

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

THE SOCIETY OF LLOYD'S,)
)
 Plaintiff,)
)
) No: 4:03CVO1113HEA
)
 ROBERT W FUERST, et al.,)
)
)
 Defendants.)

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'
FRCP 59(e), and ALTERNATIVELY, FRCP 60(b)(6) MOTION TO ALTER OR AMEND
THE COURT'S AMENDED JUDGMENT ENTERED FEBRUARY 25, 2005**

I. INTRODUCTION

In its February 22, 2005 Reply to Defendants' Memorandum in Opposition to Lloyd's FRCP 60 Motion, Plaintiff, for the first time, provided the Court with what it believed was the proper conversion rate from British Pounds to U.S. Dollars. That conversion rate was based upon the value of a British Pound on July 12, 2004, that being \$1.864. On February 25, 2005, this Court amended its July 12, 2004 Judgment in British Pounds against these Defendants, using the Plaintiff's suggested rate of \$1.864.

Further, Plaintiff suggested to the Court that this conversion rate should be applied to both the amount of the Judgment entered on July 12, 2004, but also to interest at the rate of 8% per annum from the dates the Judgments were entered in England against these Defendants, which are variously, July 24, 1997 (Defendant Shillington), March 11, 1998 (Defendants Fuerst, Klein, and Todorovich) and May 14, 1999, (Defendant Cynthia Todorovich).

Defendants believe the use of this July 12, 2004 conversion rate is doubly incorrect. First and foremost, the contract between the individual Defendants and Lloyds which gave rise to the English judgments and now this Court's July 12, 2004 Judgment, provides for an exchange rate of \$1.51 U.S. Dollars for each British Pound. Second, if for some reason the Court should choose not to enforce this contractual exchange rate, then in the absence of a contractual agreement, the better reasoned case law holds that the exchange rate applicable on the various dates of the *original* foreign judgments should be used to convert the English judgment from British Pounds to U.S. Dollars.

II. THE PARTIES HAVE CONTRACTUALLY AGREED TO AN EXCHANGE RATE OF \$1.51 TO ONE BRITISH POUND

In its Amended Judgment, this Court did not assess the value of the British Pound pursuant to the terms of the contract between Plaintiff and Defendants. Said contract is set forth at Schedule 4 to the English complaint upon which the English Judgment was entered against the Defendants. A true copy of the English complaint is attached to Defendants' Motion as Exhibit A.

The contract, styled "Undertaking" between Plaintiff and each of the Defendants at Schedule 4, page 28, Paragraph 18, states:

"Where any amount payable by a Name hereunder in respect of his Name's Premium is an amount denominated in US Dollars or Canadian Dollars, then, unless the amount is paid out of the LATF (in respect of a US Dollar liability) or out of the LCTF (in respect of a Canadian Dollar liability), the Name shall instead pay an amount in sterling being one pound sterling for each US\$ 1.51 and one pound sterling for each Can\$ 2.05."

In The Society of Lloyd's v. Carl Evans Abramson, 2004 WL 690878 (N.D. Tex), the Court rejected Lloyd's argument that the exchange rate should be as of the date of the final English judgment in that case, (which also happened to be March 11, 1998). Instead, that Court enforced the identical above-quoted contract provision, and applied the exchange rate of \$1.51 for each British pound. A copy of this unpublished opinion is attached to Defendants' Motion as Exhibit B. See also, e.g., Pecaflor Construction, Inc. v. Landes, 198 Cal. App. 3d 341,350 (1988) (in the absence of an agreement as to an exchange rate, the exchange rate in effect on the date of the foreign judgment shall apply).

Having agreed to the exchange rate of \$1.51 for each British pound, Lloyd's judgment in British pounds should be converted to U.S. Dollars at that rate. Defendants' Motion contains a conversion chart for each English Judgment against each of these Defendants.

III. IN THE ALTERNATIVE, THE COURT SHOULD CONVERT THE ENGLISH JUDGMENTS USING THE EXCHANGE RATE IN EFFECT AS OF THE DATE OF THE ENGLISH JUDGMENTS

Without waiving their claim that the contractual exchange rate of \$1.51 is applicable here, in the event that the Court should determine not to enforce the parties' contract, then the Court should convert the English Judgments using the exchange rate in effect as of the date of the English Judgments.

In the Court's Memorandum and Order dated February 25, 2005, the Court correctly ruled that the "judgment day" rule and not the "breach day" rule applies here. However, the Court determined that the "judgment day" was the date upon

which the Court entered its Judgment upon the English Judgments, to wit, July 12, 2004.

While research has disclosed no Eighth Circuit, Eastern District of Missouri, nor Missouri State Court opinion on point, California case law has held that, when enforcing a foreign judgment rendered in a foreign currency, the court must ordinarily convert the foreign currency to American dollars using the exchange rate that was in effect at the time of the foreign judgment. Pecaflor Construction, supra, 198 Cal. App. 3d at 350. *See also*, Restatement (Second) of Conflicts of Laws § 144 (1971) (“When in a suit for the recovery of money damages the cause of action is governed by the local law of another state, the forum will convert the currency in which recovery would have been granted in the other state into local currency as of the date of the award”).

Research has disclosed an alternative view. In re National Paper & Type Co. of Puerto Rico, 77 B.R. 355,357-358 (Bankr. D. Puerto Rico 1987), the Bankruptcy Court adopted the reasoning expressed in Note, “Fluctuating Rates of Exchange and the Conflict of Laws”, 40 Harvard L. Rev. 619, 624-625 (1926-27), which discussed the conversion of a right to damages expressed in units of foreign money. That author reasoned:

“The right comes into existence at the time of the breach and the character of it should not differ according to whether the contract is to deliver commodities or money. Though the value of the money of the country where breach occurred may fluctuate, the number of units to which the plaintiff has a right under the law of that country remains the same. *Consequently, when a suit is brought to enforce this right, these units must be translated into the money of the forum at the rate*

of exchange prevailing at the date when the foreign right is merged in a judgment of the forum."

Id. as quoted at National Paper *supra*, 77 B.R. at 357-358 (emphasis Court's).

The National Paper Court appears not to have taken notice of the fact that the commentator was not referring to a situation such as here, where a foreign judgment has already been entered by a foreign court and is being domesticated in the United States. Instead, that Court simply declared that it was adopting the commentator's reasoning and declared that the "rate of exchange to be applied is the one existing at the time the foreign judgment was merged in a Judgment of the forum."

Interestingly, in The Society of Lloyd's v. Abramson, *supra*, Lloyd's not only sought to ignore the identical contractual exchange rate (as it has here), but it also asserted that the March 11, 1998 English judgment being domesticated in that action should be "converted at a rate of 1.6467 U.S. dollars to English pounds, *the exchange rate on the date of the final English Judgment.*" (italics added). Because the Court enforced the contractual exchange rate of \$1.51, the Court did not reach Lloyd's argument that the date of the English Judgment should supply the currency exchange rate.

Here, by asserting the date this Court domesticated the English Judgment, rather than the date of the English Judgment, Lloyd's again seeks to ignore its exchange rate agreement, and, as it tried unsuccessfully in its opposite urgings in Abramson, seeks to benefit from an increased value in the exchange rate. If, as

this Court has determined, the English Judgments were valid when rendered, then their value in U.S. Dollars at that time must be the controlling measure.

IV. CONCLUSION

For the foregoing reasons, and without waiving their objections thereto, Defendants respectfully move the Court to alter or amend its Amended Judgment entered February 25, 2005, and apply the contractual exchange rate of U.S. \$1.51 to the British Pound to each of the Judgments outstanding against each of the Defendants, as set forth in Defendants' Motion. If the Court should deem the contractual exchange rate unenforceable, in the alternative, and without waiving its objection thereto, Defendants respectfully move the Court to apply the exchange rates in effect as of the date of each of the English Judgments, which dates and exchange rates are set forth in Defendants' Motion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served this 9th day of March, 2005, by first-class mail, postage prepaid, to the following parties:

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