JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 117/94

BEFORE: THE HON. MR. JUSTICE CAREY JA
THE HON. MR. JUSTICE FORTE JA
THE HON. MR. JUSTICE GORDON JA

BETWEEN **GUYANA REFRIGERATORS LIMITED** **APPELLANT**

AND **NATIONAL COMMERCIAL BANK JAMAICA LIMITED** **RESPONDENT**

Dennis Morrison QC & Garth McBean instructed by Dunn Cox Orrett & Ashenheim for appellant

Michael Hylton QC & Alexander Williams instructed by Myers Fletcher & Gordon for respondent

20th, 21st November & 20th December 1995

CAREY JA

This appeal raises the question of the correct measure of damages for the loss caused by delay either in forwarding proceeds of bills of exchange or advising the drawer of the date of crediting, where there has been a devaluation in the currency of payment. Is it to be measured by the extent of the devaluation or by the loss of interest on the bills? Langrin J, held that it was on the latter basis and this appeal is from his award on that basis.

The material facts are admirably summarised in the learned judge's reserved judgment dated 7th October 1994 and I gratefully adopt them and set them out below for ease of reference:

> "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 of US35,445.40 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 evidence (sic) 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."

According to Mr. Morrison, Q.C. counsel for the appellant, the plaintiff in the action, the obligation of the respondent, the defendant, was to remit the funds by wire transfer. That was not the method adopted by the respondent and accordingly, the amount payable in Guyanese dollars should be at the rate of G$33.00 = U. S. $1.00 based on the difference between the value of the Guyana dollars when they ought to have been remitted and when they were in fact remitted.

Mr. Hylton Q.C. on behalf of the respondent argued that the contract, on its true construction, required the respondent to remit funds to the appellant's bank and also to advise the appellant's bank. In so far as advice went, I would have thought he really meant that the appellant should be advised. I understood both counsel to be saying that the only alteration to the terms in the bills of exchange related to the method of payment, that is, Guyanese dollars being

substituted for U.S. dollars. Howsoever that might be, the only loss suffered by the appellant was interest on the sum they should have received.

These submissions prompt a consideration of the nature of the breach which gave rise to the loss suffered by the appellant. It may be expressed in other terms: what did the respondent fail to do that he was obliged to do.

Both bills of exchange contained special instructions with regard to the amount of each bill which was denominated in U.S. dollars. Originally, the respondent was required (i) to credit the amount of the bill to the appellant's bank in one case in New York and in the other in Miami and (ii) to advise the drawer by telex of the date and amount credited. This instruction did not expressly state how the funds should be remitted to New York or Miami. The agreed alteration related as it is accepted by both counsel to one aspect of the contract viz, as to the currency in which payment was to be made. That change would automatically relieve the respondents of their obligation to credit the appellant's bank accounts in Miami and New York U.S.A. but to credit the appellant's bank in Guyana itself. The general instructions on the bills requested the respondent to remit proceeds by air mail and those instructions governed the transaction unless "varied by any special instructions." Mr. Hylton Q.C. said there were none and also pointed to the fact that words requiring the proceeds to be remitted by wire transfer had in the case of one bill been inserted and then deleted. The construction to be placed on that erasure was that the method of wire transfer was effectively ruled out. That conclusion is not in my view inevitable. It is as consistent with a view, equally reasonable, that the special instruction requiring crediting and advising by telex, imported the requirement of urgency and speed, and necessarily, transfer by wire.

The special instruction included in both bills I would emphasize directed that the respondent advise date of credit and amount of transfer by telex, which is, as everyone would appreciate, a prompt and expeditious method of mail. It is legitimate to ask why was that obligation imposed. The answer must be that the parties were well aware of the vagaries of two unstable currencies and

wished to guard against any devaluation which might occur. Moreover it seems to me that if there was to be protection, that could only be achieved by a prompt transfer of funds. I am quite unable to understand what would be achieved by prompt advice to the appellant that the remittance was in the mail. The only purpose which could be served by requiring telex response that the funds were credited, would be to enable the receiving bank to respond that the funds were in fact credited. It is when the respondent would have been advised of the credit that they could give effect to the special instruction to advise the drawer. All of this prompts me to say that the obligation imposed on the respondent was to remit the funds by wire transfer.

It may be that a 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. Once the conclusion is reached that the obligation of the respondent was to adopt this expeditious mode of transfer, it follows that the breach of contract was the failure to remit the funds by wire. For these reasons I must, I fear, disagree with the learned judge in this regard.

The next question and the crucial question is the measure of damages. The learned judge did not allow exchange losses because he held that the loss was not reasonably within the contemplation of the parties for a devaluation was not contemplated and the loss was not forseeable. With all respect to the judge I cannot agree. It is clear from the fact that the parties denominated U.S. dollars and not either of their own currencies as the currency of payment that they wished to guard against precisely what occurred, viz devaluation, nor does change of currency for payment made by the altered term in any way alter the force of this point as payment would then have to be made in Guyanese dollars equivalent to the U.S. dollars, being the contracted price of the goods shipped.

In **President of India v. Lips Maritime Corp. The Lips** [1987] 3 All E.R. 110 at p. 116 Lord Brandon made the point that -

> "... it appears to me that claims to recover currency exchange losses as

> damages for breach of contract, whether the breach relied on is late payment of a debt or any other breach, are subject to the same rules as apply for damages for breach of contract generally."

This leads us to revisit Hadley v.Baxendale [1843-60] All E.R. Rep. 461. I would suggest that once the breach is the late payment which meant that the appellant would have incurred exchange losses, the causal connection between breach and loss is plain. It becomes a loss which may reasonably be considered as arising naturally, or may reasonably be supposed to have been in the contemplation of both parties at the time of the contract. In the result, I would increase the award in favour of the appellant to U.S.$46,117.49. The appeal is accordingly allowed with costs to the appellant to be taxed if not agreed.

FORTE J A

I agree with the reasons and conclusions which are consistent with my own. Consequently, I have nothing to add.

GORDON J A

I also agree with the reasons and conclusion and have nothing to add.