JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 27/93

COR: THE HON MR JUSTICE FORTE J A
THE HON MR JUSTICE DOWNER J A
THE HON MR JUSTICE GORDON J A

BETWEEN	**MOTOR & GENERAL INSURANCE CO LTD**	**DEFENDANT/ APPELLANT**
A N D	**SONNY GOBIN**	**PLAINTIFF/ RESPONDENT**

Norman Wright & Christopher Dunkley instructed by Wright, Dunkley & Co for Appellant

Dr. Lloyd Barnett & Alton Morgan instructed by Alton Morgan & Co for Respondent

25th - 27th April and 19th June, 1995

FORTE J A

On the 12th December 1983, the respondent obtained judgment against the appellant in Suit No. E 63 of 1983 for the sum of six hundred and fifty thousand Trinidad & Tobago dollars (TT$650,000) with interest thereon at the rate of 16% per annum. The appellant thereafter appealed the judgment, and pending the appeal applied for a stay of execution. In the meantime, the respondent applied for writs of Attachment to attach certain accounts at financial institutions in the name of the appellant, in order to secure payment of the judgment. Arising out of these

applications, the following order was made by consent of the parties on the 5th March 1984:

> "By consent stay of execution granted herein on condition that -
>
> (a) That the amounts standing to the credit of the Defendant in current and deposit accounts with:
>
> 1. Jamaica Citizens Bank Ltd
>
> 2. Bank of Commerce Jamaica Limited
>
> 3. National Commercial Bank (Jamaica) Limited
>
> 4. National Commercial Mortgage & Trust Limited
>
> 5. International Trust of Washington (Jamaica)
>
> and which are now subject to the order made herein on the 9th February 1984 be placed on deposit with Jamaica Citizens Bank Ltd in the name of the plaintiff.
>
> (b) That the said sums shall be held on deposit pending the Defendant's Appeal from the judgment herein and be dealt with on the determination of the said Appeal in accordance with the rights of the parties as determined on the said appeal."

The effect of this consent order, was to grant to the appellant, a stay of execution, on his consenting to an order which in effect "attached" the sums of money he had in the various financial institutions by placing them in a single account, in the name of the respondent thereby securing for the

respondent, a means by which he could recover the fruits of his judgment. Nevertheless, the Order quite correctly stated that the account though in the name of the appellant would be dealt with on the determination of the appeal "in accordance with the rights of the parties as determined in the said appeal."

The account was therefore untouchable by the respondent and could not be paid out to him except and until he was successful in the Appeal. This of course was consistent with the stay of execution granted to the Appellant.

In due course on the 21st June 1985 the Appeal was heard, and dismissed, the Court of Appeal, however varying the rate of interest ordered, to 12% per annum instead of 16%. Thereafter on 7th August, 1985 on the application of the respondent by Summons for Order for payment out of the sums deposited in the Jamaica Citizens Bank as a result of the Consent Order of the 4th March 1984, the following order was made by the Court:

> "Upon the Summons dated the 10th of July 1985 filed herein coming on for hearing this day and upon IT IS HEREBY ORDERED THAT:
>
> 1. The several amounts of money standing to the credit of the Defendant in accounts with the Garnishees:
>
> (a) Jamaica Citizens Bank Limited
>
> (b) Bank of Commerce Jamaica Limited
> (c) National Commercial Bank (Jamaica) Limited

> (d) International Trust of Washington (Jamaica) Limited
>
> and such as were deposited with Jamaica Citizens Bank Limited by the abovenamed Garnishees to secure the Stay of Execution pending the Appeal ordered on the 5th of March 1984, the said sums be paid forthwith to the Plaintiff together with interest accrued, toward satisfaction of the Judgment sum."

This Order confirms that the amounts paid into the account at Jamaica Citizen's Bank in the name of the plaintiff/respondent were to secure the stay of execution for the appellant. At the time, the transfers were made into the Jamaica Citizens Bank account, the total sum in the account amounted to one million and nine thousand eight hundred and fifty-eight dollars and forty-two cents ($1,009,858.42) which on conversion at the rate of exchange from the Trinidadian Dollar to the Jamaican Dollar at 1TT$ = 0.73.5111 Jamaican cents amounted to seven hundred and forty-two thousand three hundred and fifty-seven dollars and two cents in T & T dollars (TT$742,357.02). However on the 7th August 1985, the money standing in the account which according to the affidavit of the plaintiff/respondent was $1010,193.82 was paid out to the plaintiff/respondent, in accordance with the order (supra). By this time, there had been a devaluation of the Jamaican dollar as against the T & T dollar, resulting in an exchange of J$2.325 to one T & T dollar. As a result

the plaintiff/respondent realized on that date, after conversion, an amount of $ TT434,491.96 which then could not discharge the full judgment debt which at that time with added interest stood at $TT851,080.96. Consequently, the plaintiff/respondent alleging that the judgment debt was not satisfied, on the 8th July 1992 filed an affidavit and "praecipe", resulting in the issue of a writ of attachment to certain debtors of the appellant. The writ was issued to the garnishees as were stated in the "praecipe" as follows:

> "SEAL a Writ of Attachment of debts and other property belonging to the abovenamed Defendant, MOTOR & GENERAL INSURANCE COMPANY LIMITED.
>
> Name and address of Garnishee:
>
> Eagle Commercial Bank
> 6 Grenada Way
> New Kingston
> Kingston 5
>
> Scotiabank Jamaica Ltd
> 2 Knutsford Boulevard
> New Kingston
> Kingston 5
>
> Date of Judgment or Order: 12th December 1983
> Judgment debt remaining: TT$ 416,589.00
> Interest accrued for 7 years: TT$349,934.76

In the supporting affidavit, he then alleged that -

> "... to the best of my knowledge, information and belief the Garnishee named herein is indebted to the

> Judgment Debtor in the sum set out hereafter or thereabouts:
>
> Scotiabank Jamaica Limited
> New Kingston $2,000,000.00
>
> Eagle Commercial Bank
> New Kingston $2,000,000.00

In due course on 2nd April 1993, in spite of the opposition of the Appellant, the application in respect of Bank of Nova Scotia as garnishees having been withdrawn, and the sum to the credit of the appellant at Eagle Commercial Bank, being then $5,000,000 Theobalds J, granted the Garnishee Order. As a copy of the Order was not included in the record, the following is taken from the Notice of Appeal. The learned judge ordered:

> "(1) The Application for Garnishee Order is granted.
>
> (2) Garnishee Order sought is made subject to presentation of an up to date computation of the amounts due. The guide lines to follow are that payments must be computed at the rate of exchange in existence at the date of payment.
>
> (3) Interest must be calculated at the figure stipulated in the Judgment of the Court of Appeal.
>
> (4) Costs of these proceedings to be taxed if not agreed to be paid by the Defendant to the Plaintiff."

It is from this order, that the appellants now appeal.

In my view two issues arose out of the arguments presented to us. They are as follows:

> 1. Did the Defendant/Appellant discharge its liability in respect of the Judgment Debt when moneys from its various accounts were transferred to the Jamaican Citizens Bank and placed in an account in the name of the plaintiff/respondent, in obedience to the Consent Order of the 5th March 1984.
>
> 2. If not, the Judgment being expressed in a foreign currency, when is the proper date for the conversion of the currency.

1. ***Did obedience to the Consent Order discharge the respondent from any further liability in respect of the Judgment Debt?***

In my view there is no difficulty in answering this question in the negative. As earlier discussed, the respondent, though the account was in his name, had no right to withdraw the amount or otherwise deal with the account unless and until his rights were finally decided in the appeal. Further, this was not a payment of the Judgment Debt into an Escrow Account, it was circumstances in which various sums of money were transferred from various Banks for which writs of Attachment had been applied, and placed into the Account with the Jamaica Citizens Bank acting in the position of a "Stakeholder" to pay over the funds "in accordance with the rights of the parties as determined in the appeal". Significantly also, this was a part of a consent order, which allowed the appellants a "stay of execution" while they prosecuted the appeal. In

those circumstances, it could not be correct to state that in obeying the consent order, the appellant would have discharged its obligation under the judgment of 12th December 1983 and consequently I would find that this contention by the appellant is void of merit.

2. ***Date of Conversion***

In answering this issue, some regard must be given to the history and background to the Judgment Debt. The Defendant Company operated its Insurance business in three countries in the Caribbean - Jamaica, Barbados and its head office in Trinidad. On the 17th August, 1992 the company granted the plaintiff an option to purchase the Jamaican and Barbadian operations of the company. The relevant section of that agreement reads as follows:

> "1. In consideration of Five Hundred Dollars ($500.00) this day paid by the vendor (the receipt whereof the vendor acknowledges) the purchaser shall have an option of purchasing the Jamaica and Barbados operation of Motor and General Insurance Co Ltd inclusive of the right to use the vendor's name, its Goodwill, Assets and Liabilities existing outstanding and or due to or from the company in the Islands of Jamaica and Barbados, West Indies together with all furniture, fixtures office equipment and stationery at the price of Six Hundred and Fifty Thousand Dollars ($650,000.00) Trinidad and Tobago Currency to be paid to the vendor in the Island of Trinidad, in addition to 20,000 shares valued at $7.00 per share held by the purchaser in the share capital of the

> vendor to be transferred to any nominee of the vendor."

As gleaned from the speech of Sir Ivor Richardson delivering the judgment of the Judicial Committee of the Privy Council dismissing the Company's appeal, (Privy Council Appeal No. 4 delivered 3rd December 1986):

> "The option was expressly subject to the approval of the Superintendent of Insurance in Jamaica or other relevant authorities and it was common ground in the proceedings that ultimately ensued that the approval of the Supervisor of Insurance in Barbados required under that provision was never obtained. On 11th February 1983 the plaintiff purported to exercise the option, paid $650,000.00 in Trinidad and Tobago currency to the company and tendered the relevant share certificates and instruments of transfer. The company subsequently declined to transfer the operations to the plaintiff but at the same time retained and has continued to retain the $650,000.00."

To be noted is the fact that in keeping with his agreement with the company, the plaintiff/respondent paid to the company the sum in Trinidad and Tobago dollars in that island. As a result of the company's action the plaintiff/respondent commenced proceedings in Jamaica for specific performance, etc, but specifically in the alternative for the return with interest of the T&T$650.000 paid to the company.

In the course of pleadings the company was granted leave to amend its defence to include in paragraph 14 the following:

> "The Defendant further says that the 'option' agreement is an illegal transaction in that it provides for the defendant company buying its own shares and as a consequence of the said illegality. The Plaintiff is not entitled to the return of the sums paid thereunder."

Subsequently, with the express consent of the parties, the trial proceeded on the basis:

> 1. That the question of the right of the plaintiff to recover the down payment of TT$650,000.00 be argued and determined in the light of the issue raised in paragraph 14 of the amended defence.
>
> 2. If the plaintiff is adjudged to be entitled to recover the amounts paid that Judgment be entered for the Plaintiff against the Defendant for -
>
> (a) the sum of TT$650,000.00 plus interests at such rate and from such date as the court may determine and until the date of repayment
>
> (b) and the sum of J$173,000.00.
>
> 3. That Judgment be entered for the Plaintiff on the Counterclaim.
>
> 4. That the Defendant discontinue Suits CL M 277/83 filed in the Supreme Court of Jamaica and 838/83 filed in the High Court of Trinidad & Tobago and abandon all claims arising out of the matters referred to in the said suits.

In coming to its conclusion the Board per Sir Ivor Richardson stated:

> "The company's contention (in paragraph 14 of the amended defence) was that the

> option agreement provided for the company to buy its own shares. The plaintiff, in his reply had specifically joined issue with the company in its defence and in terms of the consent order the question of the right of the plaintiff to recover the $650,000.00 he had paid fell to be determined in the light of that issue raised in paragraph 14 and put in issue by the plaintiff in his reply.
>
> That question is one of the proper construction of the agreement. If the agreement could have been carried out in a legal manner then that is the end of the case; the plaintiff is to be regarded as seeking the return of money had and received by the company in circumstances where the company cannot justify its retention of money."

In the end the Board found for the plaintiff/respondent Sir Ivor Richardson concluding:

> "In order to succeed on the illegality argument it raised the company must establish that the option agreement necessarily provides that the company is to buy its own shares. This it has not done and it does not now lie in its mouth to say that it would have performed the agreement in an illegal manner."

I have cited these passages in order to show the background to the Judgment Debt, and in particular to emphasize the following points -

> 1. That the currency of the contract was Trinidad and Tobago dollars, the plaintiff having in accordance with the option agreement paid the $650,000.00 in T&T dollars, and having done so in that island.

> 2. That the judgment of Wolfe J (as he then was) on the 12th December 1983, was consistent with the basis upon which the trial proceeded in particular on the failure of the Company's contention in paragraph 14 of the Amended Defence, there should be judgment for the plaintiff for $650,000.00 ... until payment of the said sum.
>
> 3. That the money, the subject of the judgment was considered 'money had and received by the company in circumstances where the company cannot justify its retention'.

Given the above circumstances, when then is the proper date of conversion?. The plaintiff/respondent undisputedly paid Trinidad & Tobago currency, and has a judgment in that currency. It would seem then that he ought not to suffer as a result of the devaluation of the Jamaican dollar, especially given the fact that at least up to December 1986, when the Judicial Committee of the Privy Council delivered its decision, it would have been unwise of him to seek execution of the judgment. In England, prior to 1975 when the case of ***Miliangos v. George Frank (Textiles) Ltd*** (1975) 3 All E R 801, was decided, the conversion date in respect of a judgment in foreign currency was understood to be the breach date - that is the date when the breach of the contract occurred. However in the ***Miliangos*** case (supra) at page 811 Lord Wilberforce delivering his speech in the House of Lords had this to say:

> "First, I do not for myself think it doubtful that, in a case such as the present, justice demands that the creditor should

not suffer from fluctuations in the value of sterling. His contract has nothing to do with sterling; he has bargained for his own currency and only his own currency. The substance of the debtor's obligations depends on the proper law of the contract (here Swiss law); and though English law (lex fori) prevails as regards procedural matters, it must surely be wrong in principle to allow procedure to affect, detrimentally, the substance of the creditor's rights. Courts are bound by their own procedural law and must obey it, if imperative, though to do so may seem unjust. But if means exist for giving effect to the substance of a foreign obligation conformably with the rules of private international law, procedure should not unnecessarily stand in the way.

There is, unfortunately, as Lord Radcliffe pointed out in the ***Havana Railways*** case [1960] 2 All E R 332 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 [1960] 2 All E R at 356 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*** [1926] 272 US 517. 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 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.
> Secondly, and I must deal with this point more briefly than historically it deserves, objections based on authority against making an order in specie for the payment or delivery of foreign money, are not, on examination, found to rest on any solid principle or indeed on more than the court's discretion."

Then at page 813 he continued:

> "As regards foreign money obligations (defined above) it is first necessary to establish the form of the claim to be made. In my opinion acceptance of the argument already made requires that the claim must be specifically for the foreign currency as in this case for a sum stated in Swiss Francs. To this may be added the alternative or the sterling equivalent at the date of ... (see below). As regards the conversion date to be inserted in the claim or in the

judgment of the court, the choice, as pointed out in the ***Havana Railways*** case [1960] 2 All E R 332 is between (i) the date of action brought, (ii) the date of judgment, (iii) the date of payment. Each has its advantages, and it is to be noticed that the Court of Appeal in ***Schorsch Meier*** [1975] 1 All E R 152 and in the present case chose the date of payment, meaning, as I understand it, the date when the court authorises enforcement of the judgment in terms of sterling. The date of payment is taken in the convention annexed to the Carriage of Goods by Road Act 1965 (Schedule, art 27(2)). This date gets nearest to securing to the creditor exactly what he bargained for. The date of action brought, though favoured by Lord Reid and Lord Radcliffe in the ***Havana Railways*** case [1960] 2 All E R 332 seems to me to place the creditor too severely at the mercy of the debtor's obstructive defences (of this case) or the law's delay. It may have been based on an understanding of the judgment of Holmes J in the ***Deutsche Bank*** [1926] 272 US 517 now seen to be probably mistaken; see Mann on The Legal Aspect of Money 3rd Edn [1971] p 355 and cases cited. The date of judgment is shown to be a workable date in practice by its inclusion in the Carriage by Air Act 1961, which gave effect to the Hague Convention 1956 varying, on this very point, the Warsaw Convention 1929, but, in some case, particularly where there is an appeal, may again impose on the creditor a considerable currency risk. So I would favour the payment date, in the sense I have mentioned. In the case of a company in liquidation, the corresponding date for conversion would be the date when the creditor's claim in terms of sterling is admitted by

> the liquidator. In the case of arbitration, there may be a minor discrepancy, if the practice which is apparently adopted (see the ***Jugoslavenska*** case) [1973] 3 All E R 498 remains as it is, but I can see no reason why, if desired, that practice should not be adjusted so as to enable conversion to be made as at the date when leave to enforce in sterling is given."

In 1986 this Court in the case of ***Jamaica Carpet Mills Ltd v. First Valley Bank*** SCCA No 79/84 delivered 22nd September 1986 (unreported) followed the decision in the ***Miliangos*** case (supra). In doing so Rowe P, after an examination of the law, stated:

> "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] A.C. 507; [1943] 2 All E R 406 ought not to be followed in the light of the decision "of the House of Lords in the ***Miliangos*** case (supra) 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."

In keeping with the ***Miliangos*** case (supra), which is consistent with my view the conversion date is the date of payment that is to say the date when leave is given to enforce the judgment.

In the instant appeal, the dates for conversion which were advanced by the appellant were:

> (i) the date (i.e.5th March 1984) when the money existing in the Accounts of the appellant's in various commercial Banks was transferred into an account in the name of the respondent at the Jamaica Citizens Bank, or in the alternative
>
> (ii) the date (7th August 1985) when the appellant applied for and was granted an order for the amount in the account arising out of the Consent Order, to be paid out to him.

In my view neither of these satisfy the principle set out in the Miliangos case. I have already dealt with (i), and it is only necessary to say now that at that time the plaintiff/respondent had no access to those funds and consequently it could never be regarded that that was payment of the debt to him.

In respect of (ii) the respondent, by getting the order of the Court for the paying out of that sum was able to realize only part of the debt, as a result of the exchange rate on that date, and consequently it was only a part payment of the debt that was made then.

The respondent contends that he is entitled to the balance which would be necessary to compensate for TT$650,000 in full plus the accrued interest granted in the judgment.

The appellant however contended that the respondent is guilty of delay and consequently should not be allowed to benefit from his inordinate delay, given the fact that since the 7th August, 1985, there has been a devaluation of the Jamaican dollar as against the T&T dollar. This is how the appellants presented their argument in skeletal form:

> "In relation to the bona fides of this claim, we ask the Court to consider the length of time which was allowed to elapse between the time at which the Plaintiff agrees he was paid, and the institution of proceedings to enforce his claim for short-payment. We ask the Court also to consider the movement of the Jamaican $ against the TT$ of which the Plaintiff was aware. Reference to the Satistical Digest indicates that during that period of over 7 years, the J$ has consistently devalued against the TT$ thereby ensuring a windfall for the Plaintiff in his manner of calculation. What has on the Plaintiff's own calculation started out as a deficit of TT$ 416,000.00 in 1985, had now grown again on the Plaintiff's calculations and by reference to a significantly devalued J$ to $4,019,803 as at 3rd July 1992."

The praecipe for Writ of Attachment etc was in fact filed by the respondent on the 8th July 1992. What therefore is the effect of the lapse of time which exists between the 7th August, 1985 when the judgment debt was partially realized, and the 8th July 1992 when the application for garnishee order was made? Is there any restriction on a judgment creditor as to the time in which execution is to be effected or applied for?

Title 46 of the Civil Procedure Code Law is entitled "***Judgment and Execution***" - Part (ii) is entitled "***Of Execution in General***

Section 593 under this heading states:

> "593. As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment."

Section 594 in so far as is relevant states:

> "594. Where six years have elapsed since judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly.
>
> And the Court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in action may be tried.
>
> And in either case the Court may impose such terms, as to costs or otherwise, as seems just."

Section 593 gives a successful plaintiff as of right a period of six years within which to issue execution, and thereafter with the leave of the Court. In this case the respondent got judgment in December 1983, but there was a stay of execution pending the appeal to the Court of Appeal which concluded on the 21st June 1985. Having applied for a discharge of

the money in the Jamaica Citizens Bank Account on the 10th July 1985 the respondent took no other action until he applied for the ganishee order on the 8th July 1992. It is significant , however that the appellants' appeal to the Judicial Committee of the Privy Council was not determined until the 3rd December 1986 when it was dismissed.

If the period between that date (3.12.86) and the date of the application for garnishee is calculated, it would appear that the respondent did apply for execution within six years of the final judgment in the case. In my view it is extremely likely that even if a Court considered the period for calculation is from the 7th August, 1985 having regard to the circumstances it would grant an extension by virtue of section 594 of the Civil Procedure Code Law.

In those circumstances, I am not persuaded that the respondent was guilty of laches, and consequently should be deprived of the fruits of his judgment. The judgment debt remained unsatisfied at the date of the order for payment out of the sums in the account at Jamaica Citizens Bank, and consequently the appellant remained liable for the balance with interest, the conversion (to TT dollars) of which must await its payment. I would confirm the order of Theobalds J in the Court below.

The appellant is ordered to pay the cost of the appeal, to be taxed not agreed.

DOWNER JA

The issue to be determined in this case is whether the claimant Gobin who is the respondent on appeal is entitled to retain the Garnishee order against Eagle Commercial Bank Order accorded him by Theobalds J. It is helpful to set out the learned judge's order as it appears at the end of his reasons. It reads:

> "(1) The application for Garnishee Order is granted.
>
> (2) Garnishee Order sought is made subject to presentation of an up to date computation of the amounts due. The guidelines to follow are that payments must be computed at the rate of exchange in existence at the date of payment.
>
> (3) Interest must be calculated at the figure stipulated in the Judgment of the Court of appeal.
>
> (4) Costs of these proceedings to be taxed if not agreed to be paid by the Defendant to the Plaintiff."

Probably a better method of achieving (2) would be to order the additional equitable remedy of an account: section 12 of the Judicature (Supreme Court) Act. If the claimant Gobin succeeds then this addition would be an appropriate variation to this order. If this order in its entirety is upheld, the consequences are advantageous to the claimant Gobin in Jamaican currency. But the illusion of an advantage disappears once the reckoning is in Sterling, American or even TT dollars. The stress is on TT dollars as this was the currency of account and payment. Gobin would be entitled to a further payment of the equivalent of T&T$416,589 together with interest of TT$349,934.76 as at 8th July 1992 according to his computation. The conversion date would be the date when the

appellant insurance company paid him the money. He would, of course, have had to account for J$1,010,193.82 he admitted was paid out to him by the appellant insurance company. That the rate of exchange would be date of payment, is supported by **Veflings Rederi A/S v President of India** [1979] 1 All ER 380. That date as explained in **Miliangos v George Frank (Textiles) Ltd** [1975] 3 All ER at 801 at p. 838 was the date when the plaintiff was given leave to levy execution for a sum expressed in Jamaican dollars, per Lord Cross who was adopting the approach of Lord Wilberforce at p. 809. Lord Edmund-Davies at p. 841 and Lord Fraser at p. 842 followed the same course.

The Formal Order was not included in the record and perhaps other essential documents were also omitted. This despite the Registrar's note which states:

> " NOTE: THIS RECORD IS SETTLED SUBJECT TO THE FORMAL JUDGMENT OF 2ND APRIL, 1993 BEING SIGNED, ENTERED OR OTHERWISE PERFECTED."

The attorneys-at-law responsible were perhaps negligent in preparing this appeal. If this matter goes again on a further appeal greater care is anticipated. Theobalds' J order was stayed on 13th May 1993 in the following terms by order of the Master. The terms were:

> "(1) That Execution of the Order granted by His Lordship, Mr Justice Theobalds on April 2nd, 1993 be stayed until the determination of the appeal from the said Judgment or such further Order."

The originating process for this aspect of proceedings was a praecipe for writ of attachment of debts and other property and the operative part reads:

> " SEAL a Writ of Attachment of debts and other property belonging to the abovenamed Defendant, MOTOR & GENERAL INSURANCE COMPANY LIMITED. Name and address of Garnishee:-

Eagle Commercial Bank	Scotiabank Jamaica Limited
6 Grenada Way	2 Knutsford Boulevard
New Kingston	New Kingston
Kingston 5	Kingston 5

Date of Judgment or Order: 12th December, 1993

Judgment debt remaining: TT$416,589.00
Interest accrued for 7 years: TT$349,934.76
Costs:

Dated the 8th day of July 1992."

Subsequently, on 17th September 1992 the order against Bank of Nova Scotia by consent was discharged. The order against Eagle Commercial Bank for five million dollars ($5,000,000) still stands. The interest on this must be enormous having regard to the high interest rate regime in this jurisdiction. The central issue in this case is whether the claimant Gobin has an equitable claim to this fund. If he does, the amount due to him can be determined by the remedy of taking an account.

On the basis of the above writ of attachment, Gobin would have found the pot of Jamaican gold at the end of the rainbow.

As to whether this garnishee order ought to have been made subject to the qualification in paragraph (2) of Theobalds J order depends on the true construction of paragraph (b) of the consent order approved by Wolfe J on 5th March 1984. The recital of that order is instructive as it shows that the basis of the agreement between the claimant Gobin and the appellant insurance company was the filing of a summons for a stay of execution by the appellant insurance company and the issuance of a writ of attachment by the claimant Gobin. The following terms were approved by Wolfe J:

> " BY CONSENT stay of execution granted herein on conditions that:
>
> (a) That the amounts standing to the credit of the defendant in current and deposit accounts with:
>
> 1. Jamaica Citizens Bank Limited
>
> 2. Bank of Commerce Jamaica Limited
>
> 3. National Commercial Bank (Jamaica) Ltd.
>
> 4. National Commercial Mortgage and Trust Limited
>
> 5. International Trust of Washington (Jamaica) Limited
>
> and which are now subject to the Order made herein on the 9th of February 1984 be placed on deposit with Jamaica Citizens Bank Limited in the name of the Plaintiff.
>
> (b) That the said sums shall be held on deposit pending the Defendant's appeal from the Judgment herein and be dealt with on the determination of the said Appeal in accordance with the rights of the parties as determined on the said Appeal."

There is another important order to which reference must be made to appreciate the significance of the alternative submission developed by Mr Norman Wright on behalf of the appellant insurance company. It was made by the late Alexander J on 7th August 1985. It has a critical bearing on the date of payment. If the appellant insurance company is in the right in its principal submission, then the initial garnishee orders were discharged and the claimant Gobin was paid on that date. This will be crucial when a final computation is made in terms of paragraph (2) of the order of Theobalds J. The relevant sections of the order made by Alexander J must now be cited. It reads in part :

> " UPON THE SUMMONS dated the 10th of July 1985 filed herein coming on for hearing this day and upon IT IS HEREBY ORDERED THAT:

1. The several amounts of money standing to the credit of the Defendant in accounts with the Garnishees:
   (a) Jamaica Citizens Bank Limited

   (b) Bank of Commerce Jamaica Limited

   (c) National Commercial Bank (Jamaica) Limited

   (d) International Trust of Washington (Jamaica) Limited

   and such as were deposited with Jamaica Citizens Bank Limited by the abovenamed Garnishees to secure the Stay of Execution pending the Appeal ordered on the 5th of March 1984, the said sums be paid forthwith to the Plaintiff together with interest accrued, toward satisfaction of the Judgment sum."

As for the relevant date for the rate of exchange, Lord Denning MR puts it aptly in **Veflings A/S v President of India [1969] 1 All ER 380 at 384:**

> "... But since the **Miliangos** case [1975] 3 All ER 801, [1976] AC 443 the law on this subject has been revolutionized. It seems to me clear that the rate of exchange should be the rate prevailing at the date of payment."

That settled the issue of payment Mr Norman Wright submitted in the alternative and he was correct on that alternative submission. In substance that decided the appeal for it was on the 7th August 1985 that the claimant Gobin was entitled to full satisfaction of his claims. However, his principal submission outlined in his grounds of appeal was that the judgment was satisfied in full on March 23 1984. This was reiterated in his skeleton arguments and the correct alternative submission was made with reluctance in the light of authorities cited by Dr Barnett. One of those authorities was **Galbraith v Grimshaw & Boxter [1909] 1 KB 339.** It was affirmed

on appeal and was reported at [1910] AC 509. A passage in the judgment at the Court of Appeal at pp 343 - 344 demonstrates why the garnishee Citizens Bank would not have allowed the claimant Gobin to withdraw any funds from the account until they were in receipt of the order of Alexander J on 7th August 1985. It reads thus:

> " The effect of the service of a garnishee order nisi in England was thus stated by Jessel M.R. in **In re Stanhope Silkstone Collieries Co.** [1879] 11 Ch.D. 160: 'The attachment or garnishee order is a mode of enforcing by execution the payment of the debt in the original action; and the order that the debt be attached and that the garnishee, that is, the debtor of the original judgment debtor, shall appear to shew cause why he should not pay the debt, does not operate to give the plaintiff in the original action any security until it is served.' It is plain that Jessel M.R. means that as soon as the order is served it does give the judgment creditor some security. It does not, it is true, operate as a transfer of the property in the debt, but it is an equitable charge on it, and the garnishee cannot pay the debt to any one but the garnishor without incurring the risk of having to pay it over again to the creditor. That was decided in **Rogers v. Whiteley** [1892] A.C. 118, where a garnishee order nisi which attached all debts owing or accruing due from the garnishee to the judgment debtor was served on the garnishee, who had in his hands as banker moneys belonging to the judgment debtor exceeding the amount of the judgment debt. The judgment debtor having brought an action against the garnishee for refusing to honour cheques which the judgment debtor drew on the balance over and above the amount of the debt, the House of Lords held that the order attached the whole of the moneys in the garnishee's hands and that he was right in dishonouring the cheques."

It was in the light of this and other authorities cited on behalf of the respondent Gobin, that Mr Norman Wright made his alternative submission in reply with respect to the balance due to Gobin. That can be settled by taking an account having regard to the payment of interest and the rate of exchange on the day of payment.

The commencement date, in fairness, must be 11th February 1983 which is the date of the order in the court below which was stayed pending this appeal. This is the principle which must be relied on to test the accuracy of the claimant Gobin's computation. Here is his assessment:

> " 3. That by a Judgment of the Honourable Court given in this action of the 12th day of December, 1983 it was adjudged that the above-named Defendant, MOTOR & GENERAL INSURANCE COMPANY LIMITED, should pay the Plaintiff the sum of SIX HUNDRED AND FIFTY THOUSAND TRINIDAD & TOBAGO DOLLARS ($650,000.00) with interest and costs to be agreed or taxed.
>
> 4. That the said Judgment still remains unsatisfied to the extent that the Defendant, MOTOR & GENERAL INSURANCE COMPANY LIMITED, on the 7th of August 1985 paid ONE MILLION AND TEN THOUSAND ONE HUNDRED AND NINETY THREE DOLLARS AND EIGHTY TWO JAMAICAN ($1,010,193.82) on account of its liability which converted at the rate of 1J$ x 2.325= 1TT$ to ($TT434,491.96) credited against the principal and interest accrued Judgment debt which then stood at ($TT851,080.96) leaving a balance of the Judgment debt remaining in 1985 of ($TT 416,589.00).
>
> 5. That no further payment has been made by the Defendant to the Plaintiff on account of the Judgment debt since that date and interest has continued to accrue at the rate of 12% per annum on ($TT 416,589.00) giving an additional ($TT49,990.00) per year which interest for seven years from 1985 to 1992 now amounts to ($TT 349,934.76).
>
> 6. That there is still due and owing to the Plaintiff the sum of SEVEN HUNDRED AND SIXTY SIX THOUSAND FIVE HUNDRED AND TWENTY THREE TRINIDAD & TOBAGO DOLLARS AND SEVENTY SIX CENTS ($TT 766,523.76) inclusive of interest which is justly owing and unsatisfied."

If, of course, there is this balance, it can be settled by arithmetic having regard to the payment of interest and the rate of exchange on the day of payment. Needless to say interest grows daily.

Turning to the initial orders of Wolfe J made on the 5th and 12th of December 1993, let us take the 1st order which was not included in the settled record but was presented by Dr Barnett during the course of his submission. It was made on a motion on the first day of hearing of the trial. Here is the order:

> "... IT IS HEREBY ORDERED;
>
> (a) That the sum of SIX HUNDRED AND FIFTY THOUSAND TRINIDAD AND TOBAGO DOLLARS (TT$650,000) to the Bank of Nova Scotia of Trinidad and Tobago, 49 High Street, San Fernando, Trinidad, to be held by the said bank as stakeholder and to await further directions of the Court. The said amount to be paid over within 48 hours hereof."

The order purports to be made pursuant to section 459 and section 463 of the Civil Procedure Code so it is pertinent to set out these sections:

> " Preservation or custody of subject matter of contract.
>
> 459. When by any contract a 'prima facie' case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured."

Then section 465 reads:

> " 465. An application for an order under section 459 may be made by the plaintiff at any time after his right thereto appears from the pleadings, or, if there be no pleadings, is made to appear by affidavit or otherwise to the satisfaction of a Court or a Judge."

So it appears that this was an interim order. Even so, since it was intended to be enforced in another jurisdiction, proof would have to be supplied that there was compliance with the requirements of registration stipulated in section 6 of the Judgment and Awards (Reciprocal Enforcement Act). The relevant order therefore for the purpose of these proceedings was the order made by Wolfe J on 12th December 1993 at the end of the trial. That order stipulated that:

> " And Upon the parties having consented to the action being decided on a point of law only, as raised in the pleadings and to the terms of any judgment in favour of the Plaintiff exclusive of the rate of interest the court DOTH ORDER AND ADJUDGE;
>
> 1. Judgment for the Plaintiff against the Defendant for the sum of SIX HUNDRED and FIFTY THOUSAND Trinidad and Tobago Dollars (TT$650,000) with interest thereon at the rate of 16 per cent from the 11th day of February, 1983 until payment of the said sum."

It should be noted that it was agreed by counsel that rate of interest determined on appeal was 12% and this is supported in the affidavits of the claimant, Gobin, the appellant insurance company and the opinion by Their Lordships' Board on a further appeal. Also the commencement date for calculating the amount due to the claimant Gobin must be 11th February 1983.

The remaining paragraphs of the judgment are of importance and must be cited: It reads:

> 2. Judgment for the Plaintiff on the Counterclaim.
>
> 3. The Defendant to discontinue the suits C.L. 1983/M-277 filed in the Supreme Court of Jamaica and No. 838 filed in the High Court of Trinidad and Tobago and abandon all claims arising out of the matters referred to in the said suits.
>
> 4. Costs to the Plaintiff to be taxed if not agreed.
>
> 5. Execution stayed for SIX (6) WEEKS."

So as a result of this exhaustive examination of the relevant orders, the order for payment out of the funds to secure the judgment made by Alexander J on 7th August 1985, refers to the order made in favour of the claimant Gobin stipulated for by Wolfe J for TT$650,000 with interest at the rate of 12% as ordered by the Court of Appeal from 11th February 1983 until payment of the said sum.

Was there any order by the Court of Appeal or Their Lordships' Board which limited the scope of the order of Alexander J dated 7th August 1985?

There was an appeal by the respondent insurance company to the Court of Appeal and a further appeal to Their Lordships' Board. That judgment **Motor & General Insurance Company Limited v Sony Gobin Privy Council Appeal No. 4/86** was delivered 3rd December, 1986. The claimant Gobin was successful in his claim for restitution on the basis, it seems, that there was a total failure of consideration. The Board in showing the basis of the claim said at p. 1:

> "... On 17th August 1982 the company granted the plaintiff an option to purchase the Jamaican and Barbadian operations of the company. The crucial provision of the agreement is paragraph 1 which reads as follows:-
>
> > 1. In consideration of Five Hundred dollars ($500.00) this day paid by the (sic) Vendor (the receipt whereof the Vendor Acknowledges) the purchaser shall have an option of purchasing the Jamaica and Barbados operation of Motor and General Insurance Company Limited, inclusive of the right to use the vendor's name, its Goodwill, Assets and Liabilities existing outstanding and or due to or from the Company in the Islands of Jamaica and Barbados, West Indies, together with all furniture, fixtures, office equipment and stationery at the price of SIX HUNDRED AND FIFTY THOUSAND DOLLARS ($650,000.00) Trinidad and Tobago Currency, to be paid to the Vendor

> in the Island of Trinidad, in addition to 20,000 shares valued at $7.00 per share held by the Purchaser, in the share capital of the vendor to be transferred to any nominee of the Vendor."

So from the outset it was recognized that the currency of account and payment was TT dollars. The scanty assets must also be noted as it explains why the claimant Gobin had to secure garnishee orders on the bank accounts of the respondent insurance company. The judgment continued thus:

> " The option was expressly subject to the approval of the Superintendent of Insurance in Jamaica or other relevant authorities and it was common ground in the proceedings that ultimately ensued that the approval of the Supervisor of Insurance in Barbados required under that provision was never obtained. On 11th February 1983 the plaintiff purported to exercise the option, paid $650,000.00 in Trinidad and Tobago currency to the company and tendered the relevant share certificate and instruments of transfer. The company subsequently declined to transfer the operations to the plaintiff but at the same time retained and has continued to retain the $650,000.00."

Then as regards claim which was successful, the Board continued:

> " The plaintiff commenced proceedings in the Supreme Court of Judicature of Jamaica seeking specific performance of the agreement, an injunction restraining the company from parting with any part of its Jamaican or Barbadian operations, damages for breach of contract and alternatively the return with interest of the $650,000.00 paid to the company."

Summarizing the judgment of the Court of Appeal, Their Lordships said:

> " The Court of Appeal of Jamaica dismissed the appeal by the company but, in terms of a concession made by counsel for the plaintiff that the appropriate rate of interest was the 12% rate referred to in the evidence, varied the order made in the Supreme Court in that respect. In separate judgments Rowe P., Carey and Campbell JJ.A. rejected the illegality argument on the ground that the agreement as to the transfer of shares to a nominee of the company could have been

> performed in a perfectly legal manner and therefore the plaintiff in suing for the return of $650,000.00 was not relying on an illegal contract. Carey and Campbell JJ.A. would also have found for the plaintiff on the condition precedent argument."

In conclusion, Their Lordships said at p.5:

> " Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs."

As for the date of the Court of Appeal's decision, it is supplied by the claimant Gobin thus:

> " 7. That the Defendants Appeal in Civil Appeal No. 3 of 1984 was heard by the Court of Appeal and decided in the Plaintiff's favour on the 21st of June 1985. The file record of this Honourable Court will show that on the 7th of August 1985 an Order was made directing the stakeholder Jamaica Citizens Bank to pay over to the Plaintiff part of the sums of money which it held pursuant to the Consent Order of March 5 1984."

How this appeal ought to be decided

Theobalds J found for the claimant Gobin and the basis of his reasons for rejecting the case for the insurance company is to be found in the following passage of his judgment:

> " The thrust or gravamen of the plaintiff case is that the payment of money to the Jamaica Citizens Bank Limited in compliance with a consent order made by the court on the 5th day of March 1984 could not be described as a payment to the plaintiff yet the affidavit while mentioning holding 'on deposit in the name of Sony Gobin ' does not indicate the circumstances under which such payment to the Jamaica Citizens Banks was to be made. Whatever the circumstances there is no way that such payment could be classified as a payment to the plaintiff and once this is conedled (sic) the entire thrust of the submission on the defendant's behalf breaks down. The Court was asked to accept that once the defendant (in compliance with the consent order abovementioned) made the payment to the Jamaica Citizens Bank then having lost control of such

> funds which were debited directly in the defendant's accounts then the payment to the Jamaica Citizens Bank amounted to payment to the plaintiff from the date of the lodgment or transfer to Jamaica Citizens Bank."

Mr Norman Wright, in his primary submission, relied on paragraph 7 of the affidavit of Winston Murray on behalf of the appellant insurance company to show how he approached the issue of repayment. It reads:

> "7. To the best of my knowledge, information and belief the Judgment Debt inclusive of interest at the rate of 12% per annum from the 11th day of February 1983 to the 20th March 1984 amounted to SEVEN HUNDRED AND THIRTY SIX THOUSAND FIVE HUNDRED AND FORTY EIGHT DOLLARS AND TEN CENTS ($736,548.10) and when converted on the 20th March 1984 at the then prevailing rate of 1TT$ - 63.511 Jamaican Cents was equivalent to ONE MILLION AND ONE THOUSAND AND NINE HUNDRED AND FIFTY SIX DOLLARS AND THIRTY NINE CENTS ($1,001,956.30). I have ascertained the rate of exchange from the Trinidad and Tobago Gazette (Extraordinary) Vol 23-No 75 declaring the Foreign Exchange Rates inter alia, for Jamaican Dollars by the Central Bank of Trinidad and Tobago for the 20th March 1984 and I hereby exhibit a copy of the said Trinidad and Tobago Gazette (Extraordinary) 'W.M. - 3' for identity."

As stated previously, Mr Norman Wright submitted in the alternative that the date which Gobin was entitled to take his funds was 7th August 1985. Under the terms of the order made by the late Alexander J, Gobin could and did take the money in the account standing in his name. Here is his admission:

> "8. That after the Order of August 7 1985 was perfected and served on Jamaica Citizens Bank on the 22nd of August 1985 I received the amount of ONE MILLION AND TEN THOUSAND ONE HUNDRED AND NINETY THREE DOLLARS AND EIGHTY TWO CENTS Jamaican (J$1,010,193.82) on account of the Judgment debt. a copy of the Jamaica Citizens Bank managers cheque No. 004605 dated August 22 1985 for that sum is now produced and shown to me and exhibited hereto marked 'SG 1' for identity."

Can he now claim that he ought to be paid any further sum? Any further payment to which he is entitled must be on the basis of the conversion date he relies on, which is 7th August 1985, in contrast to 20th March 1984, the date the sums were deposited as relied on by the appellant insurance company. The authorities previously cited shows that Gobin's contention as to the date of payment is correct and that on his computation he is due a further sum.

There are two other aspects of this case. The first concerns the election the claimant Gobin made to take his money in equivalent Jamaican currency from the making of the consent order. It is expressed in ground of appeal (8) which states:

> "(8) That the Learned Judge in Chambers erred in Law in failing to give any or any sufficient consideration to the Defendant's submission that at all times the Plaintiff could have exercised his option to take the money from the Defendant upon giving the usual undertaking, instead of the option the Plaintiff elected of having the Judgment sum placed in his Bank on escrow to await the outcome of Appeal."

At that time if the respondent insurance company intended to convert its Jamaican funds to Trinidad & Tobago dollars, because of the Exchange Control Act, then permission would have to be sought from the Bank of Jamaica. The claimant Gobin resides within this jurisdiction and he elected to institute proceedings here although he had borrowed the money in Trinidad and paid it directly to the head office of the respondent insurance company there.

The second aspect to be considered is whether the claimant Gobin would, in any event, have been defeated by delay as was submitted on behalf of the appellant insurance company. This is how the appellant insurance company put the issue in its skeleton argument:

> " 9. In relation to the bona fides of this claim, we ask the Court to consider the length of time which was allowed to elapse between the time at which the Plaintiff agrees he was paid, and the institution of proceedings to enforce his claim for short-payment. We ask the Court also to consider the movement of the Jamaican $ against the TT$ of which the Plaintiff was aware. Reference to the Statistical Digest indicates that during that period of over 7 years, the J$ has consistently devalued against the TT$ thereby ensuring a windfall for the Plaintiff in his manner of calculation. What has on the Plaintiff's own calculation started out as a deficit of TT$416,000.00 in 1985, had now grown again on the Plaintiff's calculations and by reference to a significantly devalued J$, to $4,019,803.00 as at 3rd July 1992.
>
> 10. Nowhere in the Plaintiff's two Affidavits is there any explanation for his failure to use any of the reliefs available to collect the alleged short payment of the Judgment debt between 1985 and 1992, prior to the commencement of these proceedings. All of the garnishee procedures available currently were available to Plaintiff in 1985. Further, the Plaintiff cannot be said to have been unaware that the Defendant company during this 7 year period was actively engaged in business in the Island, and had assets available for garnishee proceedings in order to satisfy this allegation of short payment of the Judgment debt."

There is no evidence as regards the assets which were available on which a judgment creditor could levy execution. Nor was there any evidence adduced that the claimant Gobin was aware of the whereabouts of the respondent insurance company's bank accounts until he discovered those at Eagle Commercial Bank and Scotia Bank in July 1992.

Here is how Theobalds J treated the matter.

> " ... Reference has been made to the rules of Equity and it has been urged that the plaintiff having brought his suit in Equity is bound by the rules of Equity and cannot after a delay of so many years seek to enforce his rights as against the defendant. The rule of Equity which would apply here is 'where equities are equal the law prevails'. The plaintiff is legally entitled to the fruits of

> his judgment. Both parties had a right to proceed. The plaintiff to collect and the defendant a corresponding right or obligation to pay. The plaintiff is castigated for not proceeding to enforce his right; but what about the corresponding obligation to repay? The defendant has for many years had the benefit of the plaintiff's $650,000.00 TT. This position has remained unchanged in spite of a judgment of this Court from as far back as 12th December 1983."

Although these were claims for equitable reliefs, that on which the claimant Gobin succeeded ultimately before the Board was a common law claim for unjust enrichment on the basis of total failure of consideration. Here is how it was put by the Board:

> " ... the plaintiff is to be regarded as seeking the return of money had and received by the company in circumstances where the company cannot justify its retention of money."...

See **Moses v Macferlan [1760] 2 Bur 1005 at 1012.** Now he seeks to enforce his interpretation of the judgment by the equitable process in garnishee proceedings for a writ of attachment dated 8th July 1992 with respect to the respondent insurer's account at the Eagle Commercial Bank. See section 589 of the Civil Procedure Code. It reads:

> " Praecipe for execution. Schedule VII
>
> 589. When the person prosecuting such judgment or order is desirous of enforcing the same, he shall apply to the Registrar for the issue of the proper writ or writs of execution by filing a 'praecipe' for that purpose.
>
> The 'praecipe' shall contain the title of the action, the reference to the record, the date of the judgment, and of the order (if any) directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods, the execution is to be issued; and shall be signed by the

> solicitor of the party issuing it, or by the party issuing it if he do so in person."

Although process was by way of writ of attachment, the substance of this claim was the correct interpretation of the consent order by Wolfe J and the force and effect of the order by Alexander J. Since the claimant Gobin has been successful as regards the date of conversion, it is necessary to determine whether the delay during the period 7th August 1985, the date of conversion to 8th July 1992 the date garnishee proceedings were instituted to enforce the judgment, was so prolonged as to bar relief in the circumstances of this case.

The appellant insurance company submitted that it would be inequitable to permit the claimant to resort to the writ of attachment in the circumstances of this case. Section 593 of the Civil Procedure Code reads:

> " Time limit for issuing writ of execution.
>
> 593. As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment."

The important consideration is that an application could have been made for an extension: see section 594 of the Code and if garnishee proceedings were at common law I would have granted it. But a crucial factor which inclines me to rule that laches does not defeat Gobin's claim is that the appellant did not seek to discharge the garnishee order in respect of the funds at Eagle Commercial Bank. On the other hand, he sought and obtained a consent order to discharge the garnishee order in respect of those funds at the Bank of Nova Scotia. The inference must be that the appellant insurer knew that the claim had merit.

Moreover, the following passages from the affidavit of the claimant Gobin are instructive:

"8. That to the best of my knowledge, information and belief the Garnishee named herein is indebted to the Judgment Debtor in the sum set out hereafter or thereabouts:

Scotiabank Jamaica Limited
New Kingston
$2,000,000.00

Eagle Commercial Bank
New Kingston $2,000,000.00

9. The grounds of knowledge information and belief are founded on the fact that the above-named Defendant, MOTOR & GENERAL INSURANCE COMPANY LIMITED, paid remittances from its account at those Banks, I, therefore, humbly pray that this Honourable Court will exercise its jurisdiction to grant the relief sought in the terms of the Affidavit filed herein."

The inference was that some detective work had to be done by the claimant. Further, there was no evidence in the affidavits of the appellant insurer that there were assets in this jurisdiction at any stage of these proceedings to satisfy the claimant Gobin. Additionally, it must be recognised that until the Privy Council handed down its judgment on 3rd December 1986, it was not prudent to move against the appellant insurance company. So when the garnishee order was obtained against Eagle Commercial Bank on 8th July 1992 it was inside the six year period.

Yet another circumstance was that the appellant insurance company gave three conflicting accounts of the amounts it alleged was overpaid to the claimant Gobin. Winston Murray, the principal officer of the appellant insurance company gave the over payment as $14,426.84. Christopher Dunkley, one of the attorneys-

at-law, on the record gave the figures overpaid as TT$72,910.42 on 2nd November 1992 and on 27th November 1992 the figure was TT$5,406.20.

The upshot is that the claimant Gobin is again triumphant. He has established that on the date of payment he was short-paid not over-paid as the insurance company claimed.

The order of this court ought to be that the garnishee order against Eagle Commercial Bank must stand and the order below ought to be varied. It is helpful to reiterate three items of the order below. They read:

> "(1) The application for Garnishee Order is granted.
>
> (2) Garnishee Order sought is made subject to presentation of an up to date computation of the amounts due. The guidelines to follow are that payments must be computed at the rate of exchange in existence at the date of payment.
>
> (3) Interest must be calculated at the figure stipulated in the Judgment of the Court of Appeal."

Since the claimant Gobin has established an equitable right to the fund at Eagle Commercial Bank, to settle the matter, I would also order that an account be taken to ascertain the amount he is due having regard to the exchange rates on the date of payment. This provision would replace (2) above and to that extent the order below is varied.

The appellant insurance company must pay the costs of this appeal.

GORDON J A

I have read the draft judgments of Forte and Downer JJ.A. I agree with the conclusions at which they have arrived for the reasons advanced by Forte J.A. There is nothing that I can usefully add.

FORTE J A

The appeal is dismissed. The order of the court below is affirmed, and the appellant is ordered to pay the costs of the appeal to be taxed, if not agreed.