IN THE SUPREME COURT OF BELIZE, A.D. 1999

ACTION NO. 252

CONTINENTAL AIRLINES, INC. Plaintiff

BETWEEN AND

REGENT INSURANCE COMPANY LIMITED Defendant

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Dean Barrow S.C. with Mrs. Magali Marin Young for the Plaintiff.
Mr. Denys Barrow S.C. with Ms. Coleen Lewis for the Defendant.

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JUDGMENT

The plaintiff, Continental Airlines Inc., is in the business of air travel for which it sells tickets to carry passengers and cargo to and from Belize. Continental Airlines often sells its tickets directly to members of the traveling public, but it has in addition, arrangements with travel agencies who sell tickets for it as well. It had one such arrangement with a travel agent called Universal Travel Services (UTS for short and so referred to hereafter). The arrangement was later formalized with a written contract. Along with the contract, according to the Country Manager for the plaintiff, Mrs. Kim Aikman, Continental required a performance bond from each travel agent with which it had similar arrangement as with UTS. The performance bond was required in order to ensure that the travel agents, including UTS, would be in a position to pay for the tickets issued by them for travel on the aircraft of the plaintiff Continental. In other words, Continental wanted some security or recourse for the payment of tickets sold by UTS for travel on its planes. Mrs. Aikman testified that UTS procured from the defendant, Regent Insurance Co., one such bond as was required by the plaintiff, and she put this in evidence as **Exhibit KA 1**.

2. **Exhibit KA 1** is on the letterhead of the defendant and it has boldly printed on it at the top “FORM OF PERFORMANCE BOND”.

But its exact purport, reach and effect is the result of this action before me. The defendant is, it is common ground, an insurance company and carries on business providing insurance services, acts as insurance agents, brokers and underwriters. It is in this capacity that the defendant, Regent Insurance Company Ltd., issued **Exhibit KA 1** to UTS.

3. It is this document that is at the heart of this case. From the evidence, the plaintiff continued to do business with UTS up until August 1998 when it discontinued doing business with it as a result of UTS failure to pay monies owed to Continental for the sale of its tickets. The sum of $134,000.00 was then owed by UTS. Reminders to the operators of UTS provided no satisfaction for the plaintiff, it just simply defaulted in its obligation to pay the plaintiff. As a recourse, Continental then wrote to Regent Insurance, the defendant, who had issued **Exhibit KA 1**. The plaintiff duly received a response from the defendant. Both the plaintiff's letter and the defendant's response were tendered in evidence as **Exhibits KA 3 and 4**.

4. The gist of the defendant's response was that the plaintiff was harbouring some misunderstanding about the bond in **Exhibit KA 1** – in the words of the defendant's Mr. Eldon Logan of its Technical Department: *"we seem to have a different interpretation as to the purpose of this bond"*.

5. However before its recourse against the defendant in the present proceedings, Continental had, from the evidence, sued the defendant together with UTS, in Supreme Court Action No. 485 of 1999 for the sum of $134,929.11 that UTS owed on account of ticket sales and for the failure of Regent Insurance to pay on the bond executed between UTS and the defendant, Regent Insurance. The case against the defendant in that action was not continued with, but the plaintiff, Continental, was able to obtain a judgment in default against UTS. But this evidently proved to be a Pyrrhic Victory as UTS, according to the evidence of Mrs. Aikman, had no assets to levy execution on to satisfy the judgment against it. Hence the present action against the defendant Regent Insurance, on the bond it issued to UTS (**Exhibit KA 1**).

6. In its writ in this action filed on 15th June 1999, Continental's claim sounded more in negligence as it claimed damages from the defendant, Regent Insurance, *"for professional negligence and breach of duty of care arising from the defendant's failure to prepare properly and according to instructions, a valid and effectual Performance Bond in favour of and for the plaintiff's benefit"*.

However in its Amended Statement of Claim filed on 24th June 2002, Continental has broaden somewhat its tackle. It now claims:

> *"$100,000.00 being the sum due and covered under the performance bond and recoverable either in consequence of the Defendant's wrongful repudiation of a valid bond or as a consequence of the Defendant's breach of its duty of care to prepare a valid bond"*.

7. Regent Insurance for its part in its Defence filed on 28 September 1999, re-echoed its response to Continental's request to pay on the bond and says that it admits to refusing to indemnify Continental and honour the alleged bond, and asserts instead, that the bond was void for uncertainty.

What was the nature of the agreement between the Defendant, Regent Insurance Co. and UTS vis-à-vis the Plaintiff, Continental Airlines?

8. I think the answer to this question holds the key to a determination of the issues between the parties. In other words: what did UTS and Regent Insurance understand their contract (in **Exhibit KA 1**) to mean, and what consequences, if any, should flow from it regarding the plaintiff?

9. The mere fact that the agreement **(Exhibit KA 1)** is headed "Form of Performance Bond" might be suggestive, but this is almost offset by the rather opaque provision in clause (1) at page two of the agreement, if I may so call it, as the agreement contains no other numbered clause. But it cannot be doubted that this document as a whole, embodies the agreement between UTS and the defendant.

10. From the evidence in this case it appears that Continental wanted some security or guarantee from travel agents for tickets they would issue for use on the planes of Continental. One Jeffrey of

UTS approached Regent Insurance for this purpose as a result of which **Exhibit KA 1** was executed. Mrs. Aikman who testified for the plaintiff was emphatic that it was a performance bond issued by Regent Insurance, the defendant, to secure tickets issued by UTS for travel on Continental up to the sum of $100,000.00.

11. I did not have the benefit of the testimony of Jeffrey who evidently procured **Exhibit KA 1** for UTS from the defendant. But Mr. Eldon Logan, the supervisor of the defendant's technical department testified. He said that he prepared it in the absence of defendant's manager and it took only fifteen minutes to do. However, he said he recalled being approached sometime in June 1998, by Jeffrey for a "ticket bond". In response to this request he went to the computer and found the document that is now **Exhibit KA 1**. He said he prepared it for Jeffrey who paid a premium for it. Mr. Logan further said that that was not his first connection with a "ticket bond"; he had first come across "ticket bonds" in 1992, when some small airlines, in order to get operating licence, had to get "ticket bonds" demanded by the authorities. This was, he explained, because in the event that tickets sold by these airlines to customers could not be used because the airlines had got into some difficulties, the "ticket bonds" would be used to honour those tickets so that the traveling public would not be put out. He further said that the wording of the "ticket bonds" came from the Government of Belize and that he personally had issued about twelve "ticket bonds" before.

12. Under cross-examination by Mr. Dean Barrow S.C. for Continental, Mr. Logan said that he understood that Jeffrey wanted something to show to the airline, that is, Continental, so that he could get their tickets to sell and he understood that if Jeffrey did not get the bond, he would not get the tickets and that he needed a bond from an insurance company to show the airline. Mr. Logan still under cross-examination, conceded that he understood and knew that the bond was to secure the obligations of UTS to Continental for the latter's tickets.

13. I must confess that the oral evidence in this case for both the plaintiff and the defendant does not categorically and decisively settle the issue; but from a close perusal of **Exhibit KA 1** and the circumstances attending its issuance, I am satisfied that it is

reasonable to conclude that it was intended and meant to serve as a performance bond, notwithstanding, the unhelpful and opaque provision of its clause (1); and I agree with Mr. Denys Barrow S.C. for the defendant, when he said that "it was not a sensible or happy document". But in my view, the fact remains that the substratum of **Exhibit KA 1** was to secure the obligation of UTS ticket sales for Continental Airlines, the plaintiff, in the amount of $100,000.00. By this document, it is my view, that the defendant Regent Insurance became obliged to Continental if the latter were to declare UTS to be in default on the sale of its tickets in the amount of $100,000.00, then the defendant, Regent Insurance, would promptly remedy the default up to but not exceeding the sum of $100,000.00 stated in the bond.

14. I realize, of course, it is not the function or role of the courts to write contracts for the parties thereto. But equally also, it cannot be doubted the legal rights and duties created by the agreement or contract between the parties and the nature of those rights and duties are a matter of construction and determination by the courts. And whether those legal rights and duties, as ascertained by the construction of the court should be regarded as having a particular legal character or effect, is a question of law. The label whether "ticket bond" or "performance bond" or however so described, is not in and by itself conclusive – **Lloyd TSB Plc v. Clarke and Another (2002) 60 WIR 12**.

15. Looking at **Exhibit KA 1** as a whole and bearing in mind the attendant circumstances of its making, I am of the considered view that notwithstanding its apparently vague or rather opaque clause (1), it is, in fact, and was intended, to be a **performance bond**. This is its true meaning and this was what the parties understood it to be at the time of its execution. I am guided as well by the consideration that "the true construction of a document means no more than the Courts puts on it the true meaning, and the true meaning is the meaning which the party to whom the document was handed or who is relying on it would put on it as an ordinarily intelligent person construing it in the proper way in the light of the relevant circumstances" per Green MR in **Hutton v Walting (1948) Ch. 398** at page 403.

16. I am fortified further in the conclusion I have reached on **Exhibit KA 1** by the consideration that from the evidence, UTS approached Regent Insurance, the defendant in order to procure a bond, some security, if you will, for meeting its obligation for the payment of the sale of tickets on the aircraft of the plaintiff, Continental Airlines. When UTS procured this bond, it handed it to Continental and on the strength or assurance of the bond, UTS was permitted to issue tickets that would be validated for travel on the aircraft operated by Continental.

17. Moreover, it is an accepted canon of construction that a commercial document, such as an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application. I adopt with respect this statement of principle by the learned authors of **MacGillivray on Insurance Law 10 ed. (2003)** at para. 11-7 at page 280, which echoes the statement enunciated by Lord Justice Romer about one hundred years ago in the case of **The Westminster Fire Office v The Reliance Marine Insurance Co. (1903) 9 TLR** at p. 668 when on appeal, the meaning and effect of the word "temporarily" in marine insurance policy fell to be considered. Lord Romer thought that the policy ought to be construed from a business point of view, so as to give effect to it according to the view of businessmen. The policy in that case was clearly intended to cover something beyond the mere delivery of the jute on the quay, the voyage and the visits covered were not to be at an end when the jute was placed on the quay awaiting transfer.

18. Therefore taking the businesslike approach to **Exhibit KA 1**, notwithstanding its rather meaningless clause (1), but in the context of its execution and against the background that what UTS wanted was to provide assurance to Continental Airlines that its tickets sales up to at least $100,000.00 would be made good, if UTS were to default on payment, I can see no other way to construe and hold this document other than as a performance bond.

19. It is my considered view that the so-called clause (1) in **Exhibit KA 1** makes no sense in the context of the relationship between the parties. I am of the settled view that this provision as well as the

one that talks about instituting "suit before the expiration of one year from the date of the issuing of the Maintenance Certificate" is vague if not meaningless. But they do not in my view make the document void or unenforceable, according to the business intention for which it was issued.

20. I find that the true meaning, purport and reach of **Exhibit KA 1** were clearly stated on its face. That is, UTS as principal and Regent Insurance, the defendant, as surety, are held and firmly bound to Continental Airlines, the Obligee, the plaintiff, in the amount of $100,000.00 for ticket sales for Continental Airlines during the period 22nd June 1998 to 22nd June 1999 by UTS; and that whenever UTS shall be and declared by Continental Airlines to be in default on its sales of tickets contract, Regent Insurance, the defendant, shall promptly remedy the default. And that it, that is, Regent Insurance Co., shall not be liable for any sum greater than the penalty, that is, the $100,000.00 stated in the bond.

21. The document so read, I think, makes all the commercial good sense in the world and expresses what was intended by the parties. The rest of the document can, I think, be safely ignored without an iota of damage or loss to its meaning and effect, but will instead, truly reflect the parties' intention.

22. I therefore find and hold that **Exhibit KA 1** is in fact and in law, a performance bond and whatever vagueness some of its provisions may contain, this does not vitiate it or render it void: its underlying commercial purpose as a performance bond was, in the words of Hirst J., in **Siporex v Bank Indosuez (1986) 2 Lloyd's Rep. 146** at page 158: *"to provide a security which is to be readily, promptly and assuredly realizable when the prescribed event occurs"*. And anyone knowing of the transaction between UTS and Regent Insurance against the background of the requirement of Continental Airlines as disclosed by the evidence, can come to only this ineluctable conclusion, that **Exhibit KA 1** was, in fact, a performance bond. This, I think, is so notwithstanding the linguistic inconsistencies and opaqueness of its so-called clause (1).

Nature of a Performance Bond

23. Notwithstanding Lord Denning's characterization that *"(a) performance bond is a new creature …"* in **Edward Owen Engineering Ltd. v Barclays Bank (1977) 1 All E.R. 976** at page 981, performance bonds have come to assume an extremely important status in modern commerce – see **Geraldine Andrews and Richard Millett, Law of Guarantees** - at para. 16-02. They are essentially unconditional undertakings to pay a specified amount to a named beneficiary, usually on demand, and sometime on the presentation of certain documents. They perform the role of an effective safeguard against non-performance, inadequate performance or delayed performance. Thus in **Krelinger and Fernau Ltd. v Irish National Insurance Co. Ltd. (1956) 1 R 116**, a document guaranteeing performance of a contract of sale by the vendors was held to be a contract of insurance. In the **Edward Owen Engineering** case, **supra**, it was held that a performance guarantee was similar to a confirmed letter of credit, and was in the nature of a promissory note payable on demand and that where a bank had given a performance guarantee, it was required to honour the guarantee according to its terms without proof that either party to the contract which underlay the guarantee was in default.

Determination

24. In the light of my findings, I hold therefore, that **Exhibit KA 1** was in law, a valid and enforceable performance bond issue by the defendant to UTS in favour of the plaintiff, Continental, guaranteeing the payment for tickets of Continental Airlines sold by UTS up to the amount of $100,000.00.

25. From the evidence, it is clear that UTS defaulted on its obligation to Continental Airlines on the sale of tickets, albeit, in the sum of $134,929.11. This is manifested in the judgment in default the latter obtained against the former.

It would therefore, I think, be clearly unjust to allow the defendant, Regent Insurance, to set up some plea of vagueness in **Exhibit KA 1**, to avoid its obligations thereunder to make good on the

default of UTS. In **Youell and Others v Bland Welch & Co. Ltd. and Others (the "Superhulls Cover" Case) (No. 2) (199) 2 Lloyd's Rep. 431**, one of the grounds on which Phillip J. held the brokers liable was their failure to draft the contract of reinsurance with reasonable clarity thereby obscuring the difference between the cover under the original insurance and that under reinsurance – at p. 446.

26. From the evidence in this case, Mr. Logan testified that when Jeffrey explained what he wanted cover for, he went to the computer and downloaded what is now **Exhibit KA 1**. This, as it turns out, is rather inappropriately worded in some places. Must this be visited on Continental Airlines, and allow Regent Insurance to escape liability? I don't think so. I don't even feel it necessary to call in aid the **contra proferentem rule** in this case. This requires that ambiguity in the wording in a policy is to be resolved against the party who prepared it – see for example: **Provincial Insurance v Morgan (1933) A.C. 240** at p. 255. In my view, the overall meaning and effect of **Exhibit KA 1** is clear: the defendant undertook to make good up to $100,000.00 in the performance of UTS for the sale of tickets on Continental Airlines should UTS fail in this regard. I am satisfied that in this case the principle of reasonable construction is decisive.

Conclusion

I do not think it is necessary or helpful in view of my findings on the nature and purport of **Exhibit KA 1**, to pronounce on the alternative claim of the breach of duty of care that might be owed by the defendant to the plaintiff. But indubitably, the repudiation of **Exhibit KA 1** (the performance bond) on the ground that it is void for uncertainty cannot, in my judgment, avail Regent Insurance Co. Absent fraud, they cannot resile from or repudiate their obligation under the bond they executed with UTS in favour of the plaintiff.

Accordingly, I enter judgment on the bond in the sum of $100,000.00 in favour of Continental Airlines.

I also award interest on this sum at the rate of 7% per annum from 15th June 1999, the date the writ in this action was filed, to the date of this judgment.

I further award costs to the plaintiff to be taxed if not agreed.

A. O. CONTEH
Chief Justice

DATED: 24th March, 2004.