

MONDAY – 9TH JUNE, 2003

IN COURT

ACTION NO. 262

CONTINENTAL AIRLINES INC.

Plaintiff

v.

REGENT INSURANCE CO. LTD.

Defendant

Trial on policy of Insurance (bond).

APPEARANCES

Dean Barrow S.C. with Magali Marin-Young for Plaintiff.
Denys Barrow S.C. with Coleen Lewis for Defendant.

DEAN BARROW S.C.

Requests Marin-Young to open.

MARIN-YOUNG FOR PLAINTIFF:

This is a case by Plaintiff against Defendant to enforce a bond issued by Defendant on 22nd June 1998 to secure certain obligations in the sum of \$100,000.00 by Universal Travel Services Ltd.

Plaintiff has sought to have Defendant honour bond, which it has refused because of uncertainty. Plaintiff had requested payment because Universal Travel had defaulted on payment for tickets sold by it for Plaintiff.

Calls Mrs. Kim Aikman.

P.W. 1 KIM AIKMAN s/s:

Half mile, Burrel Boom.

Country Manager for Plaintiff in Belize.

Plaintiff does ticket sales to carry passengers and cargo in Belize. Plaintiff has been in business for 15 years.

Plaintiff sells tickets directly and has travel agencies who sell tickets for it as well. Presently Plaintiff has ten travel agencies.

Know travel firm Universal Travel Services. Plaintiff used to do business with it from 1988 – 1998.

Plaintiff would give Universal Travel Services ticket stubs and validated them and Universal Travel Services will sell to clients and pay Plaintiff every two weeks.

Universal Travel Services averaged about \$100,000.00 every two weeks (accounting period).

Plaintiff had contract with Universal Travel Services for conduct of business entered into in 1998 renewable each year. The contract was written with Universal Travel Services. Not always a written contract but in 1988 Headquarters wanted to regularize arrangements with travel agencies, requested to have written contract.

Plaintiff had written contract with Universal Travel Services in June 1998.

Along with the contract a performance bond was requested from each travel agency.

Performance bond was requested from Universal Travel Services and it was issued.

The Defendant issued the performance bond.

I was given a copy of this bond. I wasn't given a draft copy prior to its issue.

Universal Travel Services told me whom they had procured bond from.

After bond was issued I had occasion to review it.

The copy of bond I was given was an original copy.

Witness shown copy of performance bond (no objection by Denys Barrow S.C.) and says it is bond issued to Universal Travel Services.

Tendered and marked Exhibit KA 1.

After bond was issued, Plaintiff continued to do business with Universal Travel Services up until August 1998.

Plaintiff discontinued business with Universal Travel Services because it did not pay money owed for ticket sales.

One hundred and thirty four thousand dollars (\$134,000.00) was owed to Plaintiff by August from Universal Travel Services.

First I contacted Mrs. Jefferies of Universal Travel Services, owner of Universal Travel Services, along with her husband.

I wrote Mrs. Jefferies a letter that they had defaulted and Plaintiff needed to be paid by a certain date, failing which Plaintiff will cash in their bond. I retained a copy of this letter.

Witness shown copy of letter (Denys Barrow S.C. consented) and tenders it.

Marked Exhibit KA 2.

Universal Travel Services did not pay Plaintiff after receiving this letter.

Plaintiff then wrote a letter to Defendant, the issuers of the performance bond in October of 1998.

Witness shown letter (Denys Barrow S.C. consenting).

Tendered and marked Exhibit KA 3.

I got a written response to this letter from Defendant in October 1998.

Letter from Defendant to Plaintiff tendered and marked Exhibit KA 4.

After receiving letter I called Tony Flynn of Defendant to see him.

I saw Mr. Flynn. He notified me that the wording of bond had been done by one of Defendant's employees which was wrong and therefore Defendant could not honour bond.

I told Flynn that we would take matter to our attorneys.

Plaintiff asked attorneys to file suit against Universal Travel Services and Regent Insurance Co. (Defendant).

We got a copy of the action.

Witness shown copy of writ issued and tenders it - marked as Exhibit KA 5.

Regent had filed a Defence. We dropped suit against Regent and pursued Universal Travel Services.

We obtained judgment against Universal Travel Services.

Witness shown copy of judgment against Universal Travel Services.

Tendered and marked as Exhibit KA 6.

But no assets of Universal Travel Services to levy execution on.

Therefore Plaintiff commenced the present action against Defendant, Regent Insurance.

Witness shown Exh. KA 1 and says that according to her interpretation if Universal Travel Services sold validated tickets and defaulted up to \$100,000.00, Regent will make good on default.

CROSS-EXAMINATION BY DENYS BARROW S.C. FOR DEFENDANT:

Yes, bond was issued in June 1998. I saw it in June 1998. I reviewed it when I saw it and interpreted it then as I have just done in court.

Witness reads top of 2nd page of bond as meaning Regent will make good on Universal Travel Services default.

The "employer" is the Plaintiff on top of page 2.

Regent is principal.

I have been in airline business for about 20 years.

Yes in Belize a number of airlines had failed after commencing business.
I worked with two of them – Eastern Airlines and Air Florida.

Eastern failed about 1988 and Air Florida in 1984/1985.

I am familiar with other small airlines starting business in Belize and failing.

I have never had a ticket bond before issuing of the performance bond.

Type of cover in the bond is ticket bond.

I am not aware that as a result of failure of airlines, Government of Belize required they obtain performance bond.

I am not aware Government of Belize required a bond to safeguard passengers as a result of failure of airlines.

No, Plaintiff did not request bond from Defendant. It requested it from Universal Travel Services.

Plaintiff had no contact with Defendant and did not indicate to Defendant the type of bond it needed.

NO RE-EXAMINATION.

THE CASE FOR PLAINTIFF

DENYS BARROW S.C. FOR DEFENDANT.

Calls Eldon Logan.

D.W. 1 ELDON LOGAN s/s:

3570 Ross Pen Road. Thirty one years.

Supervisor, Technical Department with Defendant. Worked with Defendant for past 13 years.

I have dealt with bonds while working with Defendant.

Witness shown Exh. KA 1 and says he has seen it before.

Exh. KA 1 – I prepared it in the absence of manager of Defendant, Tony Flynn.

I recalled on morning of 22nd June 1998, Jefferies came and requested a ticket bond. Jefferies used words “ticket bond”.

In response to his request I went to computer and found this document and prepared it for Mr. Jefferies. I gave it to Jefferies and he paid a premium. It took in all about 15 minutes.

This was not my first connection with a ticket bond. My first connection with a ticket bond was around 1992 when they had some small airlines getting a licence from Government of Belize to operate in Belize.

Ticket bond came up in the event tickets that were sold to customers and airlines could not honour those tickets, then ticket bond would cover for those tickets that could no longer be used.

The bonds would be issued to airlines and they were bonded to Government of Belize.

The wording of bond came from Government of Belize.

Personally I issued about 12 ticket bonds.

Yes, around time Plaintiff made claim on Defendant another organization also made claim on Defendant. Defendant rejected that claim.

Yes, TACA Airlines (the other institution) gave us a new document which was wording they required.

CROSS-EXAMINATION BY DEAN BARROW S.C. OF D.W. 1:

Yes, Mr. Jefferies came to see me and requested a ticket bond. I then went to the computer and pulled out the form. That was all he said to me, to issue him a ticket bond as we had done in the past.

Jefferies did not tell me the purpose of bond.

Jefferies said to me he wanted a ticket bond same as we did for TACA Airlines and now for Continental Airlines.

Jefferies had earlier procured from us a ticket bond in respect of TACA Airlines. I had prepared this bond.

At the time Jefferies said why he required bond in respect of TACA. He said he needed ticket bond to show airline so he could get ticket stubs from them.

I understand that he needed something to show airline so he could get tickets to sell. The something he needed to get tickets was a bond. I understand that if he did not get bond he would not get tickets from airline.

He needed a bond from an Insurance Company to show airlines.

I issue bonds. Bonds are to secure performance of obligations of person for whom bonds are issued.

I understand that when Jefferies got airline tickets he was obliged to pay for them.

No, the bond I issued was not designed to secure this obligation to pay for tickets. The bond was designed to secure tickets that were sold by Universal Travel Services in the event that those tickets sold by Universal Travel Services and Continental would go bankrupt and customers would not use tickets sold.

The bond was in favour of Universal Travel Services customers holding Continental tickets.

I understand the obligation of Defendant to be to pay patrons holding Continental tickets. The bond says Defendant was bound to Continental Airlines (the Plaintiff).

Yes, Exh. KA 1 is the same bond I issued in favour of Government of Belize in respect of small airlines – ticket bonds.

Continental Airlines was not a small airline. I know it had been operating in Belize sometime before I prepared Exh. KA 1.

The small airlines used to require the bonds and pay for them. These bonds bound us to Government of Belize.

Universal Travel Services is not airline company. Plaintiff never placed any bond with Defendant.

At time I did not think about Continental, nor that the bond was to secure any obligation by Continental Airlines.

I understood and knew that bond was to secure Universal Travel Services' obligations to Continental (the Plaintiff).

RE-EXAMINATION BY DENYS BARROW S.C. OF D.W. 1:

At time, I just prepared the document for Jefferies as he requested.

CASE FOR DEFENDANT

Adjourned to 2:30 p.m. for addresses.

ADDRESS

DEAN BARROW S.C. FOR PLAINTIFF:

Plaintiff's claim is principally no contract with respect to a performance bond which the Defendant prepared and issued.

In the alternative, for breach of duty of care which Plaintiff alleges was owed by the Defendant as a professional insurer to properly prepare a performance bond in accordance with instructions.

Plaintiff is alleging that this was a performance bond – so described in Exh. KA 1.

Cites Law of Guarantees 3rd Ed. Andrew & Millett p. 477 et seq.

Courts are vigilant to give effect to terms of performance bond, normal rules of surety ship do not apply.

Submit that Exh. KA 1 is a performance bond.

On general rules of construction Exh. KA 1 submits is easily construed as performance bond.

Submit it terms supports contention of Plaintiff.

Universal Travel Services Agency which sold Plaintiff's tickets was requested by Plaintiff to procure performance bond to secure payment for Plaintiff's tickets to customers.

It is Plaintiff's case that Defendant knew and understood purpose for which bond was sought and Defendant prepared and issued the bond, albeit not happily worded – it however secured the purpose for which it was sought.

The Plaintiff therefore contends that the bond was valid and enforceable against the issuer – the Defendant.

Submit that Defendant was wrong to have refused payment under bond when Plaintiff made demand on it.

The Defendant's defence therefore that bond was vague and unenforceable can't stand.

In the alternative, the Defendant owed a duty which it would breach if the bond was held to be vague or uncertain as Defendant knew purpose for which bond was required.

Submit: Defendant knew the purpose for which bond was required - D.W. 1 was cross-examined.

Exh. KA 1 also talks expressly of Defendant's obligation to Plaintiff under the performance bond taken out by Universal Travel Services.

Submit: Defendant knew fully well what purpose of bond was, viz. to secure Universal Travel Services' payment obligation to Plaintiff.

Submit that when D.W. 1 prepared Exh. KA 1, he did so to effect this purpose.

Therefore evidence of D.W. 1 otherwise can't stand.

Some of the clauses of Exh. KA 1 are surplusage or unnecessary and clause (1) is more intelligible if it refers to other bonds required by Government of Belize from small airlines.

In any case, the first half of p. 2 of Exh. KA 1 at top is severable from clause (II).

McGillivray on Insurance 9th Ed. – p. 264 on construction of policies.

Etherington

1909 1 K.B. 591.

Morely v Morely et (1993) 1 Lloyd's Rep. 490, at p. 493.

Westminster Fire Office (1903) TLR 668.

Flying Kolbass Film Co. (1993) 2 Lloyd's Rep. 184.

John Martin (1960) Lloyd's Rep. 554 at 564.

South British Fire etc. (1906) K.B. 456 at 460.

Compagnie D'armanent Maritime (1971) A.C. 572 at p. 585.

Submit therefore on all these principles, the policy is easily construed as to the recital, penalties, the obligation insured and purpose; therefore it should be so construed as to give commercial efficacy to it.

Also, the contra proferentem rule would hold Defendant liable on the bond notwithstanding its wording.

Submit: The Defendant is liable on the bond itself and therefore it was wrongful for it to have said it was void as being vague.

The Plaintiff's alternative submission for breach of duty of care owed to the Plaintiff as the beneficiary albeit Universal Travel Services contracted the bond.

Submit on evidence of Logan D.W. 1, the Defendant well knew purpose for which bond was sought. Defendant therefore owed duty of care to properly prepare bond for purpose sought.

Jackson & Powell on Professional Negligence 4th Ed., p. 765, para. 76-36, p. 767.

Punjab National Bank (1992) 1 Lloyd's Rep. 7.

Submits in the circumstances of this case Logan D.W. 1 for Defendant being of the experience he had ought to have known that reliance would be place on his professional skill to so draft the bond for the purpose it was required.

Therefore even if the bond was found to be defective and unenforceable, submit that Defendant was liable in negligence. Defendant knew purpose for which bond was required.

DENYS BARROW S.C. FOR DEFENDANT:

Refers to writ of summons in case. Claim was for negligence. But Statement of Claim extends the claim to include action for damages for breach of contract. The claim of negligence comes in the alternative.

The claim of Plaintiff is limited to \$100,000.00 as per bond.

Paras. 3, 4, 5, 6 and 7 of Statement of Claim.

Facts Plaintiff must prove

- 1) That Defendant was requested and agreed to provide a performance bond.
- 2) That bond was requested as a form of insurance security to guarantee or indemnify Plaintiff with payment by Universal Travel Services for tickets sold by Universal Travel Services. This is disputed by Defendant.

D.W. 1 (Logan's testimony) – he may not have adverted to all possibilities of Jefferies' request. The central fact is he was not requested to issue a bond that would serve as a form of insurance security to guarantee/indemnify the Plaintiff with payments for tickets.

Submit that Plaintiff never communicated to Defendant what it required of Universal Travel Services. Jefferies only told Defendant what it wanted.

Plaintiff knew what they wanted but did not communicate it to Defendant.

Defendant knew what Jefferies wanted, that is, a ticket bond after similar bonds issued. This was what Defendant responded to Jefferies request.

- 3) Plaintiff must prove that Defendant knew purpose for which bond was requested.

Submit that Defendant having been told that Universal Travel Services wanted a ticket bond, did not know the Plaintiff wanted a surety bond.

Powell on Professional Negligence at p. 766, para. 7-37.

Submit Universal Travel Services got exactly what it requested from Defendant.

Fletcher v Manitoba (1990) S.C.R.

Submit Exh. KA 1 is not a sensible and happy document.

Defendant gave Universal Travel Services what they both understood was required: what they had historically issued in the past.

On the condition of bond: Had Logan (D.W. 1) been told what was the purpose of the bond, he would not have issued it in the form he did, otherwise he would be negligent. The condition did not make sense for Universal Travel Services to validate and honour tickets sold.

The condition failed to cover situation Plaintiff had in mind.

O'Connor v Kirby (1971) 1 Lloyd's Rep. 454.

Plaintiff decided they needed a bond.

Submit they owed a duty to themselves to communicate what they wanted, but this they did not do. It was their duty to specify what they wanted.

The proper bond could have been procured before or after the event.

Continental should have been able to determine that bond issued was not what they wanted,

Submit therefore that Plaintiff was author of its own misfortune.

The default by Universal Travel Services took place in August and Defendant was asked to refund.

In relation to the contract point

There was in fact no contract between the Plaintiff and Defendant.

There was novated performance bond, submit in this case: absent this Plaintiff can have no cause of action in contract against Defendant.

White v Jones (1995) 1 All E.R. 691.

Submit in this case the cause of the loss was the failure of Plaintiff to specify what they wanted and to have left it negligently to Universal Travel Services to procure what Universal Travel Services understood was required in the case.

DEAN BARROW S.C. IN REPLY:

D.W. 1 (Logan) did not in examination in chief testify as to anything about bonds based on airline ticket bonds for Government of Belize that Defendant had issued in the past.

It is not correct therefore to say that Jefferies had said to Logan that he wanted ticket bond as Defendant had issued to other airlines for Government of Belize.

Submit on D.W. 1's testimony in cross-examination he understood the purpose for which bond was sought.

P.W. 1 said Flynn of Defendant had said the employee of Defendant had used the wrong form – so the Plaintiff can't be at fault. Defendant can't therefore say it was Plaintiff's fault.

Submit that Exh. KA 1 is not a piece of nonsense. P.W. 1 said what she understood by the bond.

Submit the wording of condition in bond supports P.W. 1.

McGillivray on Insurance para. 11-7.

Submit that Exh. KA 1 should be interpreted in the light of business transaction: it binds Defendant to Plaintiff in the sum of \$100,000.00 if Universal Travel Services were to default.

There is after severance of other parts not necessary, a perfectly valid and enforceable bond.

D.W. 1 clearly also said that he understood the instructions were to get a bond for performance of Universal Travel Services obligations to Plaintiff.

Judgment is reserved.

A. O. CONTEH
Chief Justice