TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 186 of 2008

BETWEEN

SECURIOR TRINIDAD LIMITED now called
GROUP 4 SECURIOR alternatively
G4S HOLDINGS (TRINIDAD) LIMITED

APPELLANT

AND

REPUBLIC BANK LTD.

RESPONDENT

PANEL:
Jamadar JA
Stollmeyer JA
Narine JA

APPEARANCES:
Mr. R. Nanga for the Appellant
Mr. G. Simonette for the Respondent

REASONS

[1] This is an appeal against the decision of the trial judge on the preliminary issue of whether the limitation of liability provision in a contract made between the Appellant ("Securicor") and the ("Respondent") ("RBL") was binding on the parties.

Background

[2] By Claim Form dated December 18th, 2006 RBL claimed against Securicor $5,484,834.40, being the amount stolen during a robbery by, among others, two of Securicor's employees, together with interest and costs. The claim is expressly made in breach of contract and negligence.

[3] In its Appearance filed 2nd April 2007, Securicor admitted liability for the sum of $2,000,000.00.

[4] In its Defence of April 19th 2007, however, Securicor denied any liability for breach of contract or negligence and set out in the alternative that in any event liability would be limited to $2,000,000.00 in accordance with the limitation of liability clause (Clause 11(2) of the contract).

[5] The agreed facts put before the trial judge can be summarised as follows:

1. RBL is a bank incorporated under the Laws of Trinidad and Tobago. Securicor is a security company;
2. By a written contract dated September 1st 1987, No.527/5/1, and Securicor agreed to collect and deliver sealed containers as and when directed by RBL between its branches during normal banking hours;
3. On or about December 17th, 2002, RBL's Independence Square branch requested that Securicor transfer the sum of $5,484,834.40 in sealed containers/bags to its High Street, San Fernando branch;
4. On December 18th, 2002, Securicor collected 6 bags, the contents of which totalled $5,484,834.40, and for which an official receipt was issued;
5. While in transit, the security vehicle developed a flat tyre. When the security officers, employees of the Securicor, stopped the vehicle, they were allegedly ambushed by masked men, beaten, and the 6 bags stolen;

6. Investigations later led to two of the security officers who were with the vehicle at the time of the robbery, being arrested and charged with the robbery;
7. Relying on the limitation of liability clause in the contract, the Appellant refused to pay any sum in excess of $2,000,000.00.

[6] There was no *viva voce* evidence, and the documentary evidence appears limited to the material attached to the RBL's statement of case, in particular the contract itself. Indeed, and as will become evident, the outcome of the appeal turns very substantially on the interpretation of the provisions of the contract.

[7] The sole issue before the trial judge, as a preliminary point, was whether Securicor was entitled to rely on the limitation of liability provision in the contract.

[8] It is not clear how the claim came to be decided in this fashion, but no issue is raised as to that.

[9] Nor is it clear how liability was determined on the basis of a claim in conversion when this was never pleaded, nor any amendment sought to include such a claim, particularly since an application by RBL – based on entirely different grounds – to amend its case was refused. Again, however, no issue is raised as to this and we comment no further on it.

[10] The claim proceeded on the basis that liability was admitted, as Counsel for Securicor made clear at the hearing of the appeal. Indeed, no issue is raised on the appeal as to Securicor's liability, and it is unclear why liability was denied in the defence. That, however, has no bearing on the outcome of the appeal.

[11] The trial judge concluded that:

1. Securicor was liable in conversion;

2. The limitation provision did not apply because it did not cover circumstances of theft or conversion by Securicor's agents or servants;
3. Even if the limitation clause did apply in those circumstances, Securicor's acceptance and acknowledgment by receipt of a shipment in excess of the limit set out in the contract amounted to a waiver of the limitation.

[12] The trial judge gave judgment for RBL in the amount of $5,484,834.40 and interest, as well as costs to be calculated on the prescribed scale. Securicor appeals that decision.

[13] On 12th January 2011 the appeal was allowed with costs and brief reasons given for that decision. The full reasons are now set out.

The Claim in Conversion

[14] First, as to Securicor's liability in conversion, the judgment sets out at paragraph 4 *"... the Statement of Case and the agreed facts clearly give rise to a claim for conversion..."*.

[15] While the agreed facts may lead to a conclusion that there is liability in conversion, the Statement of Case cannot be said to set out such a claim. It refers to the involvement of Securicor's employees, but this is entirely in relation to the assertion of breach of contract/negligence, particulars of which are clearly set out. With all due respect to the trial judge, this conclusion cannot be correct.

[16] There is no appeal against this finding, however, and in any event Securicor accepts liability, subject only to the limitation. The parties proceeded on that basis and we therefore leave it at that.

[17] Second, the trial judge concluded that the parties did not contemplate dishonesty when entering into the contract. Paragraph 13 of the judgment reads as follows:

> *"Liability for conversion is clearly not contemplated by the limitation clauses as I do not think any person entering into a contract would consciously contemplate and anticipate the dishonesty of the other party even through his servants and/or agents at the time of entering into an agreement".*

[18] There was no evidence before the trial judge to support this conclusion. Indeed, it begs the question as to why written contracts exist, replacing by and large oral agreements and the handshake. Mr. Simonette for RBL submitted that they exist for the purpose of clarity and removing ambiguity, but the fact is that the certainty they seek to achieve in great measure is in an effort (not always entirely successful) to avoid a party reneging on the agreement for no good reason. The latter also gave rise to statutory requirements that certain contracts at least be written or evidenced in writing *e.g.* the Statute of Frauds in England, certain parts of which are to be found in our Conveyancing and Law and Property Act at Section 4.

[19] More important, however, is that Clause 17 of the contract refers to "... *fraud*, *collusion or dishonesty on the part of* [Securicor's] *representative".*

[20] Clause 17 sets out what is admittedly an exception to the conclusiveness of a receipt given by a consignee of cash in transit when it is delivered, but it is clear that possible dishonesty was in the contemplation of the parties at the time the contract was signed, and it cannot be reasonably said that the contemplation of dishonesty was limited to the circumstances of Clause 17.

[21] It appears that this provision was not addressed in the submissions to the trial judge, and may thus have escaped her attention. The consequence, however, is that it cannot be said that the parties did not contemplate dishonesty.

[22] For this reason the appeal should be allowed.

The Limitation of Liability does not Apply to a Claim in Conversion

[23] The trial judge also concluded that the limitation provision does not protect Securicor in the circumstances of this case. Again at paragraph 13 of the judgment:

> *"The limitation clause does not protect the defendant in the circumstances of this breach".*

[24] It is important to note first, that no issue is raised as to the validity of either Clause 10 or Clause 11.

[25] It is also useful to set out here the relevant parts of the indemnity provision (Clause 10) and the provisions limiting liability (Clause 11) under that indemnity.

> *"10. Subject to the provisions of Clauses 11-13 the Company shall indemnify the Customer:*
>
> *(1) Against all losses of or damage to valuables which occur during any Period of the Company's Responsibility up to a maximum in any one calendar day of the amount stated in the Schedule; and*

(2) Against other loss or damage, direct or indirect, consequent upon any default by the Company in the performance of the Services. This indemnity shall be limited in all circumstances to an absolute maximum amount of $3,500 in respect of all such defaults occurring in any one calendar day.

These indemnities are the totality of the Company's liability to the Customer and the Customer shall have no other claim against the Company of any kind whatsoever, either in contract or in tort, whether for negligence or otherwise.

11. The indemnity given in Clause 10(1) shall be subject to the following conditions and limitations:-

(1).....

(2) Valuables in containers

If the Services involve the carriage or custody of containers filled by the Customer or by a third party then, without prejudice to the daily limits imposed by Clause 10, the Company's obligations to indemnify the Customer in respect of any loss of or damage to the contents of each such container shall be further limited to the amounts stated in the Schedule but in any event shall not exceed ***$200,000.00*** *in respect of any one container PROVIDED ALWAYS that the Company's obligation to indemnify the Customer in respect of any loss or damage to valuables which occurs whilst such valuables are in the Company's vehicles shall not exceed and shall be limited to* ***$2,000,000.00*** *in aggregate in respect of each such vehicle".*

[26] There is no suggestion, no evidence, that the limitation of liability was ever varied by the parties in any way, either expressly or impliedly.

[27] It appears that the to the trial judge did not lay sufficient emphasis on – or make any mention at all of – that part of Clause 10 which (having set out the indemnity for losses) states with startling pellucidity *"...these indemnities are the totality of* [Securicor's] *liability to* [RBL] *and* [RBL] *shall have no other claim against* [Securicor] *of any kind whatsoever, either in contract or in tort, whether for negligence or otherwise".*

[28] Conversion is indisputably a tort, and claims in tort, whether for negligence or otherwise, are expressly excluded. That is clear. Indeed, the trial judge concluded at paragraph 12 of the judgment that when taken together clauses 10, 11(2) and 20 are sufficiently wide to limit liability for negligence. It stands to reason that conversion also being a tort, liability for conversion under the indemnity was similarly limited.

[29] In the event, it is clear that dishonesty was within the contemplation of the parties when the contract was signed, that liability under the indemnity included all torts, including conversion, and that liability was limited to a maximum of $2,000,000.00.

[30] For this reason also the appeal should be allowed.

[31] It should be noted that the trial judge also concluded (at paragraph 19 of the judgment) that *"Clause 15 cannot revive the effectiveness of the limitation clause".* This conclusion is based upon, says the trial judge, Clause 15 not being *"...free standing. It flows from Clause 11(2) the Limitation of Liability Clause and is connected to it".*

[32] Clause 15 reads as follows:

> *"The Customer undertakes that the value of the contents of any one container filled by the Customer or by a third party shall not exceed the sums referred to in Clause 11(2) (not exceeding in any event* ***$200,000.00*** *in respect of any one container)."*

[33] Clause 15 does not so much flow from the provisions of Clause 11(2) as much as it is an undertaking, a corresponding obligation, agreed to by RBL that it will not place more than $200,000.00 in any one container. The effect of Clause 15 is to deprive RBL of the right to claim in excess of $200,000.00 for the contents of a container rather than to "revive" the effectiveness of the limitation provision.

Waiver of the Limitation of Liability by Securicor

[34] The trial judge went on to say *"the real question is whether* [Securicor] *assumed the risk of transporting the actual value of* [RBL's] *shipment"* and concluded that the receipt issued by Securicor for amounts exceeding $200,000.00 in individual containers and $2,000,000.00 in the aggregate resulted in Securicor assuming the risk of transporting the full amount of $5,484,834.40, thereby waiving the limitation of its liability.

[35] This waiver of limitation was not, for whatever reason, part of RBL's case. Nonetheless, given that the trial judge dealt with it we also do so for the sake of completeness. Apart from the issue not being pleaded, however, the Schedule to the contract (to which, once again, the trial judge's attention does not appear to have been directed) provides:

> *"N.B.: Where the customer advises the Company in writing that it wishes to place in containers cheques for amounts in excess of the limits stipulated pursuant to clause 11(2) of this Agreement then notwithstanding Clause 15 of this Agreement the Customer may fill or allow a third party to fill a container with one or more cheques in excess of the limits referred to in Clause 11(2) of this agreement on the express understanding that the Company will only be liable up to those limits and the Customer will bear any losses in excess of those limits".*

[36] The effect of this is clear. If RBL exceeds the $200,000.00 limit in any one container notwithstanding Clause 15 (emphasis added) it is done on the express understanding (emphasis added) that the limits of liability in Clause 11(2) continue to apply and that RBL will be liable for any loss it may suffer in excess of the limits set out in that Clause. That cash was being carried in the present instance makes no difference when the contract is considered in its entirety. Any question of waiver is effectively answered by this provision of the Schedule.

[37] For this reason also the appeal should be allowed.

[38] The trial judge erred. The limitation of liability provision is binding on the parties for the reasons set out above. The appeal was therefore allowed with costs. The judgment of the trial judge was set aside and judgment was then entered for the Respondent in the amount of $2,000,000.00.

[39] As to costs, the Respondent was ordered to pay the Appellant's prescribed costs of the claim, such costs to be calculated on the basis of judgment for $2,000,000.00 and on 55% of the total costs in accordance with Appendices B and C to Part 67 of the Civil Proceedings Rules, given that

judgment was obtained at the case management stage after the defence was served.

[40] The Respondent was also ordered to pay the costs of the appeal, such costs to be 2/3 of the costs below, in accordance with the provisions of part 67.14 of the CPR.

15th February 2011

P. Jamadar
Justice of Appeal

C.V.H.Stollmeyer
Justice of Appeal

R. Narine
Justice of Appeal