IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of a claim arising in terms of section 2(1) (f) of the Admiralty of 1983 being a claim for loss of life in consequences of a defect in a ship or her apparel or equipment and the wrongful act, neglect and default of the owners of the vessel.

01. Anusha Karunaratne
25/47, Kalinga Place,
Wijaya Kumaratunga Mawatha,
Colombo 05.

02. Senal Karunaratne
25/47, Kalinga Place,
Wijaya Kumaratunga Mawatha,
Colombo 05 being a minor represented by his duly appointed next friend Anusha Karunaratne Wijaya Kumaratunga Mawatha,
Colombo 05.

03. Naveka Karunaratne
25/47, Kalinga Place,
Wijaya Kumaratunga Mawatha,
Colombo 05 being a minor represented by her duly appointed next friend Anusha Karunaratne Wijaya Kumaratunga Mawatha,
Colombo 05.

Plaintiffs

Case No. CA (PHC) APN 140/2012

High Court of Colombo Case No. 2/2000 REM

Vs.

Master Drivers (Private) Limited

Maritime Centre,

234/2 Galle Road Colombo 03.

Defendant

AND NOW

In the matter of a revision in terms of the Civil Procedure Code

Master Drivers (Private) Limited

Maritime Centre,

234/2 Galle Road Colombo 03.

Defendant-Petitioner

Vs.

01. Anusha Karunaratne
    25/47, Kalinga Place,
    Wijaya Kumaratunga Mawatha,
    Colombo 05.
02. Senal Karunaratne
    25/47, Kalinga Place,
    Wijaya Kumaratunga Mawatha,
    Colombo 05 being a minor represented by his duly appointed next friend Anusha Karunaratne Wijaya Kumaratunga Mawatha, Colombo 05.

03. Naveka Karunaratne
25/47, Kalinga Place,
Wijaya Kumaratunga Mawatha,
Colombo 05 being a minor represented
by her duly appointed next friend
Anusha Karunaratne,
Wijaya Kumaratunga Mawatha,
Colombo 05.

Plaintiffs-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Rohan Sahabandu P.C. with Diloka Perera for the Defendant-Petitioner

Chandaka Jayasundera P.C. with Tharindu Rajakaruna for Plaintiffs-Respondents

Written Submissions tendered on:

Defendant-Petitioner on 25.09.2014

Plaintiffs-Respondents on 07.10.2014

Argued on: 05.02. 2018

Decided on: 09.08.2018

Janak De Silva J.

This is a revision application against the order of the learned High Court Judge of Colombo (Admiralty Court) dated 08.08.2012.

The question of law that arises for determination in this case is what is the applicable exchange rate in satisfying a judgement entered in foreign currency in Sri Lanka. The learned High Court Judge decided that it is the rate of conversion as at the date of payment which is the position urged by the Plaintiffs-Respondents (Respondents). The Defendant-Petitioner (Petitioner) on the other hand relying on *Mercantile Agency v. Ismail* (26 N.L.R. 326) contends that the rate of conversion should be the applicable exchange rate as at the date of breach or date of judgment and hence this revision application.

Let me at the outset consider the possible dates at which the conversion may be done and consider the advantages and disadvantages of each date.

The general principle is that the rights of the parties are to be determined as at the date of action [*Silva v. Fernando et al* (15 N.L.R. 499)]. However, certain exceptions are said to exist to this general principle [*Thangavadivel v. Inthiravathy* (53 N.L.R. 369)]. However, in *Miliangos v. George Frank (Textiles) Ltd.* [1976 A.C. 443], Lord Wilberforce rejects using the date on which the action is brought as the date for conversion since these dates still leave the judgment creditor at a significant currency risk. According to Lord Wilberforce adopting the date on which the action is brought as the appropriate date for conversion leaves the judgment creditor at the mercy of the debtor's obstructive tactics and the law's delays (at page 469).

The next option is the date of breach. Support for this date appears to be based more on an English law perspective. In *Re United Railways of the Havana and Regla Warehouses Ltd* [(1960) 2 All. E. R. 332] one of the strongest reasons cited for continuing with the breach date rule was that it sustained uniformity in the English legal system. Lord Viscount Simonds in this case stated that it would be unrefined to have different rules as to the date of conversion depending on whether the claim is for a breach of contract, in tort or for a debt.

In *Miliangos*, Lord Wilberforce referred to currency stability and stated that floating currencies have become the norm and fixed currencies the exception (at page 463). In such a context, the breach date rule was held to be unsatisfactory because that rule was posited on a currency system that was fixed. For instance, during the period the breach date rule was in existence it was highly unnatural for the relative value of currency to change rapidly between the 'breach date', date of judgment or 'date of payment'.

Therefore, even a creditor who recovered the sterling equivalent converted as at the date of breach did not suffer a huge loss. However, in a context where world currencies are 'floating' this will not be the case and rapid changes in the relative value of currency is the norm. For instance, if the foreign currency in which judgment is sought appreciates between the date of breach and the date of payment, the judgment creditor will be able to obtain a greater amount of sterling based on prevailing exchange rates.

However, since the breach date rule requires him to rely on the past exchange rate he will recover less than he is entitled to. This can be problematic especially in situations where the legal system is slow moving and the judgment debtor has the necessary tools to drag on and delay the litigation process.

Further, Lord Simon of Glaisdale in his dissent in *Miliangos v. George Frank (Textiles) Ltd.* (supra) pointed out that several statutory enactments and rules had been formulated in England on the basis of the breach date rule and that disturbing the said rule is likely to create dislocations in the English legal system (at page 487).

However, the breach date rule is inequitable even from a judgment debtor's perspective. For instance, if the foreign currency in which the claim is made depreciates between the date of breach and date of payment, requiring the debtor to pay for example the rupee equivalent as at the date of breach is an imposition of an obligation on him to pay more than he should at prevailing market prices.

The other option is the date of payment. The main justification for the *Miliangos* formulation viz. that a judgment creditor is entitled to judgment in foreign currency or the sterling equivalent as at the date of payment is that the date of conversion enables the judgment creditor to obtain exactly what he bargained for and that the judgment creditor is less affected by fluctuations in the value of the sterling.

Therefore, the possible dates on which the conversion can be made has both positive and negative elements.

For some time, it was uncertain whether a judgement can be entered in Sri Lanka in foreign currency. The matter was authoritatively decided by the Supreme Court in *Seylan Bank Ltd. v. Manchester Yarn and Thread (Pvt) Ltd.* [(2004) 3 Sri. L. R. 303] where it was held that judgements can be given in foreign currencies in Sri Lanka.

The parties contend that there is a dispute on what is the applicable exchange rate in satisfying a judgement entered in foreign currency in Sri Lanka and rely on several English authorities to support the position taken by each of them. The relevance of these authorities can be discerned only after a proper characterization of the issue.

What I mean by "characterization" or "classification" is the allocation of the question raised by the factual situation before the Court to its correct legal category. Is the question before Court a substantive one or procedural one and if it is substantive to what sub-category, such as contract, tort etc. does it fall into? It is only after such an analysis can a court determine what is the law applicable given that although Roman-Dutch Law is the common law of Sri Lanka, English law is also at times relevant in our legal system.

I am of the view that the question before this court is one dealing with procedure. I come to this conclusion after considering the definition given to "the law of procedure" by Lush LJ in *Poyser v. Minors* [(1881) 7 Q.B.D. 329 at 333] and adopted in *Re an intended action, Shoesmith vs. Lancaster Mental Hospital Board* [(1938) 3 All.E.R. 186] which reads:

> "The mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer the machinery as distinguished from its product".

There is a clear line of authority which holds that section 2 of the Civil Law Ordinance did not introduce English rules of procedure to Sri Lanka. [*Mudalihamy v. Punchi Banda* (15 N.L.R. 350); *Suppiaya Reddiar v. Mohammed* (39 N.L.R. 459); *Oretra Enterprises and others v. Wijeykoon* (2003) 3 Sri.L.R. 1]. In that context, the English authorities cited by parties are of little significance.

However, the case before court was decided by the High Court of Colombo exercising Admiralty Jurisdiction. Therefore, this court must examine the procedure that governs proceedings before the Admiralty Court.

In *Elarca S. A. of Monrovia, Liberia & Another v. Oilborne Shipping Co. Inc. of Liberia* [(1979) 2 Sri. L. R. 293 which was approved by the Supreme Court in (1978-79-80) 2 Sri.L.R. 55] a divisional bench of this court extensively surveyed the history of admiralty proceedings in the country. Among the courts observations was that historically admiralty proceedings in Ceylon/Sri Lanka had not been governed by the procedure applicable to civil cases but always had a *sui generis* procedural regime of its own. In coming to this conclusion, the court referred to the fact that admiralty proceedings under the Ceylon (Courts of Admiralty) Ordinance had been governed by procedural rules made in terms of section 23 of that Ordinance viz. the Vice Admiralty Rules. After the coming into force of the Administration of Justice Law, although the admiralty jurisdiction was transferred to the High Court, the Vice Admiralty Rules governing procedure were kept alive by section 3(2) of the Administration of Justice Law.

The court also concluded that the Admiralty Courts did not fall within the scope of the term 'civil court' in the Civil Procedure Code (CPC). The reasoning of the court was based on the position that a 'civil court' would be regulated by the procedures of the CPC, but that the Admiralty Courts were governed by an equally extensive procedural regime reflected in the Vice Admiralty Rules.

The reasoning of the court namely that courts exercising admiralty jurisdiction are governed by a *sui generis* procedural regime is the correct position even after the enactment of the Judicature Act No. 2 of 1978. In *Mohamed Saleh Bawazir v. "M. V. Ayesha" EX M.V. Lying in the Port of Colombo and Seyda Mansoor Ul Islam, Acting Minister* [(1986) 1 Sri L. R. 314] the Court of Appeal concluded that the Vice Admiralty Rules of 1883 were kept alive by section 3 (2) of the Administration of Justice Law (which was not repealed by the Judicature Act) read with Articles 169 (6) and 168 (1) of the Constitution.

Section 11(3) of the Admiralty Jurisdiction Act No. 40 of 1983 (Admiralty Jurisdiction Act) reads:

> "Rules may be made under Article 136 of the Constitution regulating the practice and procedure of the High Court in the exercise of its jurisdiction under this Act."

Accordingly, the High Court (Admiralty Jurisdiction) Rules of 1991 published in Government Gazette No 672/7 dated 24.07.1991 is the present *sui generis* procedural regime governing admiralty jurisdiction in the country. However, these rules do not provide for an answer as to what is the applicable exchange rate in satisfying a judgement entered in foreign currency in Sri Lanka.

The question then is what is the procedural rules which must be considered by this court in determining this issue.

Section 12 of the Admiralty Jurisdiction Act reads:

> "Where in any proceedings instituted under this Act, **any matter or question of procedure arises in respect of which no provision or adequate provision has been made** by or **under this Act** or **any other enactment** or **any rule**, the Court shall have power to **make such orders and to give such directions which the Court exercising admiralty**

jurisdiction in England would have the power to make and give in like circumstances in so far as such orders and directions shall not conflict or be inconsistent with any provisions made by or under this Act or any other enactment or any rule." (emphasis added)

Therefore, it is necessary to consider the legal position if the same issue arose before the modern-day admiralty courts of England.

The learned President's Counsel for the Respondent submitted that the rule stated in *Miliangos v. George Frank (Textiles) Ltd.* (supra) has been continuously followed by the Admiralty Courts of England in *The "Halcyon Skies" (No. 2)* [(1977) 1 Lloyds Rep. 22], *The "Transoceanica Franceska"* and *"Nicos V"* [(1987) 2 Lloyds Rep. 155] and *Smit Tak International Zeesleepen Bergingsbedriff B.V. v. Selco Salvage Ltd. and others* [(1988) 2 Lloyds Rep. 398] and therefore should be followed by the Admiralty Court.

Neither the Supreme Court Act of 1981 which vests admiralty jurisdiction in the UK High Court (section 20 – 24), Part 61 of the UK Civil Procedure Rules[1] which deal with Admiralty claims or Practice Direction 61[2] which supplements Part 61 of the UK Civil Procedure Rules deal with the question/matter of whether the UK admiralty courts are empowered to make foreign currency orders in relation to claims over which it exercises jurisdiction. Practice Direction 61 states that admiralty claims *in personam* will proceed in accordance with Part 58 of the UK Civil Procedure Code. However, neither Part 58 of the UK Civil Procedure Code[3] or Practice Direction 58[4] supplementing it deals with foreign currency orders.

[1] See https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part61#IDALBKCC
[2] See https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part61/pd_part61#IDAVXD2
[3] See https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part58#IDAJRKCC
[4] See https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part58/pd_part58#IDAUXG2

However, Part 40 of the UK Civil Procedure Rules[5] which deals with judgments, orders, sale of lands and Practice Direction 40B[6] which supplements that part is instructive in this respect. Part 40 of the UK Civil Procedure Rules is described as a section which:

> *"....sets out rules about judgments and orders which apply except where any other of these Rules or a practice direction makes a different provision in relation to the judgment or order in question."*[7]

Since the UK Civil Procedure Rules apply to courts including the High Court exercising admiralty jurisdiction[8] the procedural rules governing judgments and orders in Part 40 and the supplementary Practice Direction 40B would be applicable to the UK Admiralty Courts. Practice Direction 40B supplementing Part 40 of the UK Civil Procedure Rules recognizes the capacity for civil courts[9] **to give judgments for an amount in foreign currency or their sterling equivalent at the time of payment.**[10]

This analysis results in the applicable exchange rate in satisfying a judgement entered in foreign currency in Sri Lanka to be the **rupee equivalent at the time of payment.**

In *M.V. "Ocean Envoy" and another v. Al-Linshirah Bulk Carriers Ltd.* [(2002) 2 Sri.L.R. 337] the Court of Appeal held that Section 12 of the Admiralty Jurisdiction Act provides that where there is no provision or inadequate provision in the said Act, the Admiralty Court shall have the power to make such order/ directions which the court exercising admiralty jurisdiction in England had power to make and that if the Act is silent and if there is no provision in the Law of England for de novo trials specially when the trial has been concluded, it is for the Judge of the Admiralty

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[5] See https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part40

[6] See https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part40/pd_part40b#10.1

[7] UK Civil Procedure Rules, Part 40.1 (See https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part02)

[8] UK Civil Procedure Rules, Part 2.1

[9] This includes; (a) the County Court; (b) the High Court; and (c) the Civil Division of the Court of Appeal (See UK Civil Procedure Rules, Part 2.1)

[10] UK Civil Procedure Rules, Part 40: Practice Direction 40B: section 10

Where judgment is ordered to be entered in a foreign currency, the order should be in the following form:

> *It is ordered that the defendant pay the claimant (state the sum in the foreign currency) or the Sterling equivalent at the time of payment.*

Court to use his judicial discretion and decide whether an application for a trial de novo should be allowed or not.

Accordingly, if the Practice Direction 40B supplementing Part 40 of the UK Civil Procedure Rules referred to above does not apply to the issue before court the Judge of the Admiralty Court can in view of section 12 of Admiralty Jurisdiction Act use his judicial discretion and decide the applicable exchange rate in satisfying a judgement entered in foreign currency in Sri Lanka. The learned High Court Judge appears to have done so in the instant case although the order is devoid of any reasoning as to why he ordered that it is the rate of conversion as at the date of payment.

In this situation, it is useful to consider how the English Courts approach this question. In *United Railways of the Havanna and Regla Warehouses Ltd.* (supra) Lord Viscount Simonds restated the old English rule which said that a claim in foreign currency for (a) liquidated debts, (b) damages for breach of contract or (c) damages for tort must be converted to sterling at the rate prevailing at the date of breach. He in fact classified the issue as primarily procedural.

However, the House of Lords in *Miliangos v. George Frank (Textiles) Ltd.* (supra) departed from the rule stated in *United Railways of the Havanna and Regla Warehouses Ltd.*(supra) and held that if there was a necessity to convert a judgement given in foreign currency, the conversion must be at the applicable rate at the date when leave was given to enforce the judgement, which Lord Wilberforce in delivering the leading judgment understood to mean (at page 813) **the date when the court authorizes enforcement of the judgement in terms of sterling pounds**.

Thus, different formulas apply depending on whether the Practice Direction 40B supplementing Part 40 of the UK Civil Procedure Rules referred to above applies or whether the Judge of the Admiralty Court can use his judicial discretion and decide the applicable exchange rate in view of section 12 of the Admiralty Jurisdiction Act.

However, this uncertainty is resolved in view of the decision of the Supreme Court in *Seylan Bank Ltd. v. Manchester Yarn and Thread (Pvt) Ltd.* (supra) where Wigneswaran J. held (at page 313):

> "I would therefore hold that the plaintiff in this case is entitled to obtain judgment in a currency other than Sri Lankan rupees since there is no law which prohibits such a decree being entered. **When entering judgment in a foreign currency it is also necessary that the rupee value at the exchange rate prevailing at the date of payment together with legal interest should also be entered therein.**" (emphasis added)

That case was not a matter arising from the Admiralty Court. However, the statement in my view stands to reason as applying the date of payment as the date of conversion enables the judgment creditor to obtain exactly what he bargained for and the judgment creditor is less affected by fluctuations in the value of the rupee.

For the foregoing reasons, I see no reason to interfere with the order of the learned High Court Judge of Colombo (Admiralty Court) dated 08.08.2012.

The revision application is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal