



- (1) Damages for wrongful and/or unfair dismissal pursuant to the Labour Relations and Industrial Disputes Act and/or at Common Law;
- (2) Special Damages in the amount of \$2,655,500.00;
- (3) Interest; and
- (4) Costs.

### **BACKGROUND**

- [2] The parties entered into a contract, entitled 'Contract for Services', dated 15 May 2015, ("the Contract"). The Contract describes INL as the 'Client', while Mr. McDonald is described as the 'Contractor'.
- [3] Clause 2 of the Contract reads as follows: -
- "2. Duration*
- 2.1 This Agreement shall commence on May 15<sup>th</sup>, 2015 and shall continue for a fixed period of three (3) years terminating on the 14<sup>th</sup> May, 2017 until terminated by either party giving to the other not less than 30 Days' notice."*
- [4] By way of letter dated 25 April 2016, INL terminated the Contract, with payment in lieu of notice.
- [5] A Case Management Conference Hearing was had in the instant case, during the course of which, the Court formed the view that a fundamental part of this Claim rests on the Court's interpretation of Clause 2 of the Contract. Consequently, the Court ordered that there should be a preliminary hearing in relation to the issue of the proper interpretation to be applied to Clause 2 of the Contract.

## **THE SUBMISSIONS**

### **The Claimant's position**

- [6] Learned Counsel Mr. Cameron submitted, on behalf of Mr. McDonald, that the words used in Clause 2 of the Contract do not have a plain and ordinary meaning, as, on the face of it, the clause is ambiguous and, if not ambiguous, will lead to a commercial absurdity. Mr. Cameron submitted further, that, an interpretation of the clause, as written, would make the fixed period of three (3) years, null and void. The two positions, he submitted, are mutually exclusive and are not commercially sustainable.
- [7] Mr. Cameron identified two (2) different interpretations adopted by the parties, in respect of the proper interpretation to be applied to clause 2 of the Contract. It was submitted that Mr. McDonald has interpreted clause 2 to mean that, the Contract is for a fixed term of two (2) years which, thereafter, would continue until terminated, by either party giving to the other, thirty (30) days' notice. Conversely, INL has interpreted the clause to mean that either party is allowed to terminate the Contract, by giving to the other, thirty (30) days' notice.
- [8] It was further submitted that, since clause 2 of the Contract is ambiguous, the contra preferentum rule should be applied.

### **The Defendant's position**

- [9] Learned Counsel Mr. Christie submitted that Clause 2 of the Contract reflects the intention of the parties and that the language used is clear and unambiguous. It was further submitted that, the objective interpretation to be applied to the clause is that the Contract is for a fixed term of three (3) years, with an option for early termination, without cause, that is, upon either party providing to the other, thirty (30) days' notice.
- [10] Mr. Christie relied on the authority of **Rainy Sky v Kookmin Bank** [2012] 1 All ER, which, he asserted, stated the principle that, the Court, in interpreting a contract, is seeking to objectively assess the intention of the parties. The result of

that objective assessment is applied, once the language of the contract is not ambiguous, even if it produces a commercially improbable result. It was further submitted that, where a term of a contract was open to two possible interpretations, in resolving the question of what a reasonable person would have understood the parties to have meant, it is appropriate for the Court to adopt the interpretation that is more consistent with business common sense.

- [11] Finally, Mr. Christie submitted that the contra preferentum rule does not apply in the instant case, as it is a rule of last resort, and is only to be applied if the contract, when properly interpreted, admits of doubt.

### **ISSUE**

- [12] The sole issue for the Court's determination is identified as follows: -

(1) What is the proper interpretation to be applied to clause 2 of the Contract?

### **THE LAW**

#### **The interpretation of contracts**

#### **The current approach**

- [13] In **Aedan Earle v National Water Commission** [2014] JMSC Civ 69, Sykes, J (as he then was) explored the approach to be adopted by the Court in interpreting a contract. That approach is set out in Lord Hoffman's judgment in **Investor Compensation Scheme Limited v West Bromwich Building Society** [1998] 1 All ER 98. Lord Hoffman stated that the interpretation of a contract is the process of ascertaining what the document would mean to a reasonable person, having all the background information, 'which would reasonably have been available to the parties in the situation in which they were at the time of the contract.' 'Background', in this context, means 'anything which would have affected the way in which the language of the document would have been understood by a reasonable man.' This expansive meaning of background (also called the 'matrix of fact') includes that information which was 'reasonably

available to the parties but excludes previous negotiations.’ (See also - **Goblin Hill Hotels Limited v John Thompson** SCCA No. 57/2007, judgment delivered on 19 December 2008 and **Clacken v Causwell** SCCA No. 111/2008, judgment delivered on 2 October 2009).

- [14] Sykes, J further stated that the interpreter is to begin the task of interpreting the contract with the prima facie assumption that the parties used the correct language, grammar and syntax, and understood the conventional meaning of the words that they used to express their contract. The interpreter is to assume that the contracting parties used the words in their commonly understood sense, at the time of the contract. That is the meaning that should prevail, unless the context and circumstances suggest that another interpretation should be applied. (See also – **Thompson and Another v Goblin Hill Hotels Limited** [2011] 1 BCLC 567 (PC)).
- [15] The interpreter must be alive to the possibility that the parties may simply have used the wrong words, syntax and grammar. The interpreter should also be aware that, where the document has been crafted by lawyers, or it is obvious that care has been taken in putting the document together, it should not lightly be concluded that the parties have made linguistic mistakes. The Court is to give effect to what a reasonable person, rather than a pedantic lawyer, would have understood the parties to mean. (See – **Mannai Investment Company Limited v Eagle Star Life Assurance Company Limited** [1997] A.C. 749 and **Jumbo King Limited v Faithful Properties** [1999] 2 HKCFAR 279).
- [16] The view that, before reference could be made to material outside of the four corners of the contract, there had to be an ambiguity, has fallen by the wayside. (See – **R (On the Application of Westminster City Council) v National Asylum Support Services** [2002] 4 All ER 654). It is now equally pellucid that, the fact that a document is, on the face of it, clear, does not preclude the Court from examining the surrounding circumstances, to see whether the prima facie meaning remains intact, or, is affected by the matrix of fact. (See – **Static Control Components (Europe) v Egan** [2004] 2 Lloyd’s Report 429).

- [17] The Law has now advanced to the point where the background information includes the Law and proven common assumptions, even if those assumptions were incorrect. (See – **BCCI v Ali** [2002] 1 AC 251).

### **Ambiguity**

- [18] Black’s Law Dictionary, 9<sup>th</sup> Edition, at page 92, defines ambiguity as follows: -

*“An uncertainty of meaning or intention, as in a contractual term or statutory provision.”*

- [19] An agreement is ambiguous if its terms are reasonably susceptible to more than one meaning, taking in consideration the circumstances that were present when the parties formed the agreement. An instrument is not ambiguous simply because the parties offer conflicting interpretations of the same contract or contractual provision; because it requires a careful reading; because a fair reading of it does not comport with the desires of one party; or because it contains obscure language, or language of doubtful meaning.

### **Contracts for a fixed term**

- [20] In **Ian Charles v The Board of Governors of the H. Lavity Stoutt Community College**, Claim No. BVI HCV 2010/0049, judgment delivered 30 May 2011, the Court, at paragraph [18], defined a contract for a fixed term as follows: -

*“A fixed-term contract is a contract of employment for a specified period of time, i.e. with a defined end: **Wiltshire County Council v National Association of Teachers in Further and Higher Education and Guy** [1980] I.C.R. 455. As a general rule, such a contract cannot be terminated before its expiry date except for gross misconduct or by mutual agreement. However, a contract can still be for a fixed term if it contains within it a provision enabling either side to terminate it on giving notice before the term expires: **Dixon and another v British Broadcasting Corporation** [1979] 1 Q.B. 546.”*

- [21] If the contract is for a fixed term, the contract may only be terminated on notice if there is a specific provision permitting termination on notice during the contractual period. It is not an inherent feature of this kind of contract and accordingly requires specific stipulation. (See - **Lottering and Others v Stellenbosch Municipality** [2010] 12 BLLR 1306 (LC).
- [22] In **Howard v Benson Group Inc. (The Benson Group Inc.)** [2016] ONCA 256 (CanLII), the Court held that, in circumstances where there is no early termination clause, the fixed-term contract unambiguously ousts the common law presumption of reasonable notice on termination, by providing a clear end date to the employee.
- [23] In **Robert K. Allen v Attorney General**, Claim No. 138 of 2015, and **Deon Pascascio v Attorney General**, Claim No. 153 of 2015, judgment delivered on 17 September 2015, the Supreme Court of Belize enunciated the following principle: -

*“A contract of a determinate period, as the ones before the court, end at the last day specified therein. Unless there is some provision for earlier termination, whether by notice or otherwise, within that contract, the contract will continue until the fixed term expires. In the absence of such a specific clause, the employer has no right to terminate and purporting to terminate under these circumstances would constitute a breach.”*

### **The construction of contracts**

- [24] In **Wood v Capita Insurance Services Limited** [2018] 1 All ER (Comm) 51, the Court had to determine the proper interpretation to be applied to a clause in an agreement for sale of share capital, in an insurance brokerage company. In so doing, the Court had to ascertain the objective meaning of the language used in the agreement. The Court stated that, when interpreting clauses in a contract, the Court is not only to focus on analyzing the specific clause that is in issue. It must also consider the contract as a whole. Depending on the nature, formality and

quality of the drafting of the contract, the Court must give more or less weight to elements of the wider context, in seeking to determine that objective meaning.

[25] Lord Hodge stated as follows: -

*“Interpretation is, as Lord Clarke stated in **Rainy Sky** (para [21]), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of the drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which, with hindsight, did not serve his interest.”*

(See also - **Arnold v Britton** [2016] 1 All ER 1 and **Re Sigma Finance Corp** [2010] 1 ALL ER 571).

[26] In **Dixon and Another v British Broadcasting Corporation** [1979] Q.B. 546, the Court was tasked with interpreting the terms of an employment contract. The contract was for a specified term, which was not renewed at the expiration of that specified term. The Court had to determine whether the employees were employed for a ‘fixed term’, where the contract in issue was a contract for a specified term determinable before expiry, by notice, and whether the employees were ‘dismissed’.

[27] The Court partially applied and partially overruled **British Broadcasting Corporation v Ioannou** [1975] Q.B. 781. In that case the Court had to determine firstly, whether employees, whose contract was for a specified term and, whose contract were not renewed at the expiration of that specified term, were “dismissed”; and, secondly, whether a contract for a specified term, determinable before expiry by notice, was a “fixed term contract”.

- [28] In **Dixon and Another v British Broadcasting Corporation** (supra), the Court affirmed the decision made on the first ground in **Ioannou**, to the effect that, the men, whose contract was for a specified term, and which was not renewed at the expiration of that term, were 'dismissed', as defined by paragraph 5 (2) of Schedule 1 of the Trade Union and Labour Relations Act, 1974.
- [29] The Court found that **Ioannou's** conclusion that such a contract was not a contract for a "fixed term", was erroneous. The Court also found that the words "fixed term", in relation to the contract, meant a specified term, even though it was terminable by notice within that term; and that, accordingly, the employees had been employed under contracts for a fixed term.

### **ANALYSIS**

- [30] In its consideration of the issue of the proper interpretation to be applied to clause 2 of the Contract, the Court has had regard to the principles distilled from the authorities cited above. It is accepted by both parties that Mr. McDonald was employed to INL, pursuant to the terms of the Contract, which commenced on 15 May 2015 and terminated on 14 May 2017, 'until terminated by either party giving to the other not less than thirty (30) days' notice.
- [31] In seeking to determine the proper interpretation to be applied to clause 2 of the Contract, the Court must take an iterative approach. It must examine the clause in the context of the Contract as a whole, and must consider whether the wider relevant factual matrix provides any guidance as to its meaning.
- [32] It is to be noted that the Contract describes INL as "client", while Mr. McDonald is described as the "contractor". A contractor is someone who works independently, and outside of the direct control of, the contracting party. This therefore begs the question, would the parties have intended to be bound by the terms of a contract for a specified term, without the freedom to terminate same, prior to the expiration of that specified term? Does this accord with business common sense?

- [33] The Court finds that there can be no doubt that clause 2 of the Contract falls within the definition of a fixed term contract. The provision, allowing either party to terminate the Contract, prior to the expiration of the specified term stipulated therein, by providing to the other, thirty (30) days' notice, does not create an ambiguity or an absurdity. Accordingly, the contra preferentum rule would not apply. The clause protects the parties from liability for such an early termination, should either party be dissatisfied; should INL no longer be in need of the services provided by Mr. McDonald; should Mr. McDonald be unable to continue to provide the required services; or for any other reason.
- [34] The Court also finds that a contract for a fixed term is not precluded from being terminable upon notice. Where, upon construction, the parties intended this effect, then the Court can do no less and no more than to give effect to the parties' intention.
- [35] The Court must also have regard to the nature and quality of the drafting of the Contract. It is to be noted that the Contract is rife with typographical and grammatical errors. That notwithstanding, it is clear that the parties intended to create a fixed term contract, terminable upon notice before the expiration of the specified term, however clumsily the Contract may have been drafted.
- [36] The Court therefore finds that the proper interpretation to be applied to Clause 2 of the Contract for Services, dated 15 May 2015, is that the Contract is a fixed term contract which is terminable upon thirty (30) days' notice by either party, in writing, or payment in lieu thereof.

### **DISPOSITION**

- [37] It is hereby ordered that: -
- (1) The proper interpretation to be applied to Clause 2 of the Contract for Services, dated 15 May 2015, is that the contract is a fixed term contract which is terminable upon

thirty (30) days' notice by either party, in writing, or payment in lieu thereof;

- (2) The Case Management Conference Hearing is scheduled for 8 January 2020, at 10:00 a.m., for a duration of three (3) hours;
- (3) At that Case Management Conference Hearing the following issues are to be addressed: -
  - (i) Whether, in the context of the Court's decision on the preliminary issue of the proper interpretation to be applied to Clause 2 of the Contract for Services, dated 15 May 2015, there is a reasonable ground for continuing the Claim for wrongful dismissal?
  - (ii) Whether or not the Court has the requisite jurisdiction to hear the Claim for unfair dismissal?
  - (iii) Whether or not the Court is the proper forum to hear the Claim for unfair dismissal?
  - (iv) Whether there is a sustainable cause of action with which the Claimant can proceed?
- (4) The Claimant is to prepare, file and serve Written Submissions and Authorities on or before 30 September 2019;
- (5) The Defendant is to prepare, file and serve Written Submissions and Authorities on or before 29 November 2019;
- (6) Any further Submissions to be made by the Claimant are to be made in writing and are to be filed and served on or before 20 December 2019;

- (7) The issue of the costs of this preliminary issue is reserved for the Case Management Conference Hearing scheduled for 8 January 2020;
- (8) The Claimant's application for Leave to Appeal is refused;
- (9) The Defendant's Attorneys-at-Law are to prepare, file and serve the Orders made herein.