Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. J192 Of 1989

| | | |
|---|---|---|
| BETWEEN | JAMAICA FLOUR MILLS LIMITED | PLAINTIFF |
| A N D | WEST INDIES ALLIANCE INSURANCE COMPANY LIMITED | DEFENDANTS |
| | AND OTHERS | |

Richard Mahfood, Q.C., David Muirhead, Q.C.
Christopher Honeywell and Karen Robertson
instructed by Vincent Chen and Judith Hanson
Clinton Hart & Co., for the plaintiff

Emile George, Q.C., W.K. Chin-See, Q.C.
John Vassell, O.C. and Ingrid Mangatal,
instructed by Dunn, Cox & Orrett for the
defendants

May 21, 1998

**PANTON, J.**

On March 21, 1997, the Court of Appeal, by a majority, allowed the appeal of the plaintiff, entered judgment for the plaintiff, and remitted the matter to the Supreme Court for damages to be assessed.

In July and September, 1997, at the instance of the plaintiff, I heard further submissions from the parties in relation to the award of interest.

The plaintiff's claim is set out in a document headed "further amended statement of claim".

Paragraph 1-9 thereof were admitted by the defence. These paragraphs dealt with the identity of the parties, the nature and particulars of the insurance policies, and the proportions of responsibility or liability of the various defendants.

Paragraph 10 alleged that silos 10 and 18 were "subjected to stresses which weakened them and such weakness persisted and was 'locked in' to the structure and continued to influence the integrity thereof without being apparent and was then unrecognised and was the proximate and effective cause of a sudden and violent rupturing of the structure which occurred on the 26th day of September, 1988, when the silos were being filled as hereinafter pleaded in paragraph 12".

In paragraph 11, it was pleaded that the plaintiff was interested in the property to the extent of the level of insurance, that is, $257,800,000.00 for the buildings, plant, equipment etc., and $93,060,000.00 for loss of profit etc.

Paragraph 12 reads in part: "during the filling of grain in silo 10, .... buildings, machinery, plant, equipment, stock in trade and other contents were damaged or destroyed by or through or in consequence of the insured perils ...... whereby the plaintiff has suffered loss and damage to the property insured, and loss of gross profit, wages and auditors' fees in respect of the interruption and/or interference of its business".

The damages sought were particularised thus -

| | | J$ | US$ |
|---|---|---|---|
| "A. | Property | | |
| | Repair and replacement of buildings, machinery, plant and equipment including value of silos damaged/ demolished | 13,990,571.00 | 4,964,510.00 |
| | Value of stock lost/destroyed | 246,000.00 | |
| | Removal of Debris | 150,000.00 | |
| | | 14,386,571.00 | 4,96.510.00 |

| | |
|---|---|
| B. <u>Loss of Profits etc</u>. | JA$ |
| Loss of Gross Profit | 32,204,636.00 |
| Wages | 4,772,212.00 |
| Auditors fees ($70,000 but claim) | 60,000.00 |
| <u>Operating expenses saved</u> | (5,646,396.00) |
| Total consequential loss | 31,390,452.00 " |

In addition, the plaintiff claimed "interest from the 17th January, 1989, at the prevailing commercial lending rates or, alternatively, at a rate equivalent to the investment income lost, or alternatively, at the prevailing investment income rates."

<u>In summary</u>, therefore the plaintiff's claim was for -

(1) JA$14,386,571.00 plus <u>US$4,964,510.00</u> for property damage;

(2) <u>JA$31,390,452.00</u> for loss of gross profit, wages, auditors fees etc; and

(3) interest.

So far as (1) (above) is concerned, paragraph 13 of the claim qualifies the US dollar amount by seeking the JA dollar equivalent at the date of payment.

**<u>Abandonment of Part of the claim</u>**

The plaintiff abandoned certain portions of its claim. These were -

(a) <u>local payments</u> for travel bills and miscellaneous items of expenditure totalling <u>J$272,122.00</u>; and

(b) <u>foreign payments</u> as set out hereunder

| | | |
|---|---|---|
| Evergreen | US$ | 2,990.00 |
| Greenway | | ( 58,476.00 |
| | | (172,902.00 |
| Zetlin-Argo | | 569,643.00 |
| | Total | US$804,011.00 |

**Agreed portions of claim**

The plaintiff and the defendants agreed certain amounts as being due and payable, if the defendants were found liable. Those amounts were listed by the parties as follows:

A. PROPERTY DAMAGE

Local payments

| | | | |
|---|---|---|---|
| (1) | Value of silos | | 646,828.00 |
| (2) | Various amounts of expenditure under this head to be recovered by the plaintiff totalling | | 5,024,037.00 |
| (3) | Value of stock lost/destroyed | | 246,000.00 |
| (4) | Removal of debris | | 150,000.00 |
| | | TOTAL | 6,066,865.00 |

Foreign payments

| | | | |
|---|---|---|---|
| Evergreen | | US$ 511,888.00 | |
| Greenway | | 2,223,317.00 | |
| Pillsbury | | 119,854.00 | |
| Neuro Corp | | 100,254.00 | |
| Henry Simpn | | | Ŀ25,578.90 |
| | TOTAL | US$ 3,035,313.00 | + Ŀ25,578.90 |

B. LOSS OF PROFITS ETC. 25,000,000.00

**The disputed portions of the claim**

The Court, as I understand it is required to make a determination in relation to the following portions of the claim -

(1) In respect of property damage -

Local payments

| | | |
|---|---|---|
| (i) | withholding tax | $5,009,327.00 |
| (ii) | materials issued from stores | 173,455.99 |
| (iii) | insurance premiums | 394,509.00 |
| (iv) | Allied Insurance premium | 1,404,623.00 |
| | | 6,981.914.99 |

Foreign payments

| | | |
|---|---|---|
| (i) | Pillsbury | US$ 916,413.00 |
| (ii) | Iberson | US 19,879.00 |

(2) The rate of exchange applicable to foreign payments

(3) The rate of interest and the period over which interest is payable.

I shall now proceed to deal with each disputed item. In assessing the damages payable, the Court is particularly mindful of the burden of proof that rests on the plaintiff. On the question of proof in these circumstances, Lord Chief Justice Goddard of England had this to say:

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying" 'this is what I have lost; I ask you to give me these damages'. They have to prove it."
>
> **Bonham-Carter v. Hyde Park Hotel Ltd.** The Times Law Reports Vol. 64 at p. 177.

**Withholding tax**

There is no dispute that the plaintiff paid withholding tax to the Government of Jamaica in respect of the earnings of certain persons from overseas who were employed in the reconstruction of the mill. For these payments to be reimbursed by the defendant, it is, in my view, necessary for the Court to be presented with evidence of a contractual obligation on the part of the plaintiff to pay such a tax in relation to each party that provided services in the reconstruction process.

The payments made by the plaintiff were in respect of income earned by employees provided by Zetlin-Argo, Evergreen Builders Incorporated, Pillsbury and Greenway Electric Incorporated.

I have not seen any evidence of any acceptable agreement in writing or otherwise between the plaintiff and Zetlin-Argo in relation to taxes. (See page 3918 of the transcript). In any event, Zetlin-Argo worked substantially in the United States of America and was paid by Pillsbury in United States dollars (see page 3920 of the transcript).

As I see it, the only clear evidence of such a contract is provided in Exhibits 68 and 69 which cover the relationship between the plaintiff and Greenway Electric Incorporated and Evergreen Builders respectively.

In my judgment, the plaintiff is entitled to recover from the defendants the withholding tax paid in respect of these two entities. I should point out, however, that I have not seen any evidence as to the specific amounts paid on behalf of these two companies.

**Materials issued from stores**

Price Waterhouse was responsible for auditing the plaintiff from 1988 up to the date of Mr. John Lee's evidence (September 23, 1993). Mr. Lee, a chartered accountant from Price Waterhouse's auditing department said this -

> "In essence we are quite certain that the $173,000 approximately is the figure that was transferred to repairs of the silos."

He was responding to this question from Mr. David Muirhead, Q.C. for the plaintiff -

> "Now in the course of your audit would you have been able to verify the value of materials issued from stores and used in the reconstruction consequent on the collapse of the silos?"

Under cross-examination by Mr. Chin See, Q.C., the witness was challenged to provide documentary proof that the items removed from the stores had been used in the reconstruction process. It was not forthcoming. There was also no evidence that the witness himself had even seen any such document.

The Court is not prepared to assume or infer that the materials removed from the stores found their way automatically into the reconstruction process. The plaintiff had ample opportunity to produce evidence directly on the matter. It chose not to do so. I see no basis for rewarding the plaintiff's failure with an award of damages in this respect.

**Insurance premiums**

The evidence presented indicates that the sum of $394,509.00 was paid by the plaintiff to Allied Insurance Brokers.

Mr. John Lee, the auditor, could not inform the Court as to "the exact nature of the payment". He stated under cross-examination by Mr. Chin See that he needed "to refer to the other document that we have to state the exact nature of the payment". Alas, not even in re-examination did he refer to this "other document". To this moment, I am at a loss as to this "other document" as the closing address of the plaintiff did not enlighten me on the point. The sum claimed is accordingly disallowed.

**Allied Insurance premium**

The sum claimed is $1,404,623.00. The evidence of Mr. Ruland at page 3840 of the transcript is clearly hearsay. The proven amount in my judgment, is that which is evidenced by the receipt for $1,178,800.00 (Exhibit 76). I accordingly allow the claim to that extent.

The defence had contended that the indemnity contracted for was against the cost of reconstruction, not the risks of the process of reconstruction which was described as a wholly extraneous matter unrelated to the subject of the cover. I do not find that submission acceptable as I am of the view that the taking out of the policies in question ought to be regarded as a natural and, indeed, inevitable consequence of the reconstruction process.

**Foreign payments**

Pillsbury - US$916,413.00

I saw no evidence of this payment having been made. That may well have been the reason for the plaintiff's failure to even mention the item in its written submissions. This claim, accordingly, fails.

**Iberson - US$19,879.00**

This claim is disallowed. It was paid to a contractor who had submitted a bid for the reconstruction work. The bid was rejected. I am unable to see why the defendants should be saddled with this payment. Would they be liable if one hundred persons had submitted bids that were rejected? I should think not.

**The rate of exchange applicable to foreign payments**

At page 3820 of the transcript Mr. John Ruland, managing director of the plaintiff, said that the source of the funds used by the plaintiff in the reconstruction process was their own resources, their investments and cash deposits.

There is no evidence that the plaintiff maintained an account in United States' currency. Indeed, it was at the relevant time illegal for Jamaicans to hold foreign currency or to operate a foreign currency account without the authority of the Minister of Finance. In order to make payments in foreign currency, the permission of the Bank of Jamaica was necessary. The plaintiff therefore used its Jamaican dollar holdings to purchase United States dollars to make such foreign payments as were made.

It is beyond doubt that the loss suffered by the plaintiff was the Jamaican dollars it used to purchase United States dollars. That is what the plaintiff is to be reimbursed. It follows that the applicable rate of exchange is that which prevailed at the time of each transaction.

It is a notorious fact that for several years the Jamaican dollar had been in a free fall so far as the rate of exchange was concerned. Each succeeding day would see a greater amount of Jamaican dollars being required to purchase one United States dollar.

The free fall has been halted, it seems - even if temporarily. The fact is, though, that it takes many more Jamaican dollars today to purchase a United States dollar than it did during the reconstruction of the mill. To make an award at today's rate of exchange, as the plaintiff's attorneys-at-law have submitted, would merely result in the fattening of the plaintiff's bank account with many Jamaican dollars that it did not lose. That, in my view, would be an injustice to the defendants. The purpose of these proceedings is not to provide the plaintiff with a windfall. It is, as I understand it, to secure the reimbursement of monies actually expended by the plaintiff.

**Interest Rate**

In its closing submissions in December, 1993 the plaintiff submitted "that the rate of interest should follow the commercial weighted loan rates under the column for 'commercial credit' at page 59 Exhibit 80 for the period January 1989 to April 1993". It further submitted that "for the period May 1993 to the date of judgment the interest should be fixed at 50% per annum having regard to the testimony of Mr. Lee that interest rates have been steadily increasing since April 1993 with a prime lending rate of 61% to 62%.

Since the hearing in the Court of Appeal, the plaintiff has submitted that the interest should be the "overall average weighted rate". It is interesting that Mr. Lee's evidence as to 61 to 62% for 1993 has not been borne out by the rates quoted in Exhibit KW6 which was attached to the affidavit of Karen Wade at the hearing of the summons for leave to adduce further evidence.

In determining the rate of interest I have considered that the Court has been given a wide discretionary power under the Law Reform (Miscellaneous) Provisions) Act. Section 3 reads thus:

> "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 judgment.

Exhibits 80 and 80A are statistical digests published by the Research and Programming Division of the Bank of Jamaica. I should think that they are the best guide as to the prevailing domestic interest rates.

I accept the original submission of the plaintiff that the appropriate rate of interest is that under the column headed "commercial credit". This, as I understand it, is the rate applicable to the borrowings of commercial enterprises. In my view the commercial credit rate is in keeping with the principle stated in **British Caribbean Insurance Co.Ltd. v. Delbert Perrier** Supreme Court Civil Appeal No. 114/94 - delivered on 20th May, 1996. The calculations that have been done indicate that between 1989 and March 1997, the average commercial credit rate did not reach 40%. In the circumstances, I think it appropriate to award interest at the rate of 37% from the date on which the defendants repudiated liability, that is January 17, 1989, to today.

**To summarise,** damages are assessed as follows:

The plaintiff is awarded the following sums:-

(i) J$32,245,665;

(ii) US$3,035,313; and

(iii) £25,578.90

In respect of the amounts at (ii) and (iii), there is to be a conversion into Jamaican dollars as at the date of the transaction, that is, the date on which the foreign currency was purchased for payment to the creditors.

Interest is awarded on the total sum at the rate of 37% from January 17, 1989, to today.

Costs to the plaintiff are to be agreed or taxed.