Judgment Book.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL A 004 OF 1999

BETWEEN AIR JAMAICA LIMITED	**PLAINTIFF**
AND WORLDWIDE TRAVEL SERVICE LTD	**FIRST DEFENDANT**
AND DENNIS MORGAN	**SECOND DEFENDANT**
AND BRIAN GOLDSON	**THIRD DEFENDANT**
AND IVAN BURNETT	**FOURTH DEFENDANT**

John Graham & Christopher Malcolm for the plaintiffs instructed by Patterson, Phillipson & Graham

Alfred McPherson instructed by Alfred McPherson & Co., for the defendant.

Heard on the 16th day of June, 27th day of October and the 6th day of December, 1999.

IN CHAMBERS

CORAM: ORR J.

The Background

This is an application for summary judgement on behalf of the plaintiff against the defendants. The plaintiff (Air Jamaica) seeks on order in the following terms:

> "1. Judgement be entered for the Plaintiff against the Defendants in the sum of $6,762,302.82 with interest thereon at the rate of forty-five percent (45%) per annum from the 14th day of September, 1997 until the date of judgement.
>
> "2. The costs of the action be borne by the Defendants."

The first defendant is what is commonly called a travel agency, and has a number of branches including one in Ocho Rios. The second, third and fourth defendants are directors of the first defendant. Air Jamaica brought this action to recover the sum claimed for airline tickets credited by Air Jamaica to the first defendant (hereafter called "Worldwide Travel").

Worldwide Travel admits owing the principal debt claimed - $6,762,302.82. The second, third and fourth defendants hereafter called "the guarantors", are sued as guarantors of the said debt. In September, 1992 "the guarantors", signed an instrument of guarantee in favour of the plaintiff. The main issue which falls to be decided is whether the instrument of guarantee applies to the entire indebtedness of the first defendant to Air Jamaica or whether it covers only the indebtedness of the Ocho Rios branch.

In paragraph 3 of the statement of claim the issue of interest is addressed as set out hereunder:

> "3 The plaintiff claims interest at the rate of 45% per annum on the said sum of $6,762,302.82 from 14th day of September, 1997 to the date of judgement".

In their defence the guarantors deny owing the principal debt and contend that if there is any liability at all, it is limited to the sum of $1,254,783.54 "being an amount outstanding and due from the Ocho Rios Agency of Worldwide Travel located in the parish of Saint Ann".

In paragraphs 3 and 4 they aver as follows:

> "3 Further and in the alternative, the Second, Third and Fourth Defendants contend that the aforesaid Agreement made September 23, 1992 is unenforceable the same having not been duly executed and no demand having been made thereunder in the manner required by law.
>
> "4 The Defendants do not admit that they are liable to pay interest at the rate alleged or for the period as alleged in paragraph 3 of the Statement of Claim".

Paragraph 5 contains the usual sweeping general denial.

In an affidavit in support of the summons for summary judgement, Harold Richardson, the director of Revenue Accounting of the plaintiff gives particulars relative to the claim for $6,762,302.82 by location and amounts as follows:

"AGENCY	GENERAL LOCATION	AMOUNT
85-58459-0	Manor Park - Kingston	$2,742,784.62
85-86239-4	French Street - Spanish Town	$2,602,438.66
85-52916-1	Ocean Village Shopping Centre - Ocho Rios	$1,917,529.42
85-85181-3	Island Life Building - New Kingston	$1,784,614.57
TOTAL SALES FOR PERIODS 0847-0927		**$9,051,367.27**
TOTAL PAID BY AGENCY		**$2,289,064.45**
GRAND TOTAL OUTSTANDING		**$6,762,302.82."**

The instrument of guarantee is typed on the letterhead of Worldwide Travel. At the top and to the right are listed five locations where Worldwide Travel carries on business. The Ocho Rios branch is included in this list. On the left hand side near the top is the date, September 23, 1992 and it is addressed as follows on the first page:

> "Air Jamaica Limited
> 72-76 Harbour Street
> Kingston
>
> Dear Sirs:
>
> 1. In consideration of your appointment of our Ocho Rios Branch (the Agency) of Worldwide Travel Services Limited, as an agent of the Airline with authority to sell on credit terms as agreed, passenger air transportation and issue tickets and other travel documents in connection therewith, we Dennis Morgan, Brain Goldson and Ivan Burnett of 7 Shortridge Drive, Kingston 6, 4A Shortridge Drive, Kingston 6 and Lot 4, 12 Norbury Drive, Kingston 8,

directors of the agency, unconditionally guarantee payment to you on demand upon us of all monies now or at any time remaining due and unpaid by the agency on account of ticket sales, computer rentals or any other travel related activities of the agency.

2. This is a personal guarantee enforceable against the signatories hereto, jointly and severally.
3. This guarantee shall be a continuing guarantee binding each of us and his executors, administrators or legal representatives jointly and severally, until the receipt by you from any one of us or his executors, administrators or legal representatives of notice in writing to discontinue in accordance with clause 4 hereof, and notwithstanding any changes in the name, style, or constitution of the Agency.
4. Each guarantor shall be at liberty upon giving prior notice to you to discontinue and to withdraw from all liability hereunder if such guarantor shall have ceased to be a director of the Agency, insofar as it relates to debts incurred after such discontinuance and withdrawal."

At the foot of this page the directors are listed thus:

Directors: Dennis P. Morgan (Chairman), Ivan Burnett, Brian L. Goldson, Janet E. Morgan (Director/Secretary)

On the following page are the signatures of the three directors, Brian L. Goldson, Dennis Morgan and Ivan Burnett.

THE ISSUE TO BE DECIDED

The pivotal point for decision is whether the guarantee applies to all the debts as claimed (embracing some five shops or branches) or whether it applies to the debts of the Ocho Rios branch only.

THE SUBMISSIONS

(A) By Mr. Graham for the Plaintiff

Mr Graham made the following submissions:

Notwithstanding the inclusion of the words (the Agency) in brackets immediately after the word "Ocho Rios Branch" in the first line of the body of the guarantee, read as a whole the guarantee will be seen to apply to all the operations of the Worldwide Travel Services, and not to the Ocho Rios branch only.

There is no entity known as an agency which has directors, hence the phrases "directors of the agency" in paragraph 1 and "director of the Agency" in paragraph 4 must refer to Worldwide Travel.

There is one company in issue and the name of that company is Worldwide Travel Services Limited. Even though it could be argued that there is some ambiguity, there is only one company.

The phrase "directors, of the agency" refers to the directors of Worldwide Travel. This is borne out by the fact that its directors are listed at the bottom of the document and its various shops are listed at the top.

Moreover the seal of Worldwide Travel is affixed.

If necessary the court should construe the document contra proferentem the guarantors, who should be seen as the makers.

In Jamaica the expression "Travel Agency" is used to refer to any company which carries on the same type of business as Worldwide Travel.

At worst, the court should enter judgement against Worldwide Travel in full, and against the guarantors for the sum admitted as owing by the Ocho Rios branch.

(b) By Mr. MacPherson for the Guarantors

The document of guarantee must be construed contra proferentem and Air Jamaica Ltd, the plaintiff, who must be presumed to be the maker of the document as it is for the benefit of the plaintiff.

The fact that the seal of Worldwide Travel is affixed to the document is immaterial, as it is not necessary that a guarantee be under seal.

The words "the Agency" in paragraph 1 are specific and unequivocal and so all other references to "agency" apply to the Ocho Rios Branch only.

The Court's Analysis and Conclusion

(i) Some Guiding Principles

The task of the court is well expressed by Lord Diplock in Pioneer Shipping Ltd v B.T.P. Tioxide Ltd [1981] 3 W.L.R. 292 at 297D He said

> "The object sought to be achieved in construing any commercial contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them."

Mason J, in Codelfa Construction Pty. Ltd v State Rail Authority of New South Wales (1982) 149 C.L.R. 337 at 352 pointed out that the intention is the presumed intention of the parties, He said:

> "..... when the issue is which of two or more possible meanings is to be given to a contractual provision we look not to the actual intention, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties, presumed intention in this setting."

In Reardon Smith Line v HansenTangen: Hansen - Tangen v Santio Steamship Co. [1976] 3 All ER 570 at 574 h Lord Wilberforce put it this way:

> "When one speaks of the intention of the parties to the contract one speaks objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties."

In Vitol B.V. v Compaynie Europeene des Petroles [1988] I Lloyd's Rep 574 at 576, Saville J enunicated the guiding principles in a case such as this where it is clear that a contract has been made, but there may be an ambiguity. He said:

> "The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them - and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiquity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words

> any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain."

Similarly in 1 R.C. v Raphael [1935] AC 96 at 142 Lord Wright said:

> "It must be remembered at the outset that the court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, must ascertain the meaning of the words actually used. (emphasis added)

Mr. Graham has correctly said that the court must look at the whole document. There is abundant authority for this proposition. For instance, in Leader v Duffey 1888 13 App. Cas 294 at 301 Lord Halsbury said:

> ....."I agree that you must look at the whole instrument, and inasmuch as there may be inaccuracies and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it."

(ii) A Look at the Document

There are however certain aspects of the document which bear mentioning.

Firstly, the consideration. This is expressed that in paragraph 1:

> "In consideration of your appointment
> of our Ocho Rios Branch (the agency)
> of Worldwide Travel Services Limited,
> as an agent of the Airline...."

Secondly, the words in brackets - the phrase "the agency"). In the English Language, particularly in British English, brackets are used to show that the words enclosed are used parenthetically, or put another way, brackets enclose material that supplements or explains words or phases that have gone before. In this context primafacie the phrase "the agency" in brackets, explains the words which immediately precede it - "Our Ocho Rios Branch," and are equivalent to the phrase "hereafter called the agency". This is a well known device and is often used in judgements. For example in R v Dept. of Health exp. Source Informatics [1999] 4 All E.R. 185 at 187, Latham J begins his judgement with these words:

> "In these proceedings the applicant seeks
> certain declaratory relief in relation to a
> policy document issued in July 1997 by
> the respondent to health authorities.
> This followed a request to general
> practitioners (GP s) from a data
> collecting company (not the applicant)
> for their consent to obtain certain
> information....."

Later, on the same page at line j he says:

> "At the time, the applicant itself was trying to persuade GPs and Pharmacists to allow it to collect data as to the prescribing habits of GPs."

Prima facie therefore, the words "the agency" in brackets in line 1 of paragraph 1, are intended to indicate that whenever these two words are used together thereafter in the document, they refer to the Ocho Rios branch of Worldwide Travel. But Mr. Graham argues that to apply this meaning throughout the document produces a logical inconsistency in view of the contexts in which they are used later in paragraph one and in paragraphs 3 and 4.

For ease of reference and using selective comminution I again set out the provisions contained in those paragraphs.

Paragraph 1 (second half).

> "In consideration of.....we Dennis Morgan, Brian Goldson and Ivan Burnett.... directors of the agency, un-conditionally guarantee payment to you on demand upon us of all monies now or at any time remaining due and unpaid by the agency on account of ticket sales, computer rentals or any other travel related activities of the agency."
> (emphasis mine)

Paragraph 3

> " This guarantee shall be a continuing guarantee binding each of us..... notwithstanding any changes in the name

> style, or constitution of the Agency."
> (emphasis added)
>
> Paragraph 4
>
> " Each guarantor shall be at liberty upon giving prior notice to you to discontinue and to withdraw from all liability hereunder if such guarantor shall have ceased to be a director of the Agency .....
> (emphasis supplied)

Mr. Graham submits in effect that all the references to "the Agency," except the very first in line one of paragraph 1, that is, the use of this phrase in brackets, refer not to the Ocho Rios branch but to Worldwide Travel. This would amount to disregarding the fact that the phrase is placed in brackets in the very first line of the body of the guarantee.

Mr. Graham's submits that the guarantors cannot be described as directors of the Ocho Rios branch.

I am satisfied that the phrases "directors of the agency", and "director of the agency" are not void for uncertainty but that the court can reach a conclusion as to their meaning. In this I am fortified by the dictum of Lord Wright in Scammell and Nephew v Ouston [1941] AC 251 at 268 he said:

> "The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there is an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiquity as long as any definite meaning can be extracted.

> But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say there is no contract." (emphasis mine)
>
> He later added:
>
> "It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning."

The words of Lord Upjohn in Re Gulbenkian's Settlement Trusts [1968] 3 All ER 785 at 790 h - 791b though used in a context of the need for certainty of objects for the purposes of a power of appointment, are nonetheless of general application to the construction of documents. He said:

> "There is no doubt that the first task is to try to ascertain the settler's intention, so to speak, without regard to the consequences, and then, having construced the document, apply the test. The court, whose task is to discover that intention, starts by applying the usual canons of construction; words must be given their usual meaning, the clause should be read literally and in accordance with the ordinary rules of grammar, but very frequently, whether it, be in wills, settlements or commercial agreements, the application of such fundamental canons

> leads nowhere; the draftsman has used words wrongly, his sentences border on the illiterate and his grammar may be appalling. It is then the duty of the court by the exercise of its judical knowledge and experience in the relevant matter, innate common sense and desire to make sense of the settlor's or parties' expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to the language if it can do so without doing complete violence to it. The fact that the court has to see whether the clause is 'certain' for a particular purpose does not disentitle the court from doing otherwise than, in the first place, try to make sense of it."

It is clearly the intention of both parties to the document that the guarantors, should be such in relation to debts owed to Air Jamaica by either a part or the whole of Worldwide Travel. Neither side has suggested the document is void for uncertainty, and in my view that aspect of their respective positions is correct. It remains therefore for the court in the words of Lord Upjohn "to make sense of the ..... parties' expressed intention,"

Both sides have urged the court to apply the "contra pro ferentem" rule, and submitted that the result would be in favour of their respective positions. In making their submissions both counsel stated the rule as being that the document should be construed contra pro ferentem the maker. Whilst such an enunciation of the doctrine has the support of various judicial dicta and even some text books, and notwithstanding some

confusion and lack of cohesion in the judicial dicta, a careful analysis of the concept will reveal that the correct principle is that stated by Brett MR in Burton v English [1883] 12 QBD 218 at 220 line 13.

His description was as follows:

> "The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made." (emphasis supplied)

On this basis therefore although the seal of Worldwide Travel is affixed to the document, and although it is done on the letterhead of Worldwide Travel and although it takes the form of a letter addressed to Air Jamaica, yet it is document in favour of Air Jamaica, and the ambiguous provisions were inserted for their benefit. It means therefore that the document must be construed contra proferentem Air Jamaica and I so hold.

Bearing in mind Lord Upjohn's guideline in Re Gulbenkian's Settlement Trusts (supra) that the court must endeavour to make sense of these provisions, I shall deal first with the phrases regarding directors in paragraphs 1 and 4. In the first, the guarantors describe themselves as "directors of the agency" and go on to state that they give an unconditional guarantee. In the second, the document states that a guarantor may withdraw and be free from all liability under the guarantee for debt incurred after withdrawal "if such guarantor shall have ceased to be a director of the Agency."

In both these instances it is true to say that the guarantors are strictly speaking directors of the company, Worldwide Travel, and not of the Agency. But I am of opinion, that looked at in a common sense manner, these phrases are used in a practical sense, in that it is recognised that as directors of Worldwide Travel, of which the Ocho Rios branch, the agency, is a part, the guarantors in actual fact would direct the affairs of every branch, including the Ocho Rios branch; and so in practical layman's terms they could be said to be "directors" of the Ocho Rios branch.

I now turn to the use of the word "agency" in paragraph 3. I found this unobjectionable. It merely states that the guarantee shall be binding notwithstanding any change in the name, style or constitution of the agency.

Finally, I now consider the other uses of the word "agency" in paragraph one. If one again applies selective communition and omits the description "directors of the agency" after the names of the guarantors, one is left with a simple statement that they:

> "unconditionally guarantee payment.....
> on demand..... of all monies now or
> at any time remaining due and unpaid
> by the agency on account of ticket sales,
> computer rentals or any other travel
> related activities of the agency."

I therefore hold that the guarantee is binding in respect of the activities of the Ocho Rios branch only.

The Order of the Court

Mr. McPherson submitted that if the court accepts that the guarantee relates to the Ocho Rios branch only, then the court should also accept that the guarantors have a good and arguable defence to the writ of summons filed by the plantiff, and give them leave to defend.

Mr. Graham, argued that the guarantors having admitted that the sum of $1,917,529.42 was owing by the Ocho Rios Branch, if the court interpreted the document as referring to that branch only then the court would have decided all the issues and should enter judgement.

I agree. This matter has been conducted on the basis that the positions of the parties would be conclusively determined by the court's interpretation of the document. Moreover, I am fortified in this position by the ruling of the Court of Appeal in Peter Williams (Snr) et al vs United General Ins. Co., S.C.C.A. No. 82/97 (unreported) decided June 11, 1998, in which it followed the decision of the Court of Appeal of Trinidad and Tobago in Trinidad Home Development Ltd. v I.M.H. Investment Ltd (1990) 39 W.I.R. 355. The headnote of the latter case states the principle in these words.

> "Notwithstanding the established practice before English Courts, when a matter of pure law is raised by a defendant in Order 14 (summary judgement) proceedings in Trinidad and Tobago, the master (or judge) should deal with the matter finally and definitely, no matter how complex the law

or how extended the argument
(even if it includes the citation of many
authorities).

In view of my ruling on the question of the interpretation of the document, and Mr. Graham's willingness to accept the figure admitted as owing by the guarantor's in respect of the Ocho Rios branch, there is no other issue to be decided except the matter of interest, and more so since the first defendant (Worldwide Travel), has admitted owing the full amount claimed apart from the interest, and in view of the fact that Mr. McPherson did not pursue the other aspects of the defence.

Mr. Graham submitted that twenty-five per centum per annum would be an appropriate figure for the award of interest, and adverted to a recent decision in which Langrin J. (as he then was) had made such an award.

I too regard twenty-five per centum as an appropriate figure having regard to the nature of the debt owed.

The judgment of the court is therefore as follows:

Judgement for the plaintiff, Air Jamaica, against the first defendant, World Wide Travel Services Ltd, in the sum of $6,762,302.82 with interest of 25% from September 14, 1997 and costs to the plaintiff to be taxed if not agreed.

Judgement for the plaintiff against the second, third and fourth defendants (the guarantors) in the sum of $1,917,529.42 with interest of 25% from September 14, 1997 with costs to the plaintiff to be taxed if not agreed.

Certificate for counsel