

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 63 OF 1983

BETWEEN	SONNY GOBIN	PLAINTIFF
AND	MOTOR AND GENERAL INSURANCE COMPANY LIMITED	DEFENDANT

Dr. Lloyd Barnett and Alton Morgan for Plaintiff

Donald Schardsmith and A.W. Wood for Defendant

Heard: December 5, 6, 8 and 12, 1983.

WOLFE J.

On the 12th December 1983 Judgment was entered for the Plaintiff in the abovenamed suit, at which time I undertook to put my reasons in writing. I now do so in keeping with that undertaking.

The facts which gave rise to the cause of action are simple and uncomplicated.

Plaintiff and Defendant are parties to an agreement whereby the Defendant granted an option to the Plaintiff to purchase the Jamaican and Barbadian operations of the Defendant. In accordance with the terms of the said Agreement the Plaintiff on the 4th November 1982 purported to exercise the option. The Plaintiff paid to the Defendant the entire balance of the purchase price and tendered the relevant share certificates and instruments of transfer to the Defendant. Notwithstanding repeated calls upon the Defendant by the Plaintiff to effect a transfer of the operations to the Plaintiff the Defendant has failed so to do but at the same time has retained the purchase price of \$650,000.00 in Trinidad and Tobago currency.

The Plaintiff therefore commenced proceedings for

- (1) Specific Performance of the said Agreement and/or an order that the Defendant do transfer the Jamaican portion of the Defendant's operations to the Plaintiff.
- (2) An injunction restraining the Defendant, whether by itself or its agents or servants or otherwise howsoever, from doing the following acts or any of them, that is to say, parting with or disposing of any part of the Jamaican

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or Barbadian operations or business undertaking
or assets of the Defendant.

- (3) Damages for Breach of Contract.
- (4) Alternatively the return with interest of the sum of \$650,000.00 in Trinidad and Tobago currency paid by the Plaintiff to the Defendant.
- (5) Further or other relief.
- (6) Costs.

By and with the consent of the parties the action proceeded to trial on the following basis.

- 1. That the question of the right of the Plaintiff to recover the down payment of T&T\$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 T&T\$650,000.00 plus interest 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 Counter Claim.
- 4. That Defendant discontinue Suits C.L. M277/83 filed in the Supreme Court of Jamaica and 838/83 filed in the High Court of Trinidad and Tobago and abandon all claims arising out of the matters referred to in the said suits.

Paragraph 14 of the amended Defence is recited below:

"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".

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To properly appreciate the nature of the defence it is necessary to set out the terms of the Agreement.

" TRINIDAD AND TOBAGO:

THIS AGREEMENT made this 17th day of August, in the year of Our Lord One Thousand Nine Hundred and Eighty Two Between MOTOR AND GENERAL INSURANCE COMPANY LIMITED (hereinafter called "the Vendor") of the one part and SONNY GOBIN (hereinafter called "the purchaser") of the other part:

WHEREBY IT IS AGREED 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 Jamaican 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.
2. The option shall be exercised by a notice in writing of his intention to purchase sent by the Purchaser to the Vendor within the period aforesaid.
3. The purchaser will incorporate two separate companies one in Barbados and one in Jamaica whose objects will be to acquire all the assets and liabilities existing in the aforesaid Islands of Barbados and Jamaica respectively, and shall have the right to use the vendor's name subject to the completion of the terms of this Agreement.
4. The purchase shall be completed at No. 17, Rust Street, St. Clair, Port of Spain, the office of Vendor's Solicitors, Messrs. Dave de Peiza & Company, on the expiration of Ninety (90) days after the date of the Notice exercising the said option and on such completion the purchaser shall pay the balance of his purchase price and transfer the Share Certificates Nos: 1101 to 1300 and Nos. 21901 to 41900 as aforesaid, and the Vendor will execute a transfer of its assets and liabilities in Jamaica and Barbados to the Purchaser such Deed to be prepared and perfected by and at the expense of the Purchaser.
5. If the Purchaser shall exercise the said option and duly complete the said purchase according to this agreement the Vendor shall

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give credit to the purchaser on account of the said purchase price for the said sum of Five Hundred Dollars (\$500.00). If the purchaser shall not exercise the said option the said sum of Five Hundred Dollars (\$500.00) shall belong to the Vendor absolutely and if the purchaser shall exercise the said option but shall subsequently fail to complete the said purchase in accordance with this agreement the said sum of Five Hundred Dollars (\$500.00) shall become the absolute property of the vendor who may resell the Jamaican and Barbados operations of the Vendor as it shall think fit.

6. If the purchaser shall insist upon any requisition or objection which the vendor on the ground of expense delay or other reasonable ground shall be unable or unwilling to satisfy the vendor may by notice in writing decline to proceed further in the matter of the said sale and unless the purchaser shall in writing withdraw such requisition or objection within seven (7) days after the date of such notice this agreement shall determine and the Vendor shall be at liberty to retain the said sum of Five Hundred Dollars (\$500.00) for its own absolute benefit. The vendor's power of rescission under this clause may be exercised notwithstanding any attempts by them to satisfy such requisition or objection or any negotiation or litigation or adverse judicial decision relating thereto.

7. This option is subject to the approval of the Superintendent of Insurance in Jamaica or such other relevant authorities as may be necessary.

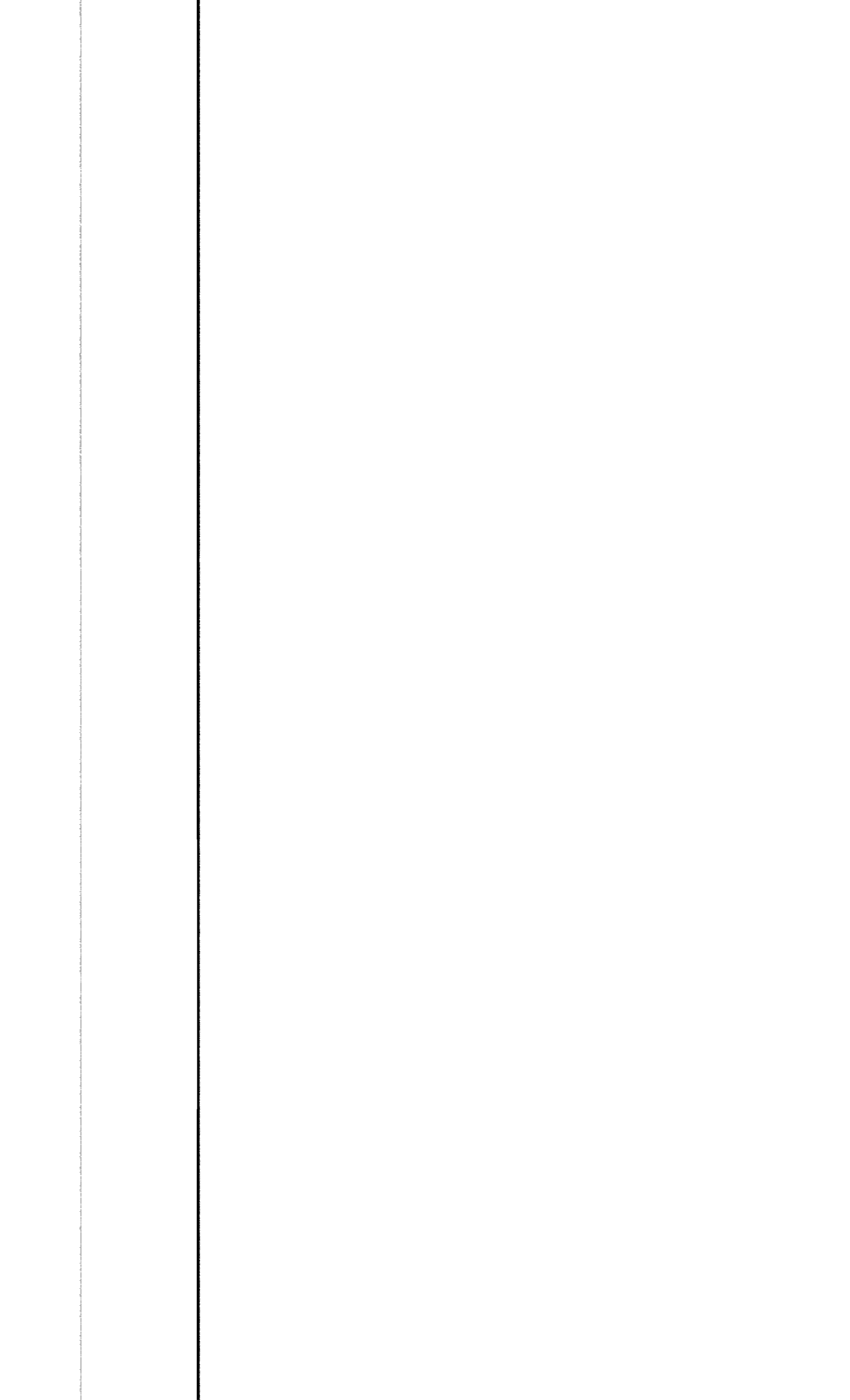
8. Any Notice under this Agreement shall be served or given by registered post or if delivered by hand to acknowledged and signed for.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first hereinabove written.

The Common Seal of MOTOR AND GENERAL INSURANCE COMPANY LIMITED was hereto affixed by Janet Neehall Secretary in the presence of

The Directors by order and authority of the Board of Directors and in conformity with the Articles of Association of the said Company and countersigned by them in the presence of

SIGNED and delivered by the within named SONNY GOBIN as and for his acts and deeds in the presence of: "



There are therefore two issues to be resolved viz:

- (1) Is the Plaintiff entitled to recover the sum of T&T\$650,000.00?
- (2) If he is so entitled the rate of interest payable and for what period?

The Defence contended that the amount ~~was~~ irrecoverable as it was paid under a contract which was illegal in its formation. It was argued that the contract was forbidden by Section 66 of The Companies Act.

Before embarking upon the merits or demerits of the arguments for the defence let me say that the matter can be disposed by a simple examination of the Agreement dated the 17th August 1982 and which is set out herein. Clause 7 of the Agreement states as follows:

"This option is subject to approval of the Superintendent of Insurance in Jamaica or such other relevant authorities as may be necessary".

It is common ground that the approval of Superintendent of Insurance in Barbados, a relevant and necessary authority for purposes of the agreement, was never obtained. It therefore means that in the absence of such approval no contract has come into being and the question of the amount having been paid under an illegal contract must of necessity fall flat.

On the basis of the foregoing I hold that the agreement is still inchoate and it cannot therefore be said that the amount has been paid under an illegal contract and therefore irrecoverable. I hold that the option not having received the approval of the Superintendent of Insurance in Barbados the amount is recoverable.

This view it is submitted is supported by the very pleadings of the Defendant. At paragraph 6 of the amended Defence and Counter Claim it is pleaded as follows:

"The Defendant further says that the obtaining of the approvals referred to in paragraph (sic) 3 and 4 hereof were a condition precedent to the exercise of the said option and that by letter dated 16th February, 1983 addressed to M.E.S.Hewitt & Co. Attorneys-at-Law acting on behalf of the Plaintiff the Supervisor of Insurance in Barbados indicated that he would not give his approval".

In passing let me state that there is nothing in the terms of the agreement which could remotely support the contention of the Defendant as set out in paragraph 3 of the amended defence and Counter claim, namely that the Plaintiff had undertaken to obtain the necessary approvals.

In deference to the industry of Counsel let me examine the arguments concerning the question of the illegality of the contract.

The offending portion of the agreement appears in paragraph 1 thereof and deals with the question of the purchase price and is set out hereunder:

"..... 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 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".

It is contended for by the defence that the words underlined above constitute a purchase by the Company of its own shares and the consequence of such a provision is that the contract is illegal and void in that the transaction was a reduction of the share capital of the Company and contrary to Section 66 of the Companies Act.

Section 66 (1)

"Subject to confirmation by the court, a company limited by shares or a company limited by guarantee and having a share capital may, if so authorised by its articles, by special resolution reduce its share capital in any way, and in particular, without prejudice to the generality of the foregoing power may -

- (a) Extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or
- (b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid up share capital which is lost or unrepresented by available assets; or
- (c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid up share capital which is in excess of the wants of the Company.

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and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly".

It appears to me that upon reading Section 66 that it permits the very thing which the defence contends is not permissible. The section clearly allows a Company to reduce its share capital by a special resolution if so authorised by the Articles subject of course to the court's confirmation. This transaction was in my view not a purchase of shares by the Company. The calling in of the shares held by the Plaintiff was an extinguishment of a liability which the Company had to the Plaintiff in respect of fully paid up shares. A course of action which is permitted by Section 66. Even if I am wrong in holding that the transaction was not a purchase the wording of the Section 66 in my view permits this type of transaction by the use of the words "in anyway".

There was no evidence before me to suggest that the Company was not so authorised by its Articles and that the course of action was not so authorised by special resolution. The burden would be upon the Defendant to establish this having raised the matter of illegality. It must be further noted that failure to obtain the confirmation of the court renders the transaction voidable only and not void.

In the light of the foregoing I hold that the amount of T&T\$650,000.00 was properly recoverable by the Plaintiff.

During the hearing the question was canvassed by the court as to whether or not the court had power to order that the amount be recoverable in Trinidad and Tobago currency. Dr. Barnett for the Plaintiff indicated that were the court to order otherwise the Plaintiff would experience difficulty in obtaining Exchange Control permission to send the funds to Trinidad and Tobago from which country the loan had been obtained. The Defence made no contribution in this regard.

I am of the view that this court is empowered to give judgment

in a foreign currency. In Schorsch Meier Gmb H v Hennin [1975]

1 A.E.R. p. 152 at p. 156 Lord Denning MR said:

"The time has now come when we should say that when the currency of a contract is a foreign currency - that is to say, when the money of account and the money of payment is a foreign currency, the English Courts have power to give judgment in that foreign currency".

At page 155 the Master of the Rolls in dealing with the reasons ~~from~~ the rule ^{the} prior to the decision in Schorsch case said:

"Why have we in England insisted on a judgment in sterling and nothing else? It is I think, because of our faith in sterling. It was a stable currency which had no equal. Things are different now. Sterling floats in the wind. It changes like a weathercock with every gust that blows. So do other currencies. Thus change compels us to think again about our rules".

The above words appropriately represent the situation with the Jamaican currency.

In the instant case the parties elected to make it a term of the Agreement that the contract price be expressed in Trinidad and Tobago currency. Not only did they so elect but they further stated that the amount was to be paid in the Island of Trinidad. Why then should the Plaintiff not be able to recover the amount in Trinidad and Tobago currency? The parties must have had a special reason for stipulating that the purchase price was to be paid in Trinidad and Tobago currency and also that the amount was to be paid in the Island of Trinidad. With this in mind the question arises had the conditions precedent been fulfilled could either party have sued for specific performance of the contract.

In Schorsch Meier v Hennin supra at p. 156 Lord Denning opined:

"In the second place it is now open to a court to order specific performance of a contract to pay money. In Beswick v Beswick the House of Lords held that specific performance could be ordered of a contract to pay money, not only to the other party but also to a third party. Since that decision, I am of the opinion that an English Court has power to, not only to order specific performance of a contract to pay in sterling but also of a contract to pay in dollars or deutschmarks or any other currency.

"Seeing that the reasons no longer exist, we are at liberty to discard the rule itself. Cessante ratione legis cessat ipsa lex. The rule has no support amongst the juridicial writers. It has been criticised by many.

Dicey says:

'Such an encroachment of the law of procedure upon substantive rights is difficult to justify from the point of view of justice, convenience or logic'."

In the absence of any statutory provision which is contrary to the decision of Beswick v Beswick [1968] A.C. 58, H.L. I am of the view that I am entitled to follow the persuasive authority of the House of Lords. The decision in Schorsch Meier Gmb H v Hennin supra was approved by the House of Lords in Milianges v George Frank (Textiles) Ltd. [1976] A.C. 443.

The Defendant was ordered to pay interest at the rate of 16% on the amount awarded from the 11th day of February 1983 until the payment of the said amount. There are two statutory provisions governing the payment of interest. Firstly, Section 3 of the Law Reform (Miscellaneous Provisions) Act states:

"In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: Provided that nothing in this section -

- (a) shall authorise the giving of interest upon interest; or
- (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
- (c) shall affect the damages recoverable for the dishonour of a bill of exchange".

This section clearly gives the court a discretion to award interest at a rate it thinks fit. I am not unmindful that it is a discretion which must be exercised judicially and not willqnilly.

What are the circumstances under which the Defendant was ordered to pay interest at the rate of 16%. The Defendant in its pleadings admitted the receipt of the amount in respect of an agreement which was not ready for performance, in that the conditions precedent had not been fulfilled. It is my considered opinion that in such circumstances the Defendant was under a clear duty to ensure that the money was deposited where it could earn the best interest for the Plaintiff, pending the fulfillment of the conditions.

In Miliangos v George Frank (Textiles) Ltd. (No.2) 1976 3 A.E.R p.599 at p.603 a case involving the question of what rate of interest was payable in respect of a judgment awarded in a foreign currency Bristow J. said:

"The lex fori, in the form of S 3(1) of the 1934 Act, empowers me to award interest at my discretion, apart, as I hold, from compound interest. In my judgment the Plaintiff should be treated mutatis mutandis in the same way as he would have been had he been awarded judgment in sterling and had then borrowed (sterling in England pending judgment) so as not to be out of his money. In my judgment he is entitled to interest during the agreed period at a rate at which someone could reasonably have borrowed Swiss francs in Switzerland at simple interest and not at compound interest. Since this Court is not in a position to take judicial notice of what this rate should be, that question has to be the subject of further enquiry".

I agree with the observations of Bristow J.

In the instant case the evidence before me and which I accept as true is that the Plaintiff up to time of the hearing had been paying 16% interest per annum on the amount of T&T\$650,000.00 which had been borrowed from Banks in Trinidad. Section 3(1) of the 1934 Act under which Bristow J purported to act is identical in wording as Section 3 of the Law Reform (Miscellaneous Provisions) Act of Jamaica.

The other statutory provision dealing with interest is Section 51(1) of the Judicature (Supreme Court) Act. It is my

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considered opinion that this section is applicable to the interest which is payable on a judgment debt which remains unpaid and does not in any way affect the power of the court to award such interest as it thinks fit under Section 3 of the Law Reform (Miscellaneous Provisions) Act. Interest under Section 51(1) of the Judicature (Supreme Court Act) can be claimed as of right on any judgment debt which remains unpaid. The right to claim such interest is not dependent upon an award by the Court.

It is for the reasons set out herein that I ordered the Defendant to pay the Plaintiff the sum of T&T\$650,000.00 with interest at the rate of 16% per annum from 11th February 1983 until the payment of the said sum.