[2016] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 36/2012

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

BETWEEN	**UNIVERSITY OF TECHNOLOGY JAMAICA**	**APPELLANT**
AND	**COLIN DAVIS**	**1ST RESPONDENT**
AND	**SHARON HALL**	**2ND RESPONDENT**

Gavin Goffe and Adrian Cottrell instructed by Myers Fletcher & Gordon for the appellant

Miss Kashina Moore instructed by Nigel Jones & Co for the respondents

2 May and 3 June 2016

PHILLIPS JA

[1] I have read, in draft, the judgment of my learned brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] On 29 May 2015, we allowed an appeal by the University of Technology Jamaica (UTech) and granted judgment in its favour in respect of a contract that it had with its employee, Mr Colin Davis. We found that Mr Davis had breached the terms of that

contract, which was a bond agreement (the bond). Ms Sharon Hall was the guarantor for the performance of his part of the bargain. Each of them is therefore liable to UTech in the capacity of principal debtor and guarantor, respectively. They will be referred to, collectively, hereafter as "the respondents".

[3] We were unwilling, at the time of delivering the judgment, to award a value to it, without having had the benefit of submissions from counsel. The judgment at that time included the following orders:

> "3) Counsel for each of the parties shall file and serve written submissions on or before 19 June 2015 as to the sum and currency in which judgment is to be entered and the rate of interest to be applied to the sum due.
>
> 4) The court will make an order, thereafter, as to the sum in which judgment is to be entered for [Utech]."

Learned counsel did provide submissions in writing within the time specified by the order, but having perused them, it was thought necessary to have further oral submissions from counsel in respect of the Moneylending Act. We are grateful for the further submissions.

[4] Under the terms of the contract, UTech paid out the following sums to Mr Davis in respect of loans, grants and salary:

Loans	J$2,150,000.00
Grants	US$43,949.15
Salary	J$4,052,319.90

Mr Davis has repaid the loans and so only the second and third figures are relevant for the present purpose of determining the sum or sums for which the judgment should be entered.

[5] The contract required Mr Davis to repay his liability with interest. Clause 3(c) of the contract, which addressed his obligations, states:

> "In the event of [Mr Davis] failing to [complete the course of study for which the advances had been made], and in the event that [he] does not work with UTECH for the stipulated period (including but not limited to where [he] is dismissed for cause) [he] shall immediately and without demand pay to UTECH or such other person entitled to the benefit of the agreement the sum due with interest thereon from the date of disbursement of each and any sum paid by UTECH calculated in pursuance hereof, at the rate of twenty-five per cent (25%) per annum as and for liquidated damages. The said sum repayable by [Mr Davis] as hereinbefore set [out], may be increased at UTECH's sole discretion and in that event [Mr Davis] shall pay the said increased sum together with interest thereon at the rate herein set out."

[6] Paragraph (iii) of the conclusion of the contract states the basis upon which Ms Hall would have become liable to UTech. It states:

> "In the event of default by [Mr Davis] in complying with 3(c) hereof [Ms Hall] shall within seven (7) days of such default satisfy and discharge the liquidated damage sustained by UTECH in the amount of the above written Bond with interest thereon at the rate of twenty-five per cent (25%) per annum together with any losses, damages, costs, expenses or otherwise which may be incurred by UTECH by reason of the default on the part of [Mr Davis] in performing or observing the terms hereof. If any question or dispute shall arise as to the amount of such losses, damages, costs, expenses or otherwise, the amount thereof shall be determined by UTECH whose decision shall be final. [Ms Hall] shall not be discharged or released for this Deed by any arrangement made between [Mr Davis] and UTECH with

> or without the assent of [Ms Hall] or by any alteration in the obligations undertaken by [Mr Davis] or any forbearance by UTECH whether as to payment, time, performance or otherwise."

[7] The issues which arose from the judgment in favour of UTech are:

i. In what currency should the judgment be expressed?

ii. If the judgment is to be expressed in Jamaican currency, what date should be used as the date of conversion for the portion that is due in United States (US) currency?

iii. What rate of interest should be applied to the sums found to be recoverable?

The Moneylending Act

[8] Learned counsel for both UTech and the respondents agreed that the terms of the Moneylending Act did not apply to this agreement. It need not be considered further.

The submissions on behalf of UTech

[9] The written submissions on behalf of UTech were, in essence, that the court should treat with the matter in accordance with the judgment in **Sheila Darby v The Jamaica Telephone Company Limited and Daniel Russell** (1988) 25 JLR 164. Following the principle in that decision, the entire sum would be expressed in Jamaican dollars using the rate of exchange existing on 29 May 2015, which was the date when this court delivered its judgment. Using that approach, the US dollar portion of the debt

would, with interest, amount to US$158,939.39 as at 29 May 2015. Using the exchange rate of J$116.40:US$1.00, as at that date, on learned counsel's calculation, would result in a figure of J$18,500,544.99. The Jamaican dollar portion, with interest, would amount to $14,654,961.86, as at 29 May 2015. The result, the submissions ran, would be a total judgment in the sum of J$33,155,506.85, as at 29 May 2015.

[10] It was further submitted that in the event that the respondents were opposed to the sum being entered in Jamaican dollars in the sum of $33,155,506.85, then the judgment should be entered in both US and Jamaican dollars, following the decision in **Owners of the mv Eleftherotria v Owners of the mv Despina R; The Despina R; Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag SVEA; The Folias** [1979] 1 All ER 421;the case commonly referred to as **The Despina (and The Folias)**.

[11] UTech accepted that the period for which the interest stated in the bond could be properly claimed, would be 3 January 2005, the date that Mr Davis returned to work, to 29 May 2015.

[12] UTech also argued that there is no reason that the contractual rate of 25% should not be applied to both currencies. In addition, it was submitted that the validity of the loan has not been impugned and the applicability of the interest rate was not contested by the respondents either in the court below or in this court.

[13] In his oral submissions, Mr Goffe, on behalf of UTech submitted, as his primary position, that this court had no basis on which it could properly interfere with the

contract that the parties have made. It should, therefore, he submitted, not do so. It is noted, however, that in its particulars of claim Utech has been less stringent toward Mr Davis, than the terms of the contract actually required.

The submissions on behalf of the respondents

[14] The submissions on behalf of the respondents were contained in a single document and are referred to, hereafter, as the respondents' submissions. At the outset, the respondents argued that the Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 2006, which provides the rate of interest to be paid on judgment debts, is not directly applicable to this case, as the rate of interest was set out in the bond. They argued however that the significance of the Order is that it did not mandate that judgments on claims, involving foreign currency debts, had to be made in foreign currency.

[15] The respondents submitted that the judgment sum should be converted to Jamaican dollars in keeping with this court's judgment in **Darby**. They argued that the date of conversion should be as at 27 January 2012, which was the date that judgment was delivered in the Supreme Court. It was also argued that this court, in **Darby**, had moved away from the "date of payment rule" used in **Jamaica Carpet Mills Ltd v First Valley Bank** (1986) 45 WIR 278, and used, instead, the date of assessment, as the time for conversion. It was pointed out in the submissions that the date of assessment was used in two reported Supreme Court decisions, namely, **Dorothy Patricia Roache v Ruel Roache** (1989) 26 JLR 32 and **Joyce Morgan v Jamaica Omnibus Services Ltd and Another** (1987) 24 JLR 56.

[16] It was also submitted that, in the circumstances of this case, it would not produce a just result for the respondents to have to pay the Jamaican equivalent at the time of payment as opposed to the date of the Supreme Court judgment, given the length of time that has elapsed between the date of the claim being filed and the date of the judgment and the fact that the exchange rate has changed dramatically during that time.

[17] The respondents submitted further, that based on the exchange rate of J$86.82:US$1.00, which was applicable at the date of judgment in the Supreme Court, the US dollar portion of the debt (US$43,949.15) would convert to J$3,815,665.20. When that figure is added to the Jamaican dollar obligation of $4,052,319.90, the total amount that the judgment should be entered for is the sum of $7,867,985.10.

[18] It was also submitted that clause 3(c) of the bond should be interpreted as a penal clause and not as a liquidated damages clause, based on the decision in **Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited** [1915] AC 79. The respondents contended that UTech has not incurred any further pecuniary loss apart from the sums disbursed. They argued that the rate of interest at 25% is extravagant, unconscionable and unjustifiable, and that, to that extent, the bond should be held to be unenforceable. In order to support that position, Miss Moore, on behalf of the respondents, provided the court with information on the rates of interest used by commercial banks for foreign currency loans.

[19] Somewhat contrary to their initial submissions, the respondents argued that the rate of interest that should be applied from the date of judgment, is the usual rate of

6% per annum as set out in the Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 2006. The latter submission is in line with UTech's position on this point.

[20] In oral submissions, Miss Moore made an adjustment to the position taken in her written submissions. She submitted that the parties did not envisage a rate of 25% interest on the US dollar portion of the liability and that the conversion should be done at the date of the breach, which was 3 January 2005. The rate of 25% interest could then be applied to the liability which would then be entirely in Jamaican dollars. She accepted that there was no evidence as to what the exchange rate was at 3 January 2005.

Analysis

[21] In approaching the analysis of these issues it must initially be said that Mr Goffe is correct in his submissions that there is no basis on which to disturb the contract between the parties. Utech was also entitled, as it has, to adjust its claim to make it less onerous for Mr Davis, than the terms of the contract actually required.

[22] As has been accepted, the Moneylending Act does not apply.

[23] Each issue identified above will be considered separately below.

Issue i - The currency in which the judgment should be expressed

[24] The common thread running through the more recent decisions concerning the currency in which judgments ought to be entered is that the claimant should be, as far as possible, placed in the position that he would have been in if the tort had not been

committed, or if the contract had been performed. In **The Despina (and The Folias)**, two cases were heard together by the House of Lords. **The Despina** dealt with damages resulting from negligence, while **The Folias** concerned damages for breach of contract. The headnote of **The Folias** aspect of the published report of the cases accurately sets out the opinion of their Lordships concerning the currency in which the award should be made so as to achieve a just result for a claimant in contract. It said, in part:

> "Where the proper law of a contract was English law and the contract specified a particular currency as the currency of account and payment in respect of all transactions arising under the contract, **then any damages awarded under the contract were to be awarded in the currency of the contract**, **since that was the currency with which the contract had the closest and most real connection**. However, where it was not apparent from the terms of the contract that damages for breach were to be awarded in a currency specified for the satisfaction of obligations under the contract, then damages were to be awarded in the currency which most truly expressed the plaintiff's loss. **In ascertaining that currency the questions to be asked were what the currency was which would as nearly as possible compensate the plaintiff in accordance with the principle of restitutio in integrum and whether the parties were to be taken to have had that currency in contemplation**. Since it was not apparent from the charterparty in what currency damages for breach should be awarded **and since the charterers' actual loss was the amount of the French francs expended by them in acquiring the cruzeiros necessary to settle the cargo receivers' claim, the arbitrators had been right to express the award in French francs**." (Emphasis supplied)

[25] From that extract it may be gleaned that there is no strict rule preventing the claimant from securing a judgment expressed in more than one currency, if that

eventuality were provided for in the contract. In **Darby**, Carberry JA suggested that it may be better to express the judgment in a single currency. That case involved an award arising from tort, and, in any event, he left the issue open in case there was an appreciable change in the exchange rate for the Jamaican dollar. He said at page 174 B:

> "While I can see no reason why a Jamaican Court should not give a judgment for foreign currency, yet I am inclined to agree with Patterson J. [in his decision in **Morgan v Jamaica Omnibus Services**] that in a case where some items will be expressed in Jamaican dollars and some otherwise, it is better to use one common currency throughout the judgment and to express it in Jamaican dollars, but using the date of assessment as the appropriate date at which to calculate the rate of exchange. **I would leave open for future consideration the possible effect of appreciable change in the exchange rate for the Jamaican dollar occurring between the date of the assessment and the date of final judgment or execution of the judgment**." (Emphasis supplied)

Carberry JA referred to the, then current, rate of exchange of J$5.52:US$1.00. The Jamaican dollar has devalued massively since that time, and continues to steadily devalue. On 29 May 2015, the exchange rate as against the US dollar, according to UTech's submissions, was J$116.40:US$1.00. Carberry JA's guidance, in respect of a judgment in a single currency, must now be open to review, given the changed financial environment.

[26] It is noted that in the above extract from the headnote of **The Folias**, it was noted that French francs were used to purchase "the cruzeiros necessary to settle the cargo receivers' claim, [and as a result] the arbitrators had been right to express the award in French francs". In the present case, although the bond expresses the liability

of the respondents in two distinct currencies, it is noted that some of the monies sent to Mr Davis was the result of a conversion from Jamaican dollars to US dollars.

[27] The first sum involved is the disbursement of a grant amount of US$5,500.00 in August 2001. The sum actually disbursed was J$250,000.00 which was converted to US dollars to assist Mr Davis. Paragraph 13 of Mrs Antoinette Rockhead-Reid's witness statement speaks to what transpired with this disbursement. She said:

> "In August of 2001, Mr Davis requested further financial assistance to continue his studies...**[He] was given financial assistance in the form of a further grant of J$250,000 (which was paid out in the US Dollar equivalent amounting to US$5,500)** and a further loan of J$150,000...." (Emphasis supplied)

[28] A similar scenario is revealed by correspondence between Mr Davis and Dr Rae Davis, the president of UTech. It concerns a sum of US$16,949.00 paid in 2003. Dr Davis sent an e-mail on 29 September 2003 in which he made an assessment of Mr Davis' financial needs and made a proposal as to how they would be met. He said:

> "Dear Colin,
>
> I am now able to respond with some specifics.
> Firstly we had to make some assumptions about your needs to December 2004. We used information from the web-site you provided. These are our estimates:
>
> | | |
> |---|---|
> | Sept. 2003 - May 2004 | US$29,418 |
> | Summer 2004 | 7,990 |
> | Sept. - Dec. 2004 | 9,500 |
> | Total | 46,908 or Approx J$2.8m |
>
> Then we had to look at the other side of the equation:
> Half pay for August 2003-July 2004 - Appr. J$800,000.00
> This suggests you will need an additional J$2.0m to make it to Dec. 2004.
> **I am proposing the following;**

A grant of J$1.0m and a loan of J$1.0m (repayable on return to work)

Rae Davis" (Emphasis supplied)

[29] The bond itself also recognised that a conversion from Jamaican dollars to US dollars was envisaged for the US$16,949.00. At page 6 of the document it spoke to the amounts that were to be disbursed. Undoubtedly those were the sums mentioned in Dr Rae Davis' e-mail. The relevant portion of the bond stated:

"BALANCE TO BE DISBURSED

G[r]ant(US$59 to J$1–J$1,000,000/59= US$16,949.00
Loan (US$59 to J$1 – J$1,000,000/59 =US$16,949.00
Total = US$33,898.00"

[30] It is apparent that Jamaican dollars were used to purchase US dollars in order to accommodate Mr Davis' situation, namely that he was resident in the United States of America at that time. It is not that UTech intended to disburse the monies in US dollars. They purchased US dollars with the amounts that they were prepared to disburse to Mr Davis. The conversion was purely for Mr Davis' convenience. Based on that scenario, it would not be unreasonable that the judgment in respect of the sums of US$5,500.00 and US$16,949.00 be expressed in the amount of Jamaican dollars that were actually disbursed, namely J$250,000.00 and J$1,000,000.00 respectively. Added to the other sums that were undoubtedly disbursed in Jamaican dollars, the total Jamaican dollar debt would be J$5,302,319.90 (J$4,052,319.90 + J$250,000.00 + J$1,000,000.00).

[31] In addition to the fact that some of the monies were originally in Jamaican dollars, a further aspect of the case inclines a leaning to expressing the judgment in a

single currency. This would affect the two disbursements that were said to have been disbursed in US dollars. The first is the sum of US$9,000.00, which was disbursed in December 2000 (paragraph 8 of Mrs Rockhead-Reid's witness statement). The second is the sum of US$12,500.00 that was disbursed in August 2002 (paragraph 15 of Mrs Rockhead-Reid's witness statement). The aspect concerns clause 3(c) of the bond, which seems to suggest that the parties contemplated repayment, if it were necessary, in a single currency. The clause states that if a repayment was required:

> "...[Mr Davis] shall immediately and without demand pay to UTECH or such other person entitled to the benefit of the agreement **the sum due** with interest thereon from the date of disbursement of each and any sum paid by UTECH calculated in pursuance hereof, at the rate of twenty-five per cent (25%) per annum as and for liquidated damages. **The said sum** repayable by [Mr Davis] as hereinbefore set [out], may be increased at UTECH's sole discretion and in that event [Mr Davis] shall pay **the said increased sum** together with interest thereon at the rate herein set out." (Emphasis supplied)

[32] Based on the above reasoning, a judgment expressed solely in Jamaican dollars could not be said to have not been contemplated by the parties. The principle stipulated by Carberry JA in **Darby** should, therefore, be applied.

[33] In the environment just described, if the judgment was expressed in Jamaican dollars, it would seem that UTech would be placed in the position that the parties contemplated it would have been in, had the contract been performed.

Issue ii - The date at which the conversion should be done

[34] The tenor of the bond agreement, as assessed above, suggests that the appropriate date for conversion for US$21,500.00 (the total of the two sums which

were disbursed in US dollars), should be the date of breach, namely, 3 January 2005. That would be the date that would best allow for the application of the term, "the sum", as used in the passage last quoted from the document.

Issue iii - The rate of interest that should be applied

[35] As has been pointed out above, the contract in this case specified the interest rate of 25% per annum to be applied to the sum to be paid by the respondents. The rate was expressed in the contract to represent "liquidated damages".

[36] It was only in the written submissions on behalf of the respondents, in this exercise of placing a value on the judgment, that they first challenged the interest rate. As mentioned above, they described it as being "extravagant and unconscionable" and "unjustifiable". It was submitted that the rate stipulated was not a true estimate of the loss that could have resulted from a breach of the bond; that it amounted to being a penalty, and was, therefore, unenforceable. The cases cited in support of those arguments were **Dunlop Pneumatic Tyre Company**, **Murray v Leisureplay Plc** [2005] EWCA Civ 963 and **Robophone Facilities Ltd v Blank** [1966] 1 WLR 1428.

[37] No point had previously been taken about the rate of interest. It was not taken as a point in the court below nor was it contained in, or argued as, a ground of a counter-notice of appeal. It is far too late in the day for the respondents to seek to raise an issue of the enforceability of the interest rate. Even if the reason behind the challenge to the rate of interest is a legitimate one, that type of challenge cannot be made at this stage.

[38] In any event, this challenge by the respondents should have been made at the trial. This is because the party who is alleging that a sum is a penalty and not liquidated damages bears the burden of proving that it is a penalty. A mere assertion, to that effect, will not suffice. In **Robophone Facilities Ltd v Blank**, Lord Diplock said at page 1447 E-F:

> "The onus of showing that such a stipulation is a 'penalty clause' lies upon the party who is sued upon it. The terms of the clause may themselves be sufficient to give rise to the inference that it is not a genuine estimate of damage likely to be suffered but is a penalty. Terms which give rise to such an inference are discussed in Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.* But it is an inference only and may be rebutted."

The relevant points made by Lord Dunedin in **Dunlop Pneumatic Tyre Company**, cannot assist the respondents in this case without the benefit of some evidence, which would raise the inference that the interest rate was "extravagant and unconscionable" and "unjustifiable".

[39] In order to have challenged the rate of interest, the respondents would have had to provide proof either to show that it was not a genuine pre-estimate of UTech's loss, or otherwise lay the basis for an inference that the rate was penal in nature. In fact, no evidence was adduced concerning this issue. The respondents cannot just assert that the rate amounts to a penalty.

[40] The rate of interest as stipulated by the agreement should be enforced since it had been agreed upon by the parties as being "liquidated damages" and the respondents are both bound by it. That being the rate of interest, and the basis therefor, agreed between the parties, this court would not disturb their agreement.

[41] The rate of interest of 25% should therefore apply to the outstanding principal debt from 3 January 2005 until the date of judgment, as claimed by UTech in its amended particulars of claim. The date of judgment, for these purposes, is 29 January 2012, being the date of the judgment in the Supreme Court. Thereafter the rate of interest applicable to judgment debts would apply to the date of payment.

The amount for which the judgment should be entered

[42] Based on the analysis of the three issues raised in this exercise, the order, in respect of the sums to be paid, should be rendered on the following basis:

> Judgment for the appellant as follows:
>
> a. in the Jamaican dollar equivalent of US$21,500.00 using the Bank of Jamaica average selling rate for the US dollar applicable on 3 January 2005, together with
>
> b. the sum of J$5,302,319.90,
>
> c. with interest on the total of those sums at the rate of 25% per annum from 3 January 2005 to 27 January 2012.

[43] In order to avoid any doubt or disagreement between the parties, the Bank of Jamaica exchange rate referred to above has been ascertained to have been US$1.00:J$61.62. The calculation required by a. in the previous paragraph is as follows:

> US$21,500 x 61.62 = J$1,324,830.00

The judgment should therefore be entered in the sum of J$6,627,149.90 (J$1,324,830.00 + J$5,302,319.90), together with interest on J$6,627,149.90 at the rate of 25% per annum from 3 January 2005 to 27 January 2012.

MCDONALD-BISHOP JA

[44] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

PHILLIPS JA

ORDER

1) Judgment for the appellant in the sum of J$6,627,149.90 together with interest thereon at the rate of 25% per annum from 3 January 2005 to 27 January 2012.

2) Costs, concerning the quantification of the judgment, to the appellant to be taxed if not agreed.