IN THE SUPREME COURT OF QUEENSLAND No. 1629 of 1986

CIVIL JURISDICTION

BEFORE MR. JUSTICE WILLIAMS

BRISBANE, 17 OCTOBER 1986

BETWEEN:

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED — Plaintiff/Appellant

-and-

MARGARET ANN CAWOOD (also known as Margaret Ann Rippon) — First Defendant/Respondent

-and-

COBRIDGE PTY. LTD — Second Defendant/Respondent

-and-

TORHALE PTY. LTD. — Third Defendant/Respondent

-and-

PYRAMUL PTY. LTD. — Fourth Defendant/Respondent

-and-

TORBELLA PTY. LTD. — Fifth Defendant/Respondent

-and-

JOHN CHARLES CAWOOD Sixth Defendant/Respondent

JUDGMENT

HIS HONOUR: In this matter I will dismiss the appeal with costs.

I publish my reasons.

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Before Mr. Justice G.N. Williams

BETWEEN:

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED Plaintiff/Appellant

AND:

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AND:

COBRIDGE PTY. LTD. Second Defendant/Respondent

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JUDGMENT - G.N. WILLIAMS J.

Delivered the Seventeenth day of October, 1986.

CATCHWORDS

Practice - court may give judgment in foreign currency - Miliangos v. Frank (Textiles) Ltd. (1976) A.C. 443 considered - summary judgment refused - triable issue as to currency in which plaintiff entitled to judgment

Counsel:	G.L. Davies Q.C. with H. Fraser for Plaintiff/Appellant
	H.G. Fryberg Q.C. with A. Morris for Defendants/Respondents
Solicitors:	Morris Fletcher & Cross for Plaintiff/Appellant
	Watkins Stokes T/A for Geoffrey Wockner for Defendants/Respondents
Hearing Dates:	23rd and 24th September, 1986.

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Delivered the Seventeenth day of October, 1986.

By specially endorsed writ issued the Eighteenth day of April, 1986 the appellant, Australia and New Zealand Banking Group Limited, claimed 1,205,171 Swiss francs together with interest from each of the six persons or companies named as a defendant to the writ, and also recovery of possession of the land specified in the endorsement thereto. Each of the parties named as a defendant to the writ entered an appearance thereto on 15th May, 1986, and then by summons filed on 4th September, 1986 the appellant sought judgment against each defendant pursuant to the provisions of O. 18 of the Rules of the Supreme Court. That application came before Senior Master Lee Q.C. on 11th September, 1986 and after hearing argument he gave each defendant unconditional leave to defend. The appellant has appealed from that decision and seeks from the Court the orders sought in the judgment summons. The Master did not give reasons for his order but I was informed that in broad terms he accepted the substance of two arguments raised on behalf of each of the six defendants:

(1) There was at least a triable issue as to whether or not the Court could give judgment for an amount expressed in a foreign currency as sought in the writ and the summons;

(2) There was such delay in bringing the application for summary judgment as to call for the refusal of the application in accordance with the principle referred to in Multiplo Incubator and Brooder Pty. Ltd. v. Whitfield (1971) Q.W.N. 6 and Crysler Marine Australia Pty. Ltd. v. Mahoney (1976) Qd.R. 184.

It would appear that as a corollary to the first ground the defendants argued before the Master that there was no proper endorsement under O. 6 r. 7(a) because the claim for a debt in foreign currency was not a claim for a "debt or liquidated demand in money" within that rule. The major argument before me centred upon the question whether or not this Court could give judgment for an amount expressed in foreign currency, and whether or not such a claim was within O. 6 r. 7(a). That of necessity involved a fairly detailed consideration of the judgments of the members of the House of Lords in Miliangos v. George Frank (Textiles) Ltd. (1976) A.C. 443.

In that decision the House overruled its earlier decision in Re United Railways of Havana v. Regla Warehouses Ltd. (1961) A.C. 1007 and recognised that an English Court was entitled to give judgment for a sum of money expressed in a foreign currency in the case of obligations of a money character to pay foreign currency under a contract the proper law of which was that of a foreign country; such a claim was valid if expressed specifically for a foreign currency or its sterling equivalent and conversion should be at the date when the Court authorised enforcement of the judgment. The members of the House, and Lord Wilberforce in particular, gave careful consideration to the history of claims to recover amounts expressed in a foreign currency and one can find in the judgments a reference to all authorities of significance on the topic. It should be said that so far as counsel were aware (and so far as my own researches have indicated) there is no binding authority on the question in Australia; in many instances though there is obiter dicta to the effect that Australian Courts should only give

judgment in Australian currency (cf. per Dixon J. in Jolley v. Mainka (1933) 49 C.L.R. 242 at 260). The decisions of Starke J. in Bando Trading Co. Ltd. v. Registrar of Titles (1975) V.R. 353 and of the Full Court of New South Wales in T.M. Duche and Sons (U.K.) Ltd. v. Walworth Industries (Aust) Pty. Ltd. (1962) 62 S.R.(N.S.W.) 165 are probably distinguishable, but in any event neither is binding on me (though the latter is of persuasive force). Specifically there is no decision of the High Court or the Full Court of this Court on the point.

A reading of the judgment of Lord Wilberforce in Milianqos shows that over the centuries the practice in England differed; from time to time there are to be found instances where English Courts gave judgment in a foreign currency. Further, the authorities referred to indicate no clear uniformity as to when the foreign currency, if that was the proper currency unit of the contract, should be converted to sterling; the date of breach, the date of commencement of action, and the date of payment after judgment were all adopted from time to time. As Lord Fraser pointed at p. 502 the decision of the House of Lords in Hyslops v. Gordon (1824) 2 Sh.App. 451 had apparently been overlooked in subsequent cases. The principle which was accepted by the House of Lords in the Havana Railway case (supra) originated in the decision of Lindley M.R. in Manners v. Pearson & Son (1898) Ch. 581 at 586-7. In Milianqos at p. 466 Lord Wilberforce referred to that as the "fons et origo of the modern self-imposed limitation". But it is significant in my view that until the decision in the Havana Railway case (supra) there was no clearly binding authority to the effect that judgment could not be given for an amount expressed in foreign currency. I accept the observation of Lord Wilberforce that the rationale behind the Havana Railway decision were practical objections relating to the enforcement of a judgment expressed in foreign currency.

But both in England and in Australia the commercial world has undergone a significant change in recent years.

Even limited experience in the commercial jurisdiction of this Court clearly indicates a marked increase in recent years in traders obtaining loans in foreign currency; the obvious inference to be drawn is that in the modern economy it is necessary for traders to obtain loan funds overseas and/or to do business in a foreign currency. Fluctuating exchange rates (the Australian dollar is now floated) have not brought about that policy change, but they have made more pertinent the considerations behind the appellant's attempt here to recover its loan in Swiss Francs. As Lord Wilberforce said in Miliangos at p. 465: "I do not for myself think it doubtful that, in a case such as the present, justice demands that the creditor should not suffer from fluctuations in the value of sterling. His contract has nothing to do with sterling: he has bargained for his own currency and only his own currency. The substance of the debtor's obligations depends on the proper law of the contract (here Swiss law): and though English law (lex fori) prevails as regards procedural matters, it must surely be wrong in principle to allow procedure to affect, detrimentally, the substance of the creditor's rights."

I respectfully adopt Lord Wilber force's analysis of the cases preceding Miliangos and adopt his conclusion that the cases said to support the decision in the Havana Railway case (supra) do not "rest on any solid principle or indeed on more than the Court's discretion" (p. 466). Once the decision in the Havana Railway case (supra) is removed, and Miliangos does that, there is no case which can be said to be a substantive authority in support of the proposition that an English Court can only give judgment for money expressed in terms of the local currency. All the previous cases were to a large extent based upon what were perceived to be procedural problems in enforcing a judgment expressed in a foreign currency and the principle, such as it was, was no more than a rule of convenience adopted by the Courts in the exercise of their discretion. Given the decision of the House of Lords in Miliangos there is no impediment, in my view, to this Court giving judgment for

an amount expressed in a foreign currency where the proper law of the contract was that of the foreign country and/or where the contract specifically provided for a loan and repayment in a foreign currency.

Though Moffitt P. in Johnco Nominees Pty. Ltd. v. Albury-Wodonga (N.S.W.) Corporation (1977) 1 N.S.W.L.R. 43 at 56 expressed the view (obiter) that a Judge at first instance would be wrong in following and applying Miliangos in the light of prevailing authority, there have subsequently been a number of single Judge decisions in New South Wales wherein judgment has been given for an amount expressed in foreign currency; those decisions have adopted the principle that a judgment ought to be in the currency that best expresses the judgment creditors loss. (cf. Maschinenfabrik Augsburg-Nurenburg Aktiengesellschaft v. Altikar Pty. Ltd. (1984) 3 N.S.W.L.R. 152). In Queensland McPherson J. has given judgment in U.S. dollars in Same and Lamborghini Tractors of Australia Pty. Ltd. v. Ikin & Ors. (unreported, No. 4218 of 1982), though Pincus J. held that the bankruptcy notice issued pursuant thereto referring to an amount in American dollars was bad (Re Ikin ex parte Lamborghini Tractors of Australia Pty. Ltd. (1985) 58 A.L.R. 759.

In this case, if it were clearly established that the appellant was entitled to judgment in Swiss Francs I would feel disposed to give judgment in those terms. The Rules of Court should, in my view, be given their ordinary and current meaning, and they must be treated as flexible enough to meet changing commercial situations. When O. 6 r. 7(a) speaks of "money" it should be construed widely enough to encompass all forms of currency which traders within the jurisdiction regard as "money" for purposes of meeting their trading and contractual obligations. If men of commerce within the jurisdiction are prepared to borrow money in foreign currency (whether because that is the only money available to them or not) the Courts must recognise the reality of the situation and ensure that the procedural rules (which are clearly within the discretion power of the

Judges) are such as to recognise and give force and effect to the contractual obligations so entered into. If necessary the judgment could be in the form that the plaintiff do recover the amount expressed in foreign currency or the equivalent in Australian dollars at the time of payment (cf. Miliangos at p. 463). I do not, in all the circumstances, consider that there is any significance in the fact that the Forms which form part of our Rules (eg. Form 183) provide for the plaintiff to "recover" a sum of money rather than that the defendant do "pay" a sum of money, despite what was said by Lord Wilberforce in Miliangos at p. 496.

In this case the first defendant/respondent made application to the plaintiff for a loan in a foreign currency. That application was dated 15th February, 1985 and sought a loan facility in the sum of A$600,000. Therein "Principal Currency" meant the lawful currency of the United States of America and "Alternative Currency" meant any currency other than the Principal Currency or Australian dollars. Further, for purposes of the loan agreement "Interest Period" meant each period of six months (or such other period as the Bank and the Customer may agree) beginning on the date on which the loan is drawn down. There is no dispute that this loan was drawn down on 28th February, 1985 and that it was made in an alternative currency, namely Swiss Francs. For present purposes it is only necessary that I refer in detail to cl. 6.01 of the Loan Application which formed the basis of the contract between the parties; it provided:

> "If the Customer so requests by giving to the Bank not less than five Banking Days' notice prior to the first day of any Interest Period and if the Bank so agrees, the whole or any part of the Loan Facility may be drawn in, converted into or continued in an Alternative Currency or Alternative Currencies . . . with effect from the beginning of such Interest Period. A separate request and the Bank's agreement thereto shall be required in respect of each such drawing in, conversion into or continuation of such Alternative Currency or Alternative Currencies for each Interest Period. In the absence of such request

> by the Customer or of such agreement by the Bank the Loan Facility shall be drawn in, continued in or converted into Principal Currency with effect from the beginning of each Interest Period."

It is the contention of the appellant that from time to time at the expiration of each Interest Period the borrower, the first defendant, signed a document headed "Selection of Interest Period and Currency of Advance". The relevant documents are said to be those forming ex. "DE2" to the affidavit of Duncan Elliot. There are there found four documents dated 28th October, 1985, 28th October, 1985, 27th November, 1985, and 21st December, 1985. They purport to show a selection of either U.S. dollars or Swiss Francs in each relevant period, with the last (that is for the period of two months from 27th December, 1985) being in Swiss Francs. It is immediately obvious that the dates of those documents do not show strict compliance with the provisions of cl. 6.01 quoted above. In particular there would not appear to be any document evidencing a selection of currency at the expiration of the first Interest Period, and in consequence the defendants contend that there was then a conversion to U.S. dollars (by operation of the last sentence of cl. 6.01) which has remained the currency of the loan.

Further, the first defendant in an affidavit has denied signing any of the documents found in ex. "DE2" until after demand was made for repayment of the loan and there had been default. Mr. Davies Q.C. who appeared for the appellant conceded that the argument had to proceed on the basis that the first defendant had not signed those documents; if it was necessary for the appellant to rely on those documents then he conceded that the defendants had clearly raised a triable issue. To overcome that problem the appellant relied on an affidavit filed during the hearing by a solicitor acting for the appellant who deposed that he had been that day informed by the manager of the Southport branch of the Bank the relevant branch) and verily believed the following matters:

"(a) In particular, in relation to the said paragraph 4 of the affidavit of Mr. Elliot that the first defendant was aware of and consented to each rollover in that, through the sixth defendant, she requested of Mr. Petty that the fresh advances for each new interest period be made in the currencies and for the interest periods which are mentioned in the document exhibit 'DE2' to the said affidavit of Mr. Elliot;

(b) That the facility was 'rolled-over' in that the plaintiff made the advances to the first defendant in the currencies and for the interest periods which are mentioned in the said exhibit 'DE2'."

In other words the appellant says that the sixth defendant, the husband of the first defendant, made oral requests to the Bank in terms which are reflected in the documents comprising ex. "DE2", and that in fact the loan transaction was so extended to the knowledge of the first defendant. Mr. Davies submits that as such allegation is not denied the appellant has established its entitlement to the judgment sought.

There is no dispute as to the making of the alleged loan, nor to the fact that the principal thereof has not been repaid. The only issue raised by the defendants is as to the amount which they must pay in order to satisfy the appellant's claim; given the present exchange rates there is a significant difference in terms of Australian dollars depending on whether the Principal Currency at the material time was U.S. dollars or Swiss Francs.

Bearing in mind that counsel for the appellant has conceded that the appellant cannot rely on the documentation comprising ex. "DE2", I am not satisfied that the defendants have raised a triable issue as to the Principal Currency at the relevant time - that is, whether the Principal Currency at the relevant time was U.S. dollars or Swiss Francs. The passage quoted above from the affidavit of the solicitor on which the appellant relies is

in my view too vague and indefinite to overcome the difficulty. It is significant, in my view, that no dates are mentioned therein, no precise conversations given, and no attempt to differentiate between what must have been at least four separate transactions involving a rollover or extension of the period of the loan. Bearing in mind the observations of the High Court in Fancourt v. Mercantile Credits Ltd. (1983) 57 A.L.J.R. 621 at 626 I am of the view that this is not a case in which the Court ought to grant summary judgment; it is not a case in my view where it can be said that there is no question to be tried concerning the currency of the loan at the material time. The appellant was in a position to establish that matter conclusively, if it could, but it did not do so. In those circumstances I am of the view that the defendants should be given leave to defend.

In those circumstances it is unnecessary for me to say anything about the question of delay.

In the circumstances the appeal should be dismissed with costs.