COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.20 OF 2005

BETWEEN:

DOMINICA AGRICULTURAL AND INDUSTRIAL DEVELOPMENT BANK

Appellant

and

MAVIS WILLIAMS

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal

Appearances:

Mr. Anthony Astaphan SC Mr. Alick C. Lawrence and Ms Francine Baron Royer for the Appellant

Mr. Reginald T. A. Armour SC Ms. Vanessa Gopaul and Mr. Lennox Lawrence for the Respondent

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2006: November 13; 14;
2007: January 29.

JUDGMENT

[1] BARROW, J.A.: The appellant did not appeal the High Court judgment of 13th April 2005 which decided that the appellant had wrongfully dismissed the respondent from her employment and awarded her damages to be assessed, if not agreed (the liability judgment).[1] On 24th November 2005 the judge assessed damages at $1,216, 641.12 and awarded that sum and costs of $60,532.70 to the respondent, as well as compound interest of 11% from dismissal until payment (the damages judgment).[2]. This appeal is

[1] In Dominica Civil Appeal No. 20 of 2005, between the same parties, judgment delivered 18th September 2006 , the court refused to extend the time within which to appeal

[2] Civil Suit No. DOMHCV 0149 of 2001,Judgment delivered 24th November 2005

against the damages judgment. The respondent counter- appealed, seeking an award of aggravated or exemplary damages.

A summary of the decisions

[2] The facts may be distilled from the liability judgment.[3] The respondent had been employed by the appellant bank for some 21 years and was an Assistant Manager, Securities, when she was dismissed for gross misconduct on 9th August 2000. The respondent was dismissed for the part she took in a loan made by the appellant to her boyfriend. The respondent had persuaded her uncle to make available his certificate of title to a parcel of land as security for the loan. The boyfriend defaulted. When the appellant tried to enforce its security the uncle contended that the respondent had asked him to provide interim and not continuing security and that he had intended to secure a loan for the respondent and not the boyfriend. The uncle reported the matter to the police and opposed the appellant's effort to enforce the security. The appellant established a committee to investigate what had taken place and the respondent's role in the transaction, and after considering the committee's report the appellant's board of directors dismissed the respondent.

[3] The judge found that the appellant relied upon three grounds for dismissing the respondent and held that none of them was a valid ground for dismissal. He therefore held that the respondent was wrongfully dismissed.

[4] In the damages judgment the judge made what he recognized were some unusual awards.[4] He found that the respondent had spared no effort to obtain alternative employment but that the appellant "has actively frustrated the attempts of the dismissed employee to obtain alternative employment."[5] The judge therefore awarded as damages the equivalent of the respondent's former salary from the date of dismissal until the date of judgment (approximately 5 years) and from the date of judgment until the date that the

[3] Civil Suit No. DOMHCV 0149 of 2001, judgment delivered April 13, 2005.
[4] Thus, at paragraph [17] he stated "nowhere in my own research have I found a case where a former employer has actively frustrated the attempts of the dismissed employee to obtain alternative employment." After making an award for that damage he stated at paragraph [20] "I would have found otherwise had not the Defendant actively prevented the Claimant from obtaining employment."
[5] At [17].

judge found that the respondent would have retired (approximately 9 years). From the total he subtracted the income that the respondent had earned in the period after dismissal leaving a net award under this head of $756,557.20. The judge awarded the respondent, as well, compensation for the bonus and gratuity that she would have received had the employment continued.

[5] Further, the judge found that the respondent owed three loans to the appellant at the date of her dismissal and that after the appellant dismissed the respondent the appellant compounded interest on the loans at a higher rate. As a result of this, the judge held, the respondent became indebted to the appellant, as at the date of judgment, for an additional sum of $185,818.36 and by the time the loan matures that sum would have increased by a further amount of $54,776.00. The judge therefore ordered this "excess interest" to be paid back by the appellant.

[6] The appellant relied on two principal and six alternative grounds of appeal in seeking to have the damages reduced to the equivalent of six or, at the most, nine months' salary after tax.

Reception of further evidence

[7] No case management order had been made for separate trials on liability and damages, and the judge seems to have taken the decision on his own, after the conclusion of the trial, to bifurcate the issues. The appellant submitted to this court that each party led evidence on both issues and this constituted all the evidence that was properly before the court. When the respondent filed an affidavit on 17th August 2005 to be used on the assessment of damages (the affidavit) there was no order or rule permitting that to be done, the appellant submitted, and the decision of the judge to allow the respondent to rely on this new evidence was wrong and manifestly unfair and violated the principles governing the introduction of new evidence.

[8] The affidavit included a claim made for the first time by the respondent, that at least three assurances of employment by prospective employers were thwarted when these prospective employers asked the appellant for its recommendation and the appellant, it is inferred, said negative things about the respondent. The affidavit also claimed for the first time that the appellant refused to give the respondent a testimonial and "as a result I was unable to obtain employment." She contended: "The Defendant Bank having wrongfully dismissed me has deliberately and wilfully aggravated the situation by actively and maliciously blocking my further employment opportunities."

[9] The respondent further deposed that an auditor employed her for two months but that the appellant caused her employment to be terminated. She stated "I am informed and verily believe that when the [appellant] got knowledge of the fact that I was employed by [the auditor], a certain senior official of the [appellant] did call [the auditor] by telephone and informed him that as he was the Auditor of the [appellant] he could not continue to employ me; my employment with [the auditor] was then terminated." The respondent also relied on this alleged conduct by the appellant as "a sufficient basis for an award of exemplary and aggravated damages."

[10] Again for the first time, the respondent alleged in the affidavit that she suffered injury to her reputation "by virtue of the Defendant's breach of an implied term of trust and confidence in the employment contract", which she alleged caused her financial loss, and made a claim for damages for such injury. Also for the first time, the respondent made a claim in the affidavit for aggravated and exemplary damages. It was also in the affidavit that the respondent claimed, for the first time, to recover the increased interest that the appellant required her to pay on three loans that she owed to the appellant.

[11] The appellant submitted rule 16.4 of the Civil Procedure Rules 2000 (CPR 2000) makes it mandatory that where the court makes a direction for the trial of an issue of quantum it must exercise the powers of a case management conference and may give directions about disclosure and service of witness statements. Part 16 "deals with the procedure by

which a hearing to assess damages is fixed"[6] after default judgment has been entered, or after there has been judgment after admission of liability or after the court makes a direction for the trial of an issue of quantum. Part 16.4 (3) states:

> "(3) On making such a direction the court *must* exercise the powers of a case management conference and in particular may give directions about –
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> (a) disclosure under Part 28;
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> (b) service of witness statements under Part 29; and
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> (c) service of expert reports under Part 32." (Emphasis added)

[12] The judge's notes of evidence on the assessment of damages, which was held on 26th October 2005, shows counsel for the appellant objected to the use of the affidavit on the basis that at the trial evidence was led on both liability and damages, and when the court decided liability only and ordered that damages be separately assessed "it was intended that those damages were or ought to be assessed on the basis of evidence led before the Court at trial." The note of the judge's ruling simply stated that the judge had considered liability only. It contained no indication of the judge's response to the point of counsel's objection that the court did not intend or order that further evidence should be given. However, the judge's ruling was obviously understood as indicating he would allow the affidavit to be used.

[13] After that ruling counsel for the appellant asked the court to give directions for service of witness statements or allow for the service of an affidavit in reply. Counsel for the respondent opposed that application. The judge noted that the application for assessment of damages was filed on 16th August 2005 and served on 26th August, which was two months past. The judge stated that the application came before the Master on 26th September 2005 and that "No application for directions was requested by (sic) the Master." The judge ruled that the matter of his limited availability had been well known to counsel for the appellant, that the appellant had had two months to file an affidavit in reply and did not do so, and the matter would proceed.

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[6] Rule 16.1

[14] Mr. Armour S.C., leading counsel for the respondent, submitted to this court that the power of a trial judge to control evidence before him must not be unduly fettered. Counsel argued the appellant had had two months to file an affidavit in reply and that, even if the appellant had taken the view that it was not under any obligation to respond to the respondent's affidavit, the appellant "could have secured its position evidentially by filing affidavit evidence in response without prejudice to its right to take objection to the alleged procedural irregularity. Not having done so," counsel for the respondent argued, "it is not open to the Appellant Bank to now contend that it was not given the opportunity to respond to the said affidavit evidence. Its failure to do so was its own doing as the Trial Judge rightly observed, particularly having regard to the seriousness of the allegations raised."

[15] Counsel for the respondent further argued that the appellant had had sufficient time "to apply, in advance of the hearing of the assessment and by way of preliminary objection, to strike out the Respondent/Claimant's further affidavit evidence and thereby, obtain a ruling from the Trial judge as to the manner in which he intended to control the evidence in this case. It would then have been open to the Appellant bank to either appeal the Trial Judge's ruling on the narrow point of the admissibility of additional evidence or to file its affidavit in response without prejudice to its position." (Original emphasis) Counsel for the respondent also argued that the appellant was not prejudiced by the admission of the additional evidence.

Obligation to exercise case management powers

[16] In their extensive written and oral submissions counsel for the respondent simply ignored any consideration of rule 16.4 and the impact of the mandatory provision that the court must exercise the powers of a case management conference. It is interesting to note that the application that the respondent made was for orders including (1) that damages be assessed pursuant to the judgment of April 2005 and (2) "that the assessment be placed on a fast track and heard by the trial judge who is already well seized of the facts and the evidence in this matter." The order that the Master made, when that application came before him on 29th September 2005, expressly stated that the matter was before him for

case management conference and that it was adjourned to a date to be fixed on the list of the judge.

[17] When the matter came before the judge apparently both the judge and counsel for the respondent had in mind that all that was to occur that day was that damages would be assessed. The matter of the court's case management powers was touched upon only after counsel for the appellant failed in her attempt to exclude the respondent's affidavit and then asked for directions for service of a witness statement or an affidavit in reply. The judge refused to give directions because he decided the assessment should then proceed. The later indication of the judge, in the damages judgment, was that he regarded counsel's application as having been simply a request for an adjournment.[7]

[18] This court considered the impact of a judge failing to exercise case management powers in Ogilvy v Attorney General of St. Lucia.[8] In that case the appellant submitted he had been denied natural justice because he was not given an opportunity to present his case as a result of the failure of the judge to give case management directions. Had the judge done so, counsel for the appellant submitted, the appellant would have had the opportunity to file an affidavit putting forward his defence. That not having been done, the hearing proceeded solely on the case put forward by the respondent.

[19] It was the fact that the judge, in that case, did not give formal case management directions and the proceedings were not conducted in accordance with CPR 2000, including the rules as to Fixed Date Claim Form procedure and the court's case management powers. This court noted, "This state of affairs was of the appellant's own engineering but this explains rather than validates the failure to properly manage the proceedings. There will be instances where the effect of the failure of a judge to actively manage a case will be to vitiate the subsequent proceedings …". That was not the effect in that case because the court found that the appellant had filed other affidavits, undeterred by the absence of a case management order to do so, and had expressly declined to put forward a defence.

[7] Paragraph [5]
[8] St. Lucia Civil Appeal No. 17 of 2006 at paragraphs [28] and [39]

The court therefore found that the appellant had no genuine desire to file a defence and had simply been looking for an adjournment.

[20] A significant feature of the instant case is that until the judge decided to allow the respondent to rely on the affidavit she had filed without permission, that affidavit was not evidence before the court. It was not before the court as of right. The appellant had every right to take the point that the respondent had no right to rely on the affidavit. The argument of counsel for the respondent that the appellant should have filed an application "in advance of the hearing of the assessment and by way of preliminary objection to strike out" the affidavit boldly ignored the respondent's own, primary failure to file an application to give further evidence. The appellant was perfectly entitled to take the approach that the affidavit was not "in" so the appellant had no need to apply to strike it out.

[21] In addition, the respondent's argument overlooks the point that the case management conference had not taken place but had been adjourned for hearing before the judge. There could have been no more appropriate occasion for the hearing of the objection to reliance on the affidavit than a case management conference. Rule 11.3 states the general rule that, so far as is practicable, all applications relating to pending proceedings must be listed for hearing at a case management conference and if an application is made which could have been dealt with at a case management conference the court must order the applicant to pay the costs of the application unless there are special circumstances.

[22] Further, the affidavit was replete with hearsay, irrelevant matters, the pleading of new facts and heads of damage, and legal argument. I can see how the appellant would have found it embarrassing to craft an affidavit in response. In my view the case was better framed for the absence of an affidavit responding to objectionable material, which would have certainly served to multiply such material.

[23] The argument of counsel for the respondent that this court should not unduly fetter the exercise of a judge's power to control evidence fails to acknowledge the requirements and objectives of Part 29, which says that the court may control the evidence to be given at any

trial *by giving appropriate directions at a case management conference* as to the issues on which it requires evidence and ways in which any matter is to be proved.[9] Part 29 provides the general rule that any fact which needs to be proved at trial must be proved by oral evidence and provides, further, for the court to order the service of witness statements and the requirements as to witness statements. The unmistakable objective of the Rules is to establish a framework within which a judge should control the evidence. That control should be exercised by way of case management. Case management has been identified as one of the single most important features introduced by Civil Procedure Rules 2000.[10]

Wrongful exercise of discretion

[24] It appears the judge did not appreciate that the Rules mandated the holding of a case management conference; he did not appreciate that the case management conference had been adjourned by the master for the judge to hold presumably because, as the application stated, the judge was familiar with the evidence and issues in the case; he did not appreciate that he needed to make a case management order; and he did not appreciate that he was making an order that was admitting into evidence material that was not, before his ruling, evidence in the case. The judge's failure to appreciate what he was doing, which is how I must express it with every respect, is strikingly manifested in the judge's misdirecting himself that the appellant had not objected to the affidavit[11] and in his misconception of what he had decided, as shown in this passage from his judgment:

> "[Counsel for] the Defendant requested an adjournment in order to file an affidavit in answer to the Claimant's Affidavits. This request was refused. The Court was satisfied that the Defendant had a full two months to reply to the Claimant's affidavits. Instead of doing so, it slept on its rights and waited until the hearing was about to begin to ask for time to reply. The Defendant also ought to have been aware of the Claimant's request for a speedy hearing … I therefore considered it unfair to the Claimant to grant the Defendant the adjournment sought by Counsel. The Claimant's case was therefore, except for cross-examination, uncontested."[12]

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[9] rule 29.1

[10] For a discussion of the " central plank " of the Civil Procedure Rules, that judges must exercise control of the litigation by judicial case management see the discussion in Blackstones Civil Practice 2000 beginning at page 383.

[11] Paragraph [4] of the damages judgment

[12] Paragraph [5] of the damages judgment

[25] When the judge refused to give directions and to allow the appellant to file evidence in response he did so in disregard of relevant factors, of the Rules, and of legal principle. Accordingly, he failed to properly exercise his discretion. The appellant was materially prejudiced by the denial of the opportunity to adduce evidence, which I have no reason to doubt the appellant genuinely wished to do, leaving the respondent's case, as the judge stated in the last sentence in the passage quoted above, uncontested. That prejudice was not neutralized by the opportunity that the appellant was given to cross-examine the respondent. In the circumstances I find the trial was unfairly conducted and the result was thereby significantly vitiated. In my view the judgment must be set aside.

An exercise of case management powers

[26] The result of setting aside the judgment would be to leave the case as it stood before the assessment began. At that stage the court needed to exercise its case management power by considering the issues on which it required evidence and the way in which any matter was to be proved; see rules 16.4(3)(b) and 29.1(a). The issues on which the court required evidence were the losses and damage that the respondent suffered as a result of her wrongful dismissal. The court already had before it all the evidence that had been given at the trial in March 2005, which had been conducted as a trial on both liability and damages. The evidence before the court consisted of the documents that had been disclosed, witness statements and oral testimony. There was no apparent need for further evidence and no right to adduce further evidence. It was, of course, open to the claimant to apply to the court for permission to lead further evidence. I think it right that I should treat the filing of the affidavit as a notional application to lead further evidence in that form. I now proceed to consider that notional application, in the exercise of the court's case management powers.

[27] A first step in considering the notional application is to examine the claimant's statement of claim on which she had already obtained judgment on liability, which the defendant had deliberately chosen not to appeal.[13] Rule 20.1(3) states that

> "the court may not give permission to change a statement of case after the first case management conference unless the party wishing to make the change can satisfy the court that the change is necessary because of some change in the circumstances which became known after the date of that case management conference."

There was no application by the claimant for permission to change her statement of claim. Therefore, it would simply not be open to the claimant at this notional, post-liability, pre-assessment, case management hearing to change her statement of claim. Even if I should stretch the point and treat the contents of the affidavit, with the new aspects and claims it seeks to introduce, as a notional application by the claimant to change the statement of claim, there was no evidence of change in circumstances which became known after the date of the first case management conference so as to satisfy this court that the change is necessary. I would, therefore, reject such an application.

[28] That determination leads to the second step in considering the application to rely on the affidavit, which is to consider the contents of the affidavit and the nature of the material it seeks to introduce. Affidavits must contain only facts[14] and whatever is contained in the affidavit that does not go to prove a fact in issue is irrelevant and liable to be struck out.[15] Those principles capture those paragraphs that consist of statements of law, such as paragraph 4, which states the law as to the normal measure of damages; part of paragraph 11, which cites the case of Malik v Bank of Credit and Commerce International S.A. (In Liquidation) [1998] AC 20; paragraph 14, which contends that as a matter of law damages for mental suffering flowing from physical injury are recoverable; and paragraph 22, which cites Hadley v Baxendale.

[13] This was the finding of this court in the earlier judgment in Dominica Civil Appeal No. 20 of 2006 refusing the appellant's belated decision and attempt to appeal the liability judgment; see paragraph 23
[14] Rule 30.3 (1)
[15] Rule 30.3 (3)

[29] Those principles also apply to those paragraphs that make claims that were not contained in the statement of claim, and so were not facts in issue, such as the claim in paragraphs 8 and 10 of the defendant "maliciously blocking" her "further employment opportunities". The claim for aggravated and exemplary damages that follows that claim runs afoul of another rule, rule 8.6 (3), which states that "a claimant who seeks aggravated damages and/or exemplary damages must say so in the claim form". The claim in paragraph 16, for exemplary damages, is also captured by that proscription.

[30] The claimant did not make any claim for injury to reputation and financial loss flowing therefrom in her statement of claim, therefore the claim she made in paragraph 11 of the affidavit is impermissible. The claim she made in paragraph 13 of the affidavit for the cost of repairing her residence as a result of financial inability flowing from unemployment is also impermissible, for the same reason. The same is true for paragraph 15, in which she claimed for damage to reputation and for emotional, mental and psychological pain and suffering.

[31] In paragraphs 17, 23 and 24 the claimant asserted a claim, for the first time, *to recover* from the defendant the increased interest that she was required to pay the defendant bank on three loans that she owed the defendant. The claimant specifically stated in the affidavit that the defendant had three High Court claims pending against her, in relation to those loans. I do not know whether the claimant needed to have applied to consolidate those claims and the instant claim, or to counterclaim in those claims, or if she did, in fact, counterclaim. The known position was simply that there were pending claims in relation to the loans. The judge gave no reason for choosing to deal on the assessment with what was a new claim and a matter that was the subject of separate, substantive proceedings.

[32] In her statement of claim the claimant pleaded loss of benefits generally and referred, in the particulars under that pleading, to "Loss due to increase in interest rate $45,304.37". There were no facts pleaded to establish the existence of a concessionary rate of interest for staff, no indication of the terms of that concession such as its legal character and the circumstances in which the concession could be withdrawn, no pleading that the

concession had been wrongfully withdrawn upon the claimant's dismissal, and no basis asserted to make the defendant liable to repay the claimant the moneys it collected by way of increased interest. The claimant simply did not mention the loans and the payment of increased interest in her witness statement. No one mentioned the matter in oral testimony. The defendant was found liable on the claims brought against it. There was no claim to recover loan interest. I do not see how the claimant can now be allowed to make such a claim. Accordingly I would rule this claim to recover interest impermissible.

[33] That examination of its contents reveals that most of the affidavit would be inadmissible, even before considering the justification for allowing further evidence. The paragraphs that I would consider admissible, if further evidence were to be permitted, are those that speak to salary, bonus, gratuity and the claimant's efforts to mitigate. As to the last matter, the duty to mitigate does not require further evidence at this stage of the proceedings. The claimant stated in her witness statement that she had been unable to obtain alternative employment and inferred thereby that she had been making efforts to do so. In examination in chief she added information as to the employment that she secured and the periods that she was unemployed. The defendant made absolutely no challenge to this evidence at the trial and, on the assessment there was no claim of failure to mitigate against which the claimant needed to defend and which could arguably require further evidence. Therefore, there is no justification for allowing the claimant to adduce further evidence of her efforts to mitigate her damage and I would reject her application to introduce this evidence.

[34] The proposed evidence on salary, bonus and gratuity hardly takes the claimant's case further and, more importantly, the claimant does not explain why it was not given before or why it needs to be given now. The proposed evidence is old matter on which the claimant testified and was cross-examined so there is nothing in its nature that provides justification for the exceptional course of allowing further or new evidence to be given. On that basis I would reject the application to introduce this further evidence.

[35] In summary, I would exercise the court's case management powers by rejecting the notional application to rely on the affidavit.

The claims and evidence that were before the court

[36] The effect of that decision is that the assessment of damages should proceed on the basis of the claims and evidence that were before the court at the end of the trial. The claims were for loss of salary, travelling and entertainment allowance, annual bonus, "loss due to increase in interest rate", unpaid vacation leave and gratuity. The claimant claimed loss of salary and other benefits until she reached 60 years of age, which she stated was the retirement age. This claim engaged much attention on this appeal because counsel for the respondent argued that the respondent's claim, that there was an implied term as to the retirement age and security of tenure, was not denied in the Defence and therefore the appellant cannot be allowed to controvert these terms. The implied term appeared in paragraph 6 of the statement of claim as follows:

> "6. Further it was an implied term of the said contract of employment that:
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> i. the Plaintiff's employment would be protected
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> ii. the Plaintiff would be given security of tenure in her employment
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> iii. the Plaintiff's employment would only be terminated (a) by resignation, (b) retirement or (c) for good and substantial cause."

[37] The appellant's Defence contained the following:

> "4. The Defendant will rely on the Rules of Conduct which governed the Plaintiff's employment, the common law and/or the implied term that the Plaintiff's contract of employment would be terminated for serious misconduct or conduct which seriously prejudiced the Defendant.
> "5. Save where otherwise admitted, all other matters mentioned in the Plaintiff's Statement of Claim are denied."

[38] Neither the claim nor the defence is a model of clarity. However, I do not accept the submission of counsel for the respondent that the implied term was not denied. It is clear enough that in contradiction of the respondent's claim, that her employment would only be terminated by resignation, retirement or for good cause, stood the appellant's claim that its

rules of conduct, the common law and an implied term as to conduct governed the respondent's contract of employment. The express statement that the appellant would rely on the common law, made in the context of its claim that it had a right to terminate the respondent's contract of employment, could only mean that the appellant was saying the common law was applicable to, and therefore governed, the contract of employment. In my view, therefore, the respondent cannot succeed on its contention that the appellant must be taken to have admitted the implied term for failing to deny it.

Failure to deny a fact

[39] Even, however, if I were to agree that the appellant failed to deny the implied term, the consequence would not necessarily be what counsel for the respondent urged. Counsel submitted that the normal consequence of failing to deny a material fact in a statement of claim is that the court may treat the fact as admitted. For present purposes I will take that proposition as correct. Nonetheless, there is a distinction involved in the factual content of a plea of an express term and a plea of an implied term. Pleading an express term is pleading the fact that an event occurred. In the case of a contract that fact is that the parties expressed agreement on a certain term and agreed that such term was to form a part of their bargain. This accords with the general rule that facts are to be pleaded: rule 8.7 (1). The default position, that a fact that is not denied is deemed to be admitted, operates in a clear way when a fact is pleaded.

[40] The position is different with an implied term because the fundamental premise underlying reliance upon an implied term is the non-existence of a fact. The party relying on an implied term is really stating that the parties did *not* express agreement on a certain term and did *not* agree that it was to form part of their bargain. The party who pleads an implied term is therefore asking the court, as a matter of law, to find that the term that was not expressed should nonetheless be treated as a part of their bargain because the law regards it as necessary in the circumstances to do so or because it is a term that the law regards as normally incident to a bargain of the particular type; see Liverpool City

Council v Irwin.[16] Pleading an implied term is therefore giving notice that the party will be asking the court, as a matter of law, to supply a missing fact.

[41] In such a case the pleader should state the facts that enable the court to supply the absent term. In that case, if such facts are not denied they are deemed to be admitted, under the rule for which counsel for the respondent contended. But if no fact is pleaded, to what can there be deemed to be an admission? A corollary of the rule that facts must be pleaded is that there is no obligation to plead matters of law.[17] There can be no sanction, therefore, against a party who fails to plead to a matter of law.

[42] In the instant situation, having pleaded that she relied on an implied term, the respondent was obliged to prove the facts that gave rise to the implied term. That implied term consisted of the proposition that the respondent would continue to be employed until she reached retirement age. The respondent failed to prove at the trial the retirement age of 60 years that she mentioned in the statement of claim. Neither in her witness statement nor in oral testimony did she mention a retirement age at the bank. Even if she had done so the existence of a retirement age would not equate to or come close to providing security of tenure. The proposition that employees will normally be retired from employment at a certain age means no more than that they will cease being employed upon attaining that age. It does not mean that they will continue to be employed until then. And it most certainly does not mean that the employer cannot terminate their employment before they reach that age.

[43] Counsel for the respondent acknowledged in their written submissions that "In the instant case, the Respondent/Claimant did not have a fixed term contract."[18] They sought to rely on the deemed admission of the alleged implied term that the respondent had security of tenure in her employment, but I have held there was no such admission. The respondent

[16] [1977] AC 239 at 257H per Lord Cross of Chelsea
[17] In The White Book Service 2003 note 16.5.1 states that the "defence *may* also refer to any point of law on which it is based …" and refers to an obligation, created by the Practice Direction supplementing their Part 16, to deal with points of law in personal injuries claims or where the defendant relies on a limitation period as a defence. This confirms, in relation to the comparable English rule, the point that there is no obligation to plead to matters of law.
[18] Paragraph 37.

otherwise provided no basis and led no evidence for implying any term as to security of tenure. I therefore conclude there was no such term. In consequence, I hold that the accepted common law position applied to this contract of employment, namely, that it was terminable upon reasonable notice. To this proposition I now turn.

Damages

[44] The respondent having been wrongfully dismissed she is entitled to an award of damages that compensates her for the losses she suffered from not having been terminated in accordance with the contract, which is to say upon reasonable notice or upon payment of salary and other contractual entitlements in lieu of notice. This is a well-established principle and was helpfully restated by Floissac C.J. in the judgment of this court in Saunders v St. Kitts Sugar Manufacturing Corporation.[19]

[45] The chief justice reviewed a number of decisions[20] in arriving at his decision that the appellant in that case was entitled to the equivalent of 10 months' salary and benefits in lieu of notice, and not the 6 months' payments that the judge had awarded. Reasonable notice was a matter of law, he stated, and its determination always depended on the circumstances of each case. The court should consider, among other things, the employee's qualifications, his stature in the position which he held, his skill, his training, the very senior position he occupied, the duration of his employment, the responsibilities of his position and the reasonable length of time it would take him to obtain alternative employment. Among the particular facts that influenced the court's award in that case were that at the time of his dismissal the employee was 56 years old, was three from the top on the field side of his employment, he had undergone specialised training, he had national responsibility and he had given the employer 34 years service.

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[19] St. Kitts and Nevis Civil appeal No. 1 of 1993; judgment delivered 6 April 1995

[20] These included SW Strange Ltd v Mann [1965] 1 AER 1065, re Oriental Bank Corporation 1866 32 CH 366, Landon V Greenberg (1906) 24 TLR 441, Daniel v Diversity Corporation Ltd. 3053 of 1984 HCT & , Martin Baker Aircraft Co. Ltd. & Another v Canadian Flight Equipment Ltd. [1955] 2 AER 722, Bardel v The Globe & Mail Ltd. (1960) 24 DRL 140, B.G. Credit Corporation v Da Silva (1965) 7 WIR 530, Grundy v Sun Printing Associates (1916) 33 TLR, Albert Mendez and The Bank of Nova Scotia (St. Kitts Branch) Suit No. 93 of 1991 (Civil) St. Christopher Circuit December 9th, 1991 Unreported

[46] Mr. Astaphan S.C., leading counsel for the appellant, placed a number of later decisions before this court in which awards for longer and shorter periods were made. These included Garnet Didier v Geest Industries Ltd.,[21] in which it was held that a reasonable period of notice was 9 months and Lera Gooding v Grenada Bank of Commerce Ltd.,[22] in which the period was 12 months. Each case turned on its own facts, as the chief justice stated in Saunders would always be the case.

[47] In the instant case the respondent was about 46 years of age at the time of her dismissal, she was an assistant manager, she had recently been given financial assistance by the appellant to enable her to pursue a master's degree in business administration and had served the appellant for 21 years and 6 months. In examination in chief in the course of the first hearing the respondent stated that she had been unemployed between August 2000 and October 2001 but had found employment in that month, at a higher basic (but lower gross) salary, which lasted two years. At times thereafter she was variously unemployed or employed at a comparatively very low salary.

[48] In her witness statement the respondent offered her view that damages equivalent to 7 years' loss of salary would be appropriate. The judge's award of 14 years' loss of salary and benefits would have heightened the respondent's expectations. It is, therefore, necessary to clarify the principles behind an award of damages for wrongful dismissal.

[49] On the basis, as set out above, that the respondent's employment was terminable upon reasonable notice, the award of damages to which she is entitled is to compensate her for the loss that flowed from not having been given such notice. The premise is that an employee who has been given reasonable notice of termination has the opportunity of seeking other employment and avoiding the loss flowing from unemployment. Had the respondent obtained better employment within two months of dismissal, for example, her loss from not having been given notice would have been a loss of earnings for two months and there would have been no need to decide what was a reasonable period of notice.

[21] [1999] E.C.L.R. 335
[22] Grenada civil suit No. 553 of 1998, judgment delivered 16 September 2002

This is the rationale for the rule that a claimant must mitigate his loss or damage, which is more accurately phrased as the rule that a claimant may not recover damages for avoidable losses.[23]

[50] There is a limit to the converse: it is not the rule that a claimant may recover for all unavoidable losses, with no limit as to the period for which damages for loss of earnings may be awarded. The object of an award of damages is not to compensate an employee for being unemployed, purely and simply. It is to compensate her for the loss of earnings, which the law presumes in her favour, she suffered from not having been given notice. If an employee has been given reasonable notice before being terminated the former employer cannot be liable to compensate the employee if the employee fails to obtain new employment after the notice period expires. This is the limit upon the respondent's entitlement.

[51] The fact that the respondent obtained comparable employment some 13 or so months after she was wrongfully dismissed sets the outer limit of the award to which she is entitled, in my view. But that fact does not determine the entitlement of the respondent; it is simply a factor to which the court may have regard. Another factor that I take into account, in favour of increasing the award that might otherwise have been made, is the very fair acceptance by counsel for the appellant that a notice period of 12 months would not be excessive in this case, although counsel thought it would be the very highest award that could be sustained. These factors, considered along with those to which Floissac C.J. referred in Saunders, lead me to the conclusion that a reasonable notice period in the case of the respondent would be 12 months.

The heads of award

[52] In the statement of claim the respondent identified the following heads of loss on an annual basis: basic salary of $52,674.00; travelling and entertainment of $20,400.00; and bonus of $3,196.23. As previously mentioned, the claimant also claimed for loss due to increase in

[23] Yetton v Eastwoods Froy Ltd. [1967] 1 WLR 104 at 114D

interest rate, unpaid vacation leave and loss of gratuity. She particularised a total loss of $1,027,347.80. The respondent also claimed interest on damages.

[53] Basic salary: The appellant did not dispute the respondent's entitlement to the equivalent of her basic salary but submitted that the gross amount should be reduced by deducting the amount she would have paid as income tax. That is correct, as the Barbadian High Court held in Waithe v Caribbean International Airways Ltd[24] and as counsel for the respondent rightly conceded. The solicitors for the parties were kind enough to communicate to the Registrar their agreement that the respondent's salary was taxable at the rate stipulated in the fifth schedule of the Income Tax Act [25]. I would therefore award damages for loss of basic salary in the sum of $43,171.80.

[54] Travel and entertainment allowance: Counsel for the appellant submitted that the sums the respondent received on account of travel and entertainment were not in the nature of remuneration but were reimbursement for moneys she expended for these activities. There is no evidence that establishes that these sums were paid otherwise than for what their description suggests. I would disallow that claim, as Gordon JA did in Dexter Ducreay v Dominica Water and Sewerage Co. Ltd,[26] on the basis that the sum in issue was to cover expenditure in the course of performing in the employment and when the employment was terminated so was the expenditure.

[55] Bonus: The evidence of the respondent that she was paid a bonus every year was confirmed by the testimony of the appellant's general manager and that evidence makes it very probable that she would have been paid a bonus during the 12 months' notice period, had she been given the notice to which she was entitled. No issue was taken with the sum claimed in her statement of claim and I would treat that figure as accepted. Therefore, I would award compensation for the loss of bonus in the sum of $3,196.23.

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[24] (1988) 39 WIR 61 at 68

[25] Chapter 67:01 Revised Laws of Domonica

[26] Dominica Civil Appeal No. 20 of 2004 at [7]; judgment delivered 14 October 2004

[56] Increased interest rate: As indicated earlier, the respondent made no claim in her statement of claim for compensation for the loss that she suffered by having to pay interest on loans that she owed to the appellant at a higher rate, after she was terminated, than the rate she paid when she was employed with the appellant. No one gave evidence on the matter in the witness statements or at the trial. The claim was only made in the affidavit that I have excluded. There is simply no basis for allowing this claim and I therefore reject it.

[57] Unpaid vacation leave: This item suffers similarly from a lack of substance. It was simply an item stated in the particulars of loss. No evidence was given on it. I do not know on what basis it was claimed. As I understand the concept of paid vacation leave, an employee is permitted during each year of employment (an employment year) to absent herself from work for an agreed period and will still be paid her salary during such absence. It is not that the employee gets an added salary during her absence. Of course it often happens that when an employee is dismissed she will have already worked for a portion of the employment year for which she would be entitled to vacation leave for the agreed or prescribed period. In such a situation the employee will have worked for a number of days for which she would have been entitled to be absent. In that situation the employee is entitled to be paid for the days that she worked but for which she was entitled to be absent. In this case there is no evidence of when last the respondent went on vacation, whether she had earned any vacation days for the employment year in which she was dismissed, or whether she had already taken her vacation for the employment year. It is also unclear, even if there was evidence that the respondent had earned some vacation leave, whether she would be entitled to be paid for them since she will be getting the equivalent of one year's salary for which she did no work for the employer. Again, I would reject the claim on the basis that the respondent has simply not established her factual entitlement.

[58] Gratuity: there was a specific claim in the statement of claim, in reliance on an implied term and a business practice, that the respondent would be paid a gratuity. The respondent repeated that averment in her witness statement, but that is all she did. She gave no

evidence on it. However, in examination in chief she agreed "that there was no agreement between myself and the Bank for payment of a gratuity for my time at the Bank." She disagreed with the suggestion that was put to her that members of staff were not paid gratuities while she was employed at the bank. In cross-examination she stated that the bank had approved gratuities for general staff and was in the process of considering gratuities for management staff. She further stated "it was a general rule that gratuities were paid when management staff left the Bank on a case by case basis." In her oral testimony the bank's general manager stated it was not true that gratuity was paid on a case-by-case basis.

[59] To my mind it does not matter whether or not gratuity was paid on a case-by-case basis. The respondent's testimony established it was not a contractual entitlement. No evidence was given that was capable of advancing the bare claim that there was an implied term in her contract of employment that she would be paid a gratuity. Even if it were true that gratuity was paid to management staff on a case by case basis there is nothing from which to deduce what, if any, policy considerations informed the decision in each case and whether it is more probable than not that the respondent would have been paid a gratuity if she had not been wrongfully dismissed. In my view the respondent therefore fails on this claim, also.

[60] Interest: The judge's award of interest on damages at the rate of 11% per annum compounded, running from the date of dismissal until the date of payment, is simply wrong. Apart from statute, in the absence of express agreement our courts do not award interest on debt or damages[27] and they do not award compound interest except in the case of trustees profiting from a breach of trust.[28] Counsel for the respondent properly conceded in their written submissions that the law of Dominica does not support an award of compound interest on damages.[29]

[27] Jefford v Gee [1970] 1 All ER 1202 at 1205(g).
[28] Westdeutsche v Islington BC [1996] 2 ALL ER 961
[29] At paragraph 68.

[61] The statute which regulates the award of interest on damages is the Judgments Act[30], which provides in section 7 "Every judgment debt shall carry interest at the rate of 5% a year from the time of entering up of the judgment …" Counsel for the respondent, again properly, conceded that post-judgment interest was limited by statute to the rate of 5%. However counsel submitted that the court had power to award pre-judgment interest, from the date of dismissal to the date of judgment, based on the provision in section 35A of the English Supreme Court Act 1981, which is applied to Dominica by section 11 of the Eastern Caribbean Supreme Court Act.[31]

[62] Section 11 of the latter Act provides

> "11-(1) The jurisdiction vested in the High Court in civil proceedings and in probate, divorce and matrimonial causes, shall be exercised in accordance with provisions of this Act, or other law in operation in the State and of the rules of court; and where no special provision is therein contained such jurisdiction shall be exercised as nearly a may be in conformity with the law and practice administered on 1st June 1984 in the High Court in England.

[63] Section 35A of the English Supreme Court Act confers a discretion on the court to award interest at such rate as the court thinks fit on damages in respect of which judgment is given, for all or any part of the period between when the cause of action arose and the date of judgment. Counsel for the respondent submitted that our courts can rely on that jurisdiction to award pre-judgment interest, at 11% per annum, because the laws of Dominica contained no special provision that would preclude the court exercising its jurisdiction in conformity with the law and practice administered in the High Court in England. On the other hand counsel for the appellant submitted that the Judgment Act contained special provision conferring jurisdiction on the courts to award interest and that provision deliberately limited the court to awarding post-judgment interest.

[64] There is clear authority in the judgment of Byron C.J. in Eversley Thompson v The Queen[32] that the words "law and practice administered" in England must be taken to include Acts of the United Kingdom Parliament. I therefore accept the argument on behalf

[30] Chapter 4:70 of the Revised Laws of Dominica
[31] Chapter 4:01 of the Revised Laws of Dominica.
[32] St. Vincent and the Grenadines Criminal Appeal No 9 of 1995 , at page 4; judgment delivered July 21, 1997

of the respondent that the English legislation that permits the awarding of pre-judgment interest is capable of being imported, by the application of section 11 of the Eastern Caribbean Supreme Court Act, into the laws of the Commonwealth of Dominica. But that can only be done where no special provision is contained in local law. Counsel for the respondent did not offer any basis upon which this court should treat the Judgment Act, which deals specifically with the matter of awarding interest in judgments, as not being a "special provision".

[65] It seems to me Mr. Astaphan is correct; the Judgment Act was special legislation passed to confer jurisdiction to award interest on damages for the period after judgment. It could not have been because of a slip or inadvertence that it conferred no jurisdiction on the court to award interest for the period between the arising of the cause of action and judgment. I would, therefore, refuse the claim for interest. That decision makes it unnecessary to consider the effect of the clear failure of the respondent to comply with rule 8.6 (4), which states that a claimant who is seeking interest must say so expressly in the claim form and include, in the claim form or statement of claim, details of the basis of the entitlement; rate; and period for which it is claimed.

Costs

[66] The general rule is that this court must order the unsuccessful party to pay the costs of the successful party.[33] It seems to me that both parties were successful. The appellant has succeeded in setting aside the damages judgment of the High Court and having an award made to the respondent of $46,368.03 instead of $1,216,641.12. The respondent has succeeded in obtaining an award of damages for the reduced figure. I regard the appellant as the more successful party on the appeal but sight must not be lost of the fact that the respondent has had overall success on her claim that the appellant was liable to pay her damages for wrongful dismissal. I consider the proper order to make is that each party must bear its or her own costs of the appeal.

[33] Rule 64.6 (1)

[67] In the liability judgment the judge awarded prescribed costs to the respondent based on the amount of damages after assessment. There was no appeal against that order and I see no basis for this court to interfere with it. Accordingly, I calculate and would award costs in the High Court to the respondent in the sum of $13,092.01.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal