SAINT LUCIA:

IN THE HIGH COURT OF JUSTICE
(Civil)

Civil Suit No.221 of 1995

BETWEEN

VANDERBILT MCINTOSH

Plaintiff

and

SUNBILT INTERNATIONAL LIMITED

Defendant

Appearances:
Mr. Dexter Theodore for the Plaintiff
Mrs. Brenda Floissac-Fleming for the Defendant

2001: April 30 and May 24

JUDGMENT

[1] Barrow J. (Ag.) The sole issue that arises for determination in this case is whether, having been paid the equivalent of one month's salary in lieu of notice, holiday pay, bonus and salary earned to the date of the termination of his employment, amounting to $20,866.34, the plaintiff is entitled to damages for wrongful dismissal.

[2] Counsel agreed that the witness statements should stand as the evidence of the parties and that there was no need for cross- examination. The agreed facts are that the defendant employed the plaintiff upon the terms of successive written contracts beginning 14th December 1987 and ending 19th April 1994 and that the last contract was dated 25th May 1993 and was for a term of two years at a monthly salary of $8250.00 (at the date of termination) with an annual bonus. At clause 10 it was provided that "This contract may be terminated by either party in writing with one month's notice".

[3] It appears that the plaintiff was exceptionally good with the tourists on whom he had to attend in the conduct of the business of the defendant. His managerial skills may have been less stellar. It does not matter. Relations between the parties started to deteriorate and they ended with a flare up followed by a letter of termination dated 19th April 1994 to take immediate effect. The defendant paid the plaintiff the equivalent of one month's salary in lieu of notice. The Labour Department got involved and they wrote to the defendant stating what were the entitlements of the plaintiff and the defendant thereafter paid the plaintiff all that was stated to be due. A month later the plaintiff's attorney wrote to the defendant alleging unfair dismissal and claiming that the plaintiff ought to be paid the equivalent of six months' salary in lieu of notice as opposed to the equivalent of one month's salary in lieu of notice that the defendant in

fact paid. The attorney's letter demanded that the defendant pay the sum of $41,250.00 representing the equivalent of a further five months' salary.

[4] The plaintiff sought to get around the contractual provision for termination on one month's notice and its implications for damages by arguing that the contract period of notice is only a prima facie measure of the period for which to award damages for breach of contract (i.e. wrongful dismissal) and that the true measure of damages in any particular case is a question of fact for the court to decide. *B.G. Credit Corporation v Da Silva* (1964) 7 WIR 530 was cited to support this proposition on the basis that had it been otherwise the Privy Council would not have remitted to the appellate court the determination of what is a reasonable period of notice but would have simply relied on the contractually stipulated six months notice in Da Silva's contract.

[5] Even in the face of the Contracts of Service Act 1970 (the Act), which establishes minimum periods of notice according to the length of an employee's period of service, the courts have awarded damages for wrongful dismissal in excess of the statutory notice period, submitted the plaintiff. In support of this argument the plaintiff cited the decisions in suit 625/1994 *Samuel Clarke v Castries City Council*, Civil Appeal 6/1997 *Brenda Edwin v St. Lucia Banana Corporation* and suit 187/1998 *Austina Fanus v Davie Estate Co. Ltd.*

[6] In his oral submissions to the court counsel for the plaintiff made a broad appeal to equity and the interventionist manner of Lord Denning to urge the court to imply a term that reasonable notice was required in this case and that the length of such notice should be more than what was stipulated by the contract. No party could have intended to cause injustice to himself, it was submitted on behalf of the plaintiff, and the court should imply whatever term was necessary to ensure that justice was done.

[7] Counsel for the defendant met the plaintiff's submissions head on. Her starting and fundamental proposition was that the court would not imply a term requiring reasonable notice into a contract so as to contradict or conflict with an express term of the contract which prescribes the period of notice of termination. I accept that this proposition is established by the decisions in *Mc Clelland v Northern Ireland General Health Services Board* [1957] 2 All ER 129 and *Richardson v Koefod* [1969] 3 All ER 1264.

[8] In my respectful view there is no conflict between what these cases say and the decision in *B.G. Credit Corporation* because in the latter case the appellant refused to recognize that a contract of employment existed. Had it done so, as the Privy Council noted, and terminated in accordance with the contract, the respondent could have recovered no more than the salary and other benefits under the contract for the notice period. It was because the appellant proceeded on the footing that no contract of employment existed that the Privy Council treated the notice period in the discarded contract as only prima facie a reasonable period of notice and not definitively so. This authority therefore seems to confirm rather than detract from the proposition that when a contract provides a period of notice that will be the notice period that binds the parties.

[9] There is no need for me to consider the effect of the decisions referred to in paragraph 5 above and decide why the courts awarded damages for a period significantly greater than the

minimum notice periods set out in the Act. I find from a reading of those decisions that in two of them there was no mention of the Act and in the third the Act was stated to be silent on the subject of wrongful dismissal. I therefore do not find that they establish any proposition of law that has implications for the decision in this case. The case that concerns us here does not deal with a statutory minimum notice period; it is one that deals with a period of notice fixed by contract. The case of *Delaney v Staples* [1992] 1 All ER 944, also cited by counsel for the defendant, is instructive as regards what a wrongfully dismissed employee may recover as damages. Where, as here, an employer summarily dismisses an employee without the proper notice but tenders payment in lieu of proper notice, the employer is in breach of contract by terminating without giving proper notice but the payment will usually be set against and extinguish any claim for damages for wrongful dismissal in breach of contract. It is judicially recognized that damages for wrongful dismissal will usually be limited to the period within which the employer could have properly brought the contract to an end: *Gunton v London Borough of Richmond Upon Thames* [1980] 3 All ER 577. Since the employer could have properly brought the contract to an end by giving the length of notice of intention to terminate specified in the contract, that will generally be the period of lost remuneration for which the employee is to be compensated, subject to mitigation.

[10] In light of these authorities put before me by counsel for the defendant I am unable to see on what legal basis the plaintiff can hope to recover the equivalent of six months' salary when his employment was terminable upon one month's notice. The broad appeal to equity is met by the observations of the Privy Council in *Union Eagle Ltd v Golden Achievement Ltd.* [1997] 2 All ER 215.

[11] In that case completion of a contract to purchase a flat for Hong Kong $4.2M was to take place before 5.00p.m. on a certain day and time was made of the essence and the contract provided for forfeiture of a deposit if the purchaser failed to complete. The purchaser was ten minutes late in tendering cheques for the purchase money. In dismissing the purchaser's appeal the Privy Council explained the distinction between granting relief against penalties and refusing to relieve against breaches of essential conditions as to time. The Board quoted from the judgment of *Viscount Haldane* in *Steedman v Drinkle* [1916] A.C. 275 at 279 who said:

> "Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to de…. specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be of the essence of their bargain."

By a similar process of reasoning, it would seem to me, there is no room for the court to intervene to fix a reasonable notice period when the parties have expressly provided the notice period by which they are to be bound.

[12] My decision is that the plaintiff cannot recover more than he has already received. I therefore dismiss the plaintiff's claim with costs to the defendant. At an early stage in the course of the hearing counsel for the plaintiff and for the defendant – both of whom prepared and conducted their cases with characteristic skill and helpfulness - gave me the benefit of their thinking as to

an appropriate sum for an award of costs: the range was between $4,000.00 and $8,000.00. Taking all the relevant factors into account I fix costs at $6,500.00.

Denys Barrow SC
High Court Judge (Ag.)