point reinforces their Lordships' view at least so far as the second contract is concerned. But counsel for the sellers argued that it is irrelevant to the earlier contract. That raises the theoretical possibility of implying the term in the first contract but not in the second. That would be a curious result. Their Lordships are inclined to reject this possibility. Taking into account the coincidence of the other printed and typed terms, and the proximity in time and link between the contracts, as well as the absence of any commercial explanation for a difference between the two contracts on the method of remitting the proceeds of the bills, their Lordships regard the deletion of the words in the second case as retrospectantly tending to show that in the earlier transaction the implication is also unnecessary. In any event, as their Lordships have explained, even without this consideration, their Lordships would have rejected the sellers' argument.

For these reasons their Lordships concluded that the contracts merely required the transfer of the proceeds of the bills by air mail and there was therefore no breach of contract.