EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

HCVAP 2011/008

BETWEEN:

MICHEL WILLIAMS

Appellant

and

NATIONAL BANK OF DOMINICA LIMITED

Respondent

Before:

The Hon. Sir Hugh A. Rawlins — Chief Justice
The Hon. Mde. Janice M. Pereira — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Fraser for the Appellant
Mr. Alick Lawrence for the Respondent

2012: May 1;
August 31.

Contract of employment – Executive of bank – Termination clause – Contract may be terminated for 'reasonable cause or by no fault by either party' – Contract terminated by bank 'without cause by no fault by either party' – Whether termination in accordance with the contractual provision – Whether terminated in breach of contract entitling the executive to damages

The respondent Bank employed the appellant, Mr. Williams, under an agreement for a period of three (3) years from 1st October 2008. The Bank terminated his employment with effect from 1st April 2009, by a letter dated 31st March 2009. The letter was signed by Mr. Gregory de Gannes as Managing Director of the Bank, on behalf of the Board of Directors. Under the agreement, Mr. Williams was entitled to a basic salary, which was subject to be reviewed for each subsequent year, and various allowances and benefits as well as a gratuity on completion of the contract. He was also entitled to be considered for a new service agreement. Clause 7(3) of the agreement was the termination clause, which permitted the Bank to terminate the employment of Mr. Williams 'with reasonable cause or by no fault by either party' on giving him three (3) months' notice in writing or on paying him three (3) months salary. By its letter of 31st March 2009, the Bank purported to

terminate the employment of Mr. William pursuant to clause 7(3) of the agreement 'without cause "by no fault by either party"'. The termination took effect almost immediately and the Bank's termination payments to Mr. Williams included a sum for three (3) months salary.

Mr. Williams sought damages in the High Court for wrongful dismissal, for breach/repudiation of the agreement and costs. His claim was dismissed by the trial judge. In so doing, the trial judge found that the words 'with reasonable cause or by no fault by either party' were clear and that the second aspect of those words 'by no fault by either party' permitted the Bank to dismiss him 'without cause'. The trial judge found that inasmuch as the termination formulation was clear, it was unnecessary to interpret the words by resort to the *contra proferentem rule* or to imply a term of trust and confidence into the agreement that the Bank would avoid doing anything that was likely to destroy or seriously injure the relationship of trust and confidence between the parties. The judge also held that the termination letter could have been properly signed by Mr. Gregory de Gannes as Managing Director, on behalf of the Board of Directors. In dismissing the claim, the trial judge ordered Mr. Williams to pay prescribed costs to the Bank based on the damages which he (Mr. Williams) claimed. Mr. Williams appealed.

Held: dismissing the appeal (Rawlins CJ dissenting), confirming the judgment and order of the trial judge, and awarding prescribed costs to the respondent Bank in the High Court and in the appeal:

1. The trial judge correctly held that the termination provision formulation 'with reasonable cause or by no fault by either party' contained in clause 7(3) of the 2008 employment agreement between the appellant, Mr. Williams and the respondent Bank is clear. The judge was accordingly also correct when he found that there was no basis in law for interpreting the terminating formulation by reference to the *contra proferentem* rule or for implying a term of trust and confidence into the agreement.

   Reda and Another v Flag Ltd. (2002) 61 WIR 118; [2002] UKPC 30 applied.

2. (Per. Pereira JA and Michel JA [Ag.], Rawlins CJ dissenting) The parties, having executed the agreement with the expression 'by no fault by either party', intended it to mean something different from 'reasonable cause', and to provide an additional basis for termination of the agreement, distinctly different from the basis of reasonable cause. Further, given all the eventualities for termination specifically covered in the agreement, the expression 'by no fault by either party' could only mean termination 'without cause'. The learned judge was therefore correct in holding that the said termination provision formulation 'with reasonable cause or by no fault by either party' permitted the Bank to dismiss Mr. Williams without cause. By extension, the trial judge was also correct when he found that the Bank terminated the services of Mr. Williams on a ground that was disclosed or provided for in the said agreement. Accordingly, the employment of Mr. Williams was not terminated in breach of clause 7(3) of the said agreement.

3. (Per Rawlins CJ), while the learned trial judge rightly held that the termination provision 'with reasonable cause or by no fault by either party' is clear, he erred when he held that this formulation permitted the Bank to terminate the employment of Mr. Williams without cause. There would have been no difficulty had the parties specifically covenanted for a 'without cause' termination provision. In the circumstances such a provision would have been necessary, given the adverse effects which such a termination of employment could have.

4. The learned trial judge correctly found that the letter of dismissal was not ultra vires since Section 58 of the Companies Act 1994 and the by-laws of the Bank give the power to the directors to exercise the powers of the company and manage its affairs.

JUDGMENT

[1] SIR HUGH RAWLINS CJ: These proceedings will determine whether the appellant, Mr. Williams, is entitled to recover over $2 million or any damages at all, from the respondent Bank for wrongful dismissal and/or for breach/repudiation of the written executive service agreement between him and the Bank. After the Bank terminated his employment, Mr. Williams sought special damages; damages for breach of contract; punitive damages; statutory interest and costs in his claim against the Bank in the High Court. The trial judge dismissed his claim and ordered Mr. Williams to pay $99,893.42 costs to the Bank. This was prescribed costs pursuant to rule 65.5(2)(b)(i) of the Civil Procedure Rules 2000 ("CPR 2000"). The trial judge calculated these costs on the basis of the $2,113,114.00 special damages that Mr. Williams sought in his claim, which the judge took to be the value of the claim. Mr. Williams appealed. He insisted in the appeal that the Bank breached or repudiated the agreement, and that, accordingly, damages are at large and entitle him to be awarded the sum which he claims.

Background

[2] The Bank employed Mr. William under an agreement for a fixed period of three (3) years from 1st October 2008.[1] The Bank terminated his employment with effect

[1] This may be referred to herein as "the 2008 agreement".

from 1st April 2009. This was done by way of a letter dated 31st March 2009, which was signed by Mr. Gregory de Gannes as Managing Director of the Bank, on behalf of the Board of Directors of the Bank. Mr. Williams is addressed in the letter as Assistant General Manager, Service and Development.

[3] Under the agreement, Mr. Williams was entitled to a basic salary of $192,000.00 for the first year. This was subject to be reviewed for each subsequent year. He was also entitled to an annual entertainment allowance of $24,000.00; a vehicle allowance of $12,000.00 per year; an incentive allowance of between 15% and 25% of salary based on performance; staff loans; medical insurance; training attachments, as well as annual vacation leave. On completion of the contract he was to be paid gratuity at a rate of 20% of basic salary. Mr. Williams was also entitled, upon giving 3 months' notice, to be considered for a new service agreement on terms which were to be agreed between him and the Bank.

[4] Clause 7(3) of the agreement was the termination clause. The Bank purportedly terminated the employment of Mr. Williams pursuant to this clause which states as follows:

> "The Bank may at any time terminate with reasonable cause or by no fault by either party, the engagement of the Executive on giving him three (3) months' notice in writing or on paying him three (3) month's [sic] salary."[2] (Emphasis added)

[5] The Bank's termination letter to Mr. Williams states as follows:[3]

> "Dear Mr. Williams
>
> The Board of Directors of National Bank of Dominica Ltd, has instructed me to terminate your Executive Service Contract without cause "by no fault by either party" in accordance with Clause 7(3) of the said contract dated December 18, 2008. [emphasis added]
>
> I hereby, on behalf of the Board of Directors, terminate your contract without cause "by no fault by either party" effective April 1, 2009.

[2] Found at TAB 12 of the Core Bundle.
[3] This is contained in TAB 13 of the Core Bundle.

> Please find enclosed a cheque for one hundred and sixty-nine thousand and sixty-five dollars and fifty-eight cents ($169,065.58) made up as follows:
>
> | | |
> |---|---|
> | Payment in lieu of notice | 48,000.00 |
> | Payment in lieu of vacation leave | 14,030.77 |
> | LESS tax | (18,781.08) |
> | Gratuity: | |
> | June 14, 2004 to September 30, 2005 | 20,215.89 |
> | October 1, 2005 to September 30, 2008 | 86,400.00 |
> | October 1, 2008 to March 31, 2009 | 19,200.00 |
>
> On behalf of the Board, I thank you for your years of service to the Bank and wish you every success in your future endeavours."

It would be noted that the Bank paid Mr. Williams, inter alia, 3 months payment in lieu of notice for which clause 7(3) of the agreement provides.

Grounds 1 and 3 of the appeal

[6] As was noted in paragraph 1 of this judgment, the trial judge dismissed Mr. Williams' claim and ordered him to pay prescribed costs pursuant to rule 65.5 (2)(b)(i) of CPR 2000.

[7] In paragraph 4 of the judgment, the trial judge noted the submission by Mr. Lawrence, learned counsel for the Bank, that the Bank was entitled to terminate the employment of Mr. Williams without cause under clause 7(3) of the agreement upon paying him in lieu of the stipulated notice. The termination letter evidences that the Bank ended the employment of Mr. Williams expressly 'without cause by no fault by either party' and paid him for 3 months in lieu of notice.

[8] Mr. Fraser has insisted that the words 'without cause "by no fault of either party"' in the termination letter disclosed no ground for termination under clause 7(3) of the agreement between Mr. Williams and the Bank. This is ground 3 of the appeal, which states as follows:

> "3. The learned trial judge erred in law when he failed to consider or to properly consider the meaning and import of the words used in the termination letter of the 31st March,2009, and in particular that the words

used in the said letter did not disclose any ground for termination contained in the said Executive Service Contract;"

[9] It appears to me that by using the words 'with reasonable cause or by no fault by either party' in the termination letter, the Bank attempted, in a manner, to formulate its ground for the termination of the employment of Mr. Williams to show that the termination was under clause 7(3) but it was not for reasonable cause, and, accordingly, the use of 'without cause'. However, it seems clear that the Bank wanted to depend upon the second aspect of the termination phrase in the agreement, and, accordingly, added the words 'by no fault by either party'.

[10] It seems to me that ground 3 of the appeal merges into ground 1 which, in my view, is at the fulcrum of this appeal. Accordingly, I shall consider them together. It is for this reason that I think it useful to reproduce ground 1 of the appeal in detail. It states that the learned trial judge erred in law and misdirected himself:

(i) when he held that the words 'by no fault by either party' meant without cause;

(ii) when he failed to consider, find or hold that the *contra proferentem* rule operated to exclude interpretation of the words '*by no fault by either party'* to mean without cause;

(iii) when he failed to consider, find or hold that retrenchment, redundancy, incapacity bankruptcy, the appointment of a receiver, and indeed any other ground that may arise by no fault by either party, and are recognized as grounds for no fault termination in employment law;

(iv) when he erroneously construed the language of clause 7(3) of the Appellant's Contract and held that this must mean termination without cause;

(v) by failing to hold that the said clause 7(3) was ambiguous and thus required to be interpreted within the context of the language of the preceding clauses and those which followed, and

(vi) by failing to hold that the Appellant's Contract of employment was subject to an implied term of trust and confidence, namely that the Bank would avoid any conduct on its part that was likely to destroy or seriously injure the relationship of trust and confidence extant between the parties.

These grounds of appeal bring into focus the interpretation of clause 7(3).

Interpreting clause 7(3)

[11] Mr. Lawrence agreed with Mr. Fraser that clause 7(3) of the agreement is ambiguous. However, they do not think that the ambiguity should lead to the same result. Mr. Lawrence thinks that in the result the termination clause should be interpreted contextually, looking at other provisions in the agreement. He urged us to find that by doing this, we would conclude that the parties provided for dismissal without cause in clause 7(3) of their 2008 agreement which entitled the Bank to terminate the employment of Mr. Williams as it did. Mr. Fraser, on the other hand, insisted that the ambiguity would require the court to interpret clause 7(3) by reference to any of the bases set out in ground 1 of the appeal.

[12] However, I do not think that clause 7(3) is ambiguous. Accordingly, I do not think that it requires interpretation by reference to the *contra proferentem* rule, by implying a term of trust and confidence or by interpreting it within the context of the language of other clauses as is contended in sub-grounds 1(ii), 1(iv) and 1(v) of the appeal. I am accordingly inclined to dismiss these sub-grounds of the appeal.

[13] It is significant, however, that the learned trial judge noted the following submission, which Mr. Fraser, learned counsel for Mr. Williams made:

> "In the absence of specified circumstances of misconduct, he [Mr. Williams] could only be properly dismissed for reasonable cause or if

> his position became redundant, or the bank went out of business or he became incapacitated or for some unforeseeble [sic] cause which rendered the performance of the contract impossible (commonly referred to as no fault termination)."[4]

[14] By this submission, Mr. Fraser suggested that clause 7(3) of the agreement permitted the Bank to terminate the employment of Mr. Williams for reasonable cause, which may have amounted to misconduct on the part of Mr. Williams. I agree that this is the clear purport of the words 'with reasonable cause' contained in clause 7(3) of the agreement. However, the present difficulties are not caused by these words, but rather by the words '**by no fault by either party**' the second aspect of the formulation in the clause which provides grounds for the termination.

[15] It is on this second aspect that Mr. Fraser submitted, alternatively, that the Bank could only have ended the employment of Mr. Williams as a no fault termination, for example, on any of the grounds stated in the quotation in paragraph 14 of this judgment.[5] This is the essence of ground 1(iii) of this appeal. A no fault termination may be provided for by agreement between the parties. It is apparent that clause 7(1) of the 2008 agreement, which is discussed later in this judgment, is such a provision. It is also trite principle that a no fault termination may also, by the operation of common law principles, be occasioned by frustration or repudiation, for example. Thus, the trial judge noted Mr. Fraser's further submission that the words 'by no fault by either party' in clause 7(3) of the agreement refers to an event that amounts to a frustration of the agreement.[6]

[16] In my view, Mr. Fraser was not here necessarily using the term frustration in its precise or forensic contract law construct. It seems to me that he was speaking in practical terms. It does not appear that his thesis was that frustration is the only event upon which a 'no fault' terminating event may be grounded. It was thus that he submitted that the Bank could not have simply terminated the employment of Mr. Williams in the way that it did under the 'by no fault by either party' term in

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[4] See para. 4 of the trial judge's judgment.
[5] Redundancy; if Mr. Williams became incapacitated; if the Bank went out of business; the appointment of a receiver; or for unforeseeable cause, which rendered the performance of the contract impossible.
[6] See paras. 4 and 5 of the trial judge's judgment.

clause 7(3) of the agreement in the absence of an event which he referred to in ground 1(iii) of the appeal, or any other ground, for that matter, that may have arisen without the fault of either party to the agreement.

[17] The result is that in Mr. Fraser's view, termination 'by no fault by either party' could only be properly effected for an event, which rendered Mr. Williams incapable of performing the contract or which rendered the performance of the contract impossible. In effect, Mr. Fraser is insisting that since the Bank did not terminate the employment of Mr. Williams for 'with reasonable cause' it could only have done so 'by no fault by either party'. This, as I understand Mr. Fraser's submission, could not have been, as it transpired in this case, for no expressed or discernible cause. His contention, as I understand it is that the termination may only have been effected for a genuine 'no fault' rather than on a no cause or without cause ground. The learned trial judge held otherwise because he found that 'by no fault by either party' meant that the Bank was entitled to terminate the employment of Mr. Williams without providing a cause for so doing.

[18] In my view, the trial judge was correct when he opined that the case FC Shepherd and Co. Ltd. v Jerrom,[7] upon which Mr. Fraser relied, is no authority for the submission that the Bank was not entitled to terminate the employment of Mr. Williams without cause under clause 7(3). This, in my view, is because FC Shepherd was a case of unfair dismissal. Unfair dismissal has statutory underpinnings and has no bearing on the present case of wrongful dismissal.[8]

[19] The learned trial judge also noted that the facts in FC Shepherd were concerned with the contract of employment of an apprentice who was sentenced to Borstal training for criminal conduct not connected with his employment. The event rendered his employment radically different from what the parties first contemplated. This, the judge stated, correctly in my view, ended the contract through no fault or default by the employee in FC Shepherd.[9] By extension, he

[7] [1987] QB 301.
[8] See para. 5 of the judgment.
[9] Para. 6 of the judgment.

also correctly concluded that FC Shepherd is not an authority for the proposition that the words 'by no fault by either party' in the employment contract of Mr. Williams are necessarily referable to frustration of the contract, notwithstanding that frustration terminates a contract with no fault or default.[10] This, in my view, was the learned judge's way of stating that frustration does not always terminate a contract, and, in addition, may only be one aspect of a no fault termination.

[20] I further agree with the trial judge's conclusion[11] that Mr. Fraser could not rely on the judgment of Gordon JA in Dexter Ducreay v Dominica Water & Sewerage Co. Ltd.[12] This is because, as the trial Judge noted, Gordon JA stated in Dexter Ducreay that an implied term permitting dismissal without cause upon notice could not be read into a fixed term contract.

[21] It is my view that the trial judge quite correctly analysed the decision of the Privy Council in Reda and Another v Flag Ltd.[13] to mean that where an employment contract provided for termination of employment at any time without cause on the payment of compensation, termination of employment without cause was in accordance with that term in the contract. I do not think that Reda provides assistance in the present case as there was an express termination 'without cause' provision in the contract which was considered in that case. In passing, it is noteworthy that the Privy Council held in Reda that in the face of that clear 'without cause' term there was no reason to consider whether there should have been resort to the implied term of trust and confidence.

[22] Similarly, in the present case the learned trial judge held that there was no reason to resort to such an implied term because clause 7(3) in the agreement between the parties is clear. He then went on to hold, in effect, that in the context of the stipulation that termination of employment may be either for 'reasonable cause or

[10] See para. 7 of the judgment.
[11] At para. 8 of the judgment.
[12] Commonwealth of Dominica High Court Civil Appeal No. 20 of 2004 (delivered 14th October 2004, unreported).
[13] (2002) 61 WIR 118; [2002] UKPC 38.

by no fault by either party', the words 'by no fault by either party' must mean termination without cause.[14] It is this latter conclusion that has given me pause.

[23] It is common ground that in the normal scheme of things, there are 3 main employment terminating events. Thus Mr. Fraser submitted that employment law generally recognises 3 categories of termination of employment. I would state them as follows: (a) termination for reasonable cause including redundancy, frustration and such events; (b) termination for fault on the part of the employee for misconduct, for example; and (c) termination without cause, which would often attract liability for wrongful dismissal unless specifically provided for.

[24] Mr. Fraser submitted that termination without cause was not available on the present agreement because the parties did not provide for it. He submitted, additionally, that there is no authority for the proposition that termination for no fault means termination without cause.

[25] On the other hand, Mr. Lawrence insisted that the trial judge was correct when he held that clause 7(3) of the agreement permitted the termination of the employment of Mr. Williams without cause. Mr. Lawrence accordingly asked us to note that the words 'by no fault by either party' were the only words that were added in clause 7(3) in the 2008 agreement between the parties to the formulation contained in clause 7(1), which was the termination clause in their prior employment agreement.

[26] Mr. Lawrence then drew our attention to clause 7(1) of the 2008 agreement. This clause states as follows:

> (1) If the Executive shall at any time after signing hereof-
>
> (a) neglect or refuse or from any cause other than ill-health not caused by his own misconduct or fault as provided in Clause 5, become unable to perform any of his duties or to comply with any legitimate instruction or direction of the Managing Director

[14] See para. 10 of the judgment.

(b) disclose any information respecting matters of the Bank to any unauthorized person; or

(c) is guilty of serious misconduct or willful neglect or any act of dishonesty in the discharge of his duties hereunder;

(d) commit any material breach of this agreement;

(e) become bankrupt or compounds with or suspends payment to his creditors;

(f) be convicted of any criminal offence other than an offence which in the reasonable opinion of the Company does not affect his position as Director or officer of any company within the Group or cast doubt upon his future ability or fitness to perform his duties hereunder the Bank may terminate his engagement forthwith by written notice and thereupon all rights and advantages reserved to him by this agreement shall cease.

[27] It is obvious that all of these matters set out in the foregoing sub-clauses are instances of misconduct by the employee in one form or another, which the parties specifically provided gave the Bank the right to summarily terminate the employment of Mr. Williams in the event that any of specified circumstances arose without the Bank incurring liability for wrongful dismissal. This is the main 'fault clause' in the agreement. Mr. Lawrence has urged us to interpret the terminating formula in clause 7(3) of the 2008 agreement to find, in effect, that the formulation 'by no fault by either party' could only logically be a 'without cause' formulation, which permitted the Bank to terminate the employment of Mr. Williams without providing a reason for the termination.

[28] The first aspect of the critical formulation in clause 7(3) of the 2008 agreement is clearly a 'reasonable cause' formulation. Clause 7(1) is a 'fault clause'. It is difficult for me to accept, however, that the words, 'by no fault by either party' the

second aspect in clause 7(3) of the 2008 agreement is a 'without cause' provision, which permitted the Bank to terminate the employment of Mr. Williams in the circumstances without providing a reason and none is even discernible. There would have been no difficulty had the parties specifically covenanted for a without cause termination provision. In my view, it would have been necessary to so covenant, given the adverse effects which such a termination of employment could have.

Result on grounds 1, 2 and 3 of the appeal

[29] In the foregoing premises, it is my view that while the learned trial judge correctly held that the termination provision 'with reasonable cause or by no fault by either party' contained in clause 7(3) of the 2008 agreement is clear, he erred when he held that this formulation permitted the Bank to dismiss Mr. Williams without cause. By extension, the trial judge further erred when he failed to find that the Bank terminated the services of Mr. Williams on a ground that was not disclosed or provided for in the said agreement. I would accordingly allow grounds 1(i), 1(iii), 1(iv), 2(i), 2(iii) and 3 of the appeal.

[30] By way of reminder, ground 2 of the appeal states that the trial judge erred when he did not find that Mr. Williams was dismissed by the Bank in breach of: (i) clause 7(3) of the Executive Service Contract dated 18th December 2008, and (iii) the express provisions for grievances and disciplinary procedures contained in the said Executive Service Contract. Ground 3 states that the trial judge erred by failing to consider or to properly consider the meaning and import of the words used in the termination letter of the 31st March 2009, and, in particular that the words used in the said letter did not disclose any ground for termination contained in the said Executive Service Contract.

[31] It follows from the foregoing findings that, in effect, the services of Mr. Williams were terminated in breach of their 2008 employment agreement between him and the Bank. Accordingly he was wrongfully dismissed.

[32] I would, however, dismiss grounds 1(ii), 1(v), 1(vi) and 2(ii) of the appeal, inasmuch as the terminating formulating provision is clear and unambiguous. It is trite principle that where the provision is clear, there is no basis in law for interpreting the terminating formulation in clause 7(3) in the present case by reference to the *contra proferentem* rule or by the implying a term of no trust and confidence.

Grounds 4, 6 and 7

[33] The result of allowing the appeal on the grounds identified in paragraph 34 of this judgment, I would also dismiss grounds 4, 6 and 7 of the appeal as redundant. This would be better understood when it is realized that these grounds state as follows:

> 4. the learned trial judge erred in law; (i) when he failed to consider, find or hold that the dismissal of the Claimant by the Board of Directors was a nullity and (ii) when he failed to consider, find or hold that by-law 4.1 of the Respondent's by-laws by itself did not empower the Board of Directors to dismiss the Claimant on behalf of the Company ,and (iii) when he found that the Respondent Bank could act through Directors and: (iv) that the directors acted in accordance with the terms of the contract;
> 5. …
>
> 6. the learned trail judge failed to evaluate the evidence properly or at all and his decision is unsupported by the evidence;
>
> 7. the learned trial judge's reasoning did not address all the relevant issues.

[34] Given my decision to allow the appeal on the grounds identified in paragraph 29 of this judgment, it is my view that it is of no moment who issued the termination letter or upon what authority it was purportedly issued for the purposes of ground 4 of the appeal. Grounds 6 and 7 clearly speak for themselves.

Ground 5 - damages

[35] Ground 5 appeals the damages aspect of the case. It states as follows:

> 5. The learned trial judge erred in law when he failed to find that the Appellant is entitled to damages for wrongful dismissal, damages for breach of the implied term of trust and confidence, damages for breach of the express provisions for grievances and disciplinary procedures contained in the Executive Service Contract, and in particular damages under the following heads, that is to say; loss of salary, gratuity, medical insurance, training value, premature termination losses, entertainment allowances, motor vehicle allowances, loss of further employment, staff loans, and exemplary damages.

[36] Inasmuch as the trial judge dismissed the claim, it was not necessary for him to assess damages. Having allowed the appeal, however, and having found, in effect, that the employment of Mr. Williams was wrongfully terminated by the Bank, I would remit the case to the High Court for damages for wrongful dismissal to be assessed in the normal way.

Costs

[37] I have not discerned any reason why Mr. Williams should not have his costs in the High Court and in these appeal proceedings. The High Court should determine sum to be awarded for costs on a prescribed costs basis upon the determination of the quantum of damages on the assessment. Mr. Williams would then be entitled to two thirds of that prescribed costs in the appeal, pursuant to rule 65.13 of CPR 2000. The parties may otherwise agree costs.

Conclusion

[38] In the foregoing premises, I would have made the following order:

1. The appeal is allowed on grounds 1(i), 1(iii), 1(iv), 2(i), 2(iii) and 3 of the appeal, and, accordingly, the judgment and order of the trial judge are wholly set aside.

2. Unless the parties otherwise agree, the Bank shall pay to Mr. Williams prescribed costs in the High Court, based on the assessment of damages, and two-thirds of those costs in these appeal proceedings in accordance with rule 65.13 of CPR 2000.

3. The case is remitted to the High Court for damages for wrongful dismissal to be assessed.

Sir Hugh A. Rawlins
Chief Justice

[39] PEREIRA JA: I have had the benefit of reading the judgment of Rawlins CJ. The background facts giving rise to this appeal are quite fully and helpfully set out by him, and no useful purpose will be served by reiterating them here save to the extent necessary for my treatment on the issues raised in this appeal.

[40] The appellant, Mr. Williams, and the respondent Bank entered into a written contract fixed for a period of three years from 1st October 2008 whereby Mr. Williams agreed with the Bank to be employed on the terms and conditions contained herein. The employment contract contained provisions for termination set out mainly in clause 7. Clause 7(1) of the agreement is already set out at paragraph 26 above. This clearly envisages summary termination for fault or misconduct on the part of the employee.

[41] Clause 7(2) of the agreement imposed certain duties and restraints upon Mr. Williams following a termination of the agreement for 'whatever reason' and is not germane to the issue arising on this appeal.

[42] Clause 7(3) of the contract contained this formulation for termination:

> "The Bank may at any time terminate with reasonable cause or by no fault by either party, the engagement of the Executive on giving him three (3) months' notice in writing or on paying him three (3) month's [sic] salary." (Emphasis added)

[43] The Bank terminated his employment with effect from 1st April 2009. This was done by way of a letter dated 31st March 2009, which was signed by Mr. Gregory de Gannes as Managing Director of the Bank, on behalf of the Board of Directors of the Bank. Mr. Williams is addressed in the letter as Assistant General Manager, Service and Development. The Bank's termination letter to Mr. Williams states in part as follows:[15]

> "Dear Mr. Williams
>
> The Board of Directors of National Bank of Dominica Ltd, has instructed me to terminate your Executive Service Contract without cause "by no fault by either party" in accordance with Clause 7(3) of the said contract dated December 18, 2008. [emphasis added]
>
> I hereby, on behalf of the Board of Directors, terminate your contract without cause "by no fault by either party" effective April 1, 2009."

With that letter, the Bank enclosed a cheque for payment in lieu of the three months' notice as well as for vacation leave and gratuities all totaling a sum of approximately $169,000.00.

[44] Mr. Williams took action against the Bank seeking damages for breach of the agreement and for wrongful dismissal. Before the judge below, counsel for Mr. Williams argued in relation to clause 7(3), that the phrase 'by no fault by either party' ought not to be read as permitting dismissal without cause with payment in lieu of notice. Rather, counsel argued, as the learned trial judge set out in his judgment at paragraph 4, that: 'in the absence of specified circumstances of misconduct, he could only be properly dismissed for reasonable cause, or if his position became redundant, or the bank went out of business, or he became incapacitated or for some unforeseeble [sic] cause which rendered the

[15] This is contained in TAB 13 of the Core Bundle.

performance of the contract impossible (commonly referred to as 'no fault' termination).' In essence, counsel contends that the phrase 'by no fault by either party' applies to an event that amounts to a frustration of the contract.

[45] The learned judge rejected counsel's argument and concluded that clause 7(3) was clear; that it deals with termination either for reasonable cause or by no fault of either party, and that 'this must mean termination without cause'.[16] In so finding he also rejected the argument advanced by counsel that a term was to be implied into the contract requiring the Bank to avoid doing anything which was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. In the event he dismissed the claim and awarded costs on the prescribed basis on the sum of $2,113,114.00 claimed by Mr. Williams as special damages, which the learned trial judge treated as the value of the claim for the purposes of making a costs award.

[46] On appeal, counsel for Mr. Williams, in the main engaged in a re-run of the arguments placed before the learned trial judge. The focal issue in this case is very simple. It is whether Mr. Williams was dismissed in accordance with the terms of the contract or, put another way, whether the agreement was terminated on a basis provided for in the agreement. No issue or principle relating to unfair dismissal arises. It is trite law that the court, even if it may consider a contract unfair may not take upon itself the task of re-writing the contract for the parties. Even where the terms are not otherwise clear, the court will seek to give effect to the parties' intention as discerned from a consideration of the agreement as a whole. Here, the parties expressly agreed under clause 7(3) two bases for termination by the Bank namely:

(a) with reasonable cause; or

(b) by no fault by either party.

In either case, the Bank was required either to give three months' notice in writing or alternatively, pay three months' salary in lieu thereof.

[16] See para. 10 of the trial judge's judgment.

[47] Interestingly, the agreement also contained a term by which Mr. Williams could earlier terminate his services to the Bank. This is contained in clause 7(4). It says in effect, that he could at any time after three months' service terminate the agreement by giving to the Bank three months' notice in writing or, on paying the Bank two months' salary.

[48] Further, the agreement contained a provision whereby the agreement may come to an end by reason of physical or mental incapacity not caused by the employee's own conduct. This is contained in clause 6. In such a case the Bank was required to pay to the employee, his salary up to the date of the employee's resignation on this basis, or up to the date of the issuance by a bank approved medical practitioner of a certificate of incapacity. In such circumstance there is was no liability on either side for either the giving of notice or for payment in lieu thereof. This may be contrasted with the termination obligations contained in clause 7(3) and (4).

[49] From all this I conclude that the agreement provided various bases on which the agreement may be brought to an end. I summarise them as follows:

(i) termination due to mental of physical incapacity under clause 6 in which event no notice or payment in lieu was triggered;

(ii) summary termination arising from the employee's misconduct under clause 7(1); which also does not trigger a notice period or payment in lieu by the Bank;

(iii) termination for reasonable cause under clause 7(3) which required the Bank to either give notice or make payment in lieu;

(iv) termination 'by no fault by either party' also under clause 7(3) which similarly triggered the obligation on the part of the Bank either to give notice or make payment in lieu; and

(v) termination by the employee by either giving three months' notice or by making payment to the Bank of a sum equivalent to two months' salary.

[50] There is no discord as to the bases set out under (i), (ii) and (v) above. Counsel argues that the provision 'by no fault by either party' refers to circumstances such as redundancy, incapacity and the like as referred to in paragraph 46 above. This phraseology can very well cover such grounds. But counsel's argument in my respectful view overlooks the following:

(a) that the eventuality of incapacity (which may well amount to a frustrating event) is already provided for under clause 6; and

(b) that circumstances such as redundancy, retrenchment, loss of business, or dissolution may equally be considered as reasonable cause under clause 7(3).

These are all events or causes, where there is 'no fault' which can be ascribed to either party. Put another way, although there is 'no fault' they are nevertheless 'causes' which are normally accepted as being reasonable causes for the termination of an employment agreement. The word 'fault' is not a term of art, and is not a defined term under the agreement. The word and the expression must accordingly be interpreted by according to them the ordinary meaning in which the words would be understood in the context of the agreement however inelegantly crafted.

[51] It has not been expressly argued (nor could it sensibly be), that the expression 'reasonable cause' and 'no fault by either party' share one and the same meaning. However, counsel's argument taken to its logical conclusion suggests this to be so, in which case, either the expression 'reasonable cause' or the expression 'by no fault by either party' would be superfluous and thus devoid of meaning. It is common ground however, that the agreement between the parties prior to the agreement which is the subject of this appeal, did not contain the expression 'by no fault by either party' and that this expression was specifically added into clause

7(3) of the agreement. Clearly, the parties, having executed the agreement with this expression, intended it to mean something different from 'reasonable cause' and to provide an additional basis for termination of the agreement distinctly different from the basis of reasonable cause. The word 'fault' connotes a 'failing' or 'cause' or 'reason'. The expression 'by no fault by either party' in my view can only be interpreted to mean 'without cause' or 'without reason'. Going a step further, if I thought it necessary, given all the eventualities for termination covered in the agreement, it begs the question: what else could the expression 'by no fault by either party' possibly mean in the context of the entire agreement. The eventuality left is termination 'without cause'. I am therefore in agreement with the finding made by the learned trial judge that the expression, in effect, means termination without cause.

[52] In my view the learned trial judge was also correct in his analysis of the Privy Council decision in Reda and Another v Flag Ltd.[17] and his application of it to this case. The fact that the expression 'without cause' was not used in the instant case (though use of that expression would have placed the matter beyond doubt, given the pronouncement in Reda v Flag), it does not take away from the fact that the expression used, in effect, means the same thing. Furthermore, in Reda v Flag their Lordships observed that 'a power to dismiss without cause is a power to dismiss for any cause or none.' (my emphasis). Similarly here, a power to dismiss for no fault is a power to dismiss for any fault or none. Counsel for the appellant concedes in his Skeleton Argument in Reply that where a contract of employment provides for termination on notice without more, it is, in effect, a contract terminable without cause.[18]

[53] The terms of the agreement, specifically, clause 7(3), are, in my view, quite clear and admit of no ambiguity which brings into play the *contra proferentem* rule. Similarly, there is no need for implying a term to give effect to the parties' intention.

[17] (2002) 61 WIR 118; [2002] UKPC 38.
[18] See Encyclopaedia of Forms and Precedents Vol. 14(1), Form 22.

Their intentions are clearly expressed and thus this leaves no room for implying a term of trust and confidence into the agreement.

Letter of termination ultra vires?

[54] Counsel also argued on appeal that the dismissal letter signed by the Managing Director of the Bank was *ultra vires* its powers as only the bank and not the board of directors of the Bank was given power under the agreement to dismiss. This argument is without merit, for the reasons given by the learned judge in paragraph 14 of his judgment, and with which I agree. Further, as counsel for the Bank submitted, it flies in the face of the Companies Act 1994[19] and the by-laws of the Bank (a corporate entity). Section 58 of the Companies Act 1994 and the by-laws of the bank give the power to the directors to exercise the powers of the company and manage its affairs.

[55] For these reasons alone I would dismiss the appeal. However, there is a further reason why this appeal should be dismissed. The letter of termination by the Bank specifically stated that termination was being effected pursuant to clause 7(3) 'without cause "by no fault by either party"'. Even though the letter stated 'without cause' it also expressly stated 'by no fault by either party' which is the exact expression agreed to by the parties and set out in clause 7(3). The fact that the Bank chose to interpret the expression 'by no fault by either party' to mean 'without cause' and so stated in the termination letter, does not take away from the fact that the expression stipulated in the agreement as an express basis for termination, was also stated in the letter. The Bank's expressed interpretation of the expression adds nothing to the point. Accordingly, the termination effected by the letter, was a termination in accordance with the terms of the agreement. There was no breach of the agreement and thus no wrongful dismissal. The trial judge was therefore correct in dismissing the claim. I would also dismiss this appeal for this additional reason.

[19] Act No. 21 of 1994, Laws of Dominica.

[56] For completeness, even though I have mentioned frustration in passing, I have not delved into this subject as I consider it wholly irrelevant for the purposes of this appeal. Also, having arrived at the conclusion that I have, it is unnecessary to consider the other grounds of appeal raised.

Conclusion and Order

[57] For the foregoing reasons I would dismiss this appeal and confirm the decision of the learned trial judge. I would also order that the appellant bears the costs of the respondent on this appeal fixed at two thirds of the prescribed costs ordered below pursuant to CPR 65.13.

Janice M. Pereira
Justice of Appeal

[58] MICHEL JA [AG.]: I have had the benefit of reading the judgments prepared by both Sir Hugh Rawlins CJ and Pereira JA and, like Pereira JA, I do not consider it necessary to repeat the facts of the case so well summarised by Rawlins CJ.

[59] I also do not consider it necessary to repeat the analysis made and the conclusions arrived at by Pereira JA which I find myself in agreement with.

[60] I would only add that, if counsel for the appellant is correct in his submission that termination of the contract of employment 'by no fault by either party' could only properly be effected for an event which rendered the performance of the contract impossible (such as redundancy, bank going out of business, employee becoming incapacitated or some unforeseeable cause which rendered the performance of the contract impossible) then it would not be, in any of these events, that the bank was terminating the employee's contract of employment by no fault of either party, but it would be that the employee's contract was terminated by the frustrating event through no fault of either party. There would be no need therefore to insert a clause in the contract for the bank to terminate the employee's contract through no fault of either party in a situation where the employee's contract was terminated not by a decision of the bank but by an event of frustration. It would also have

been inappropriate, incongruous even, to have located the termination of an employee's contract of employment because of a frustrating event rendering the performance of the contract impossible in the same clause as the bank's power to terminate the contract of employment for or with reasonable cause.

[61] I too would dismiss the appeal and confirm the decision of the learned trial judge and would order that the appellant pays the respondent's costs in accordance with CPR 65.13. In conclusion, therefore, the order on this appeal is that proposed by Pereira JA in paragraph 57 of this judgment.

Mario Michel
Justice of Appeal [Ag.]