[1]THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANGUILLA

Claim Number: AXAHCV2013/0079

Between

STARRY BENJAMIN

Claimant

And

CARIBBEAN COMMERCIAL BANK (ANGUILLA) LIMITED

Defendant

Before:
Justice Cheryl Mathurin

Appearances:

Mrs. Joyce Kentish-Egan, Ms. Tara Carter and Mr. Kerith Kentish for the Claimant
Ms.Keisha Spence and Ms. Navine Fleming for the Defendant.

2014: June 10th; July 14th ; October 3rd

JUDGMENT

[1] MATHURIN, J; On the 12th August 2013, the Eastern Caribbean Central Bank (ECCB) assumed control of the affairs of the Defendant Bank (CCB) acting pursuant to section 5B of the Eastern

Caribbean Central Bank Agreement Act (the Act). The Act states that when ECCB is of the view that the interests of depositors or creditors of a financial institution are being threatened or that the financial institution is likely to become unable to meet its obligations or it is not maintaining high standards of financial probity or sound business practice, it may exercise such powers. Further in order to assume control of the affairs of the financial institution, ECCB must be of the opinion that the financial system is in danger of disruption, substantial damage, injury or impairment as a result of the circumstances giving rise to the exercise of such powers. Where ECCB proposes to exercise these powers, a notification stating the property and undertaking that ECCB proposes to take over and the powers of control that ECCB proposes to exercise must be published in the Official Gazette. The said notification with respect to CCB was published in the Official Gazette of Anguilla on the 12th August 2013.

[2] Section 5 D of the Act states that;

> *"Where the Bank (ECCB) has under Article 5B assumed control of a financial institution, it may terminate or retain the services of any or all of the directors, officers and employees of the institution and the directors so retained shall manage the affairs of the institution subject however to any directions of the Bank."*

[3] On the 19th November 2013, the Claimant (Ms. Benjamin) filed a claim against CCB for a declaration that she was summarily dismissed without cause or notice and for a declaration that Article 5D of the Act did not supersede her Contract of Employment (the Contract). Ms. Benjamin states that on the 12th August 2013, she was summoned to meet with representatives of the ECCB and was presented with a letter from the Governor of ECCB which indicated that CCB was under conservatorship and all Directors were immediately terminated.

[4] Ms. Benjamin states that she was terminated from her position as Managing Director of CCB without notice and without cause on the 12th August 2013, which, she states is in breach of her Contract with CCB. The Contract was for a period of 3 years with the commencement date being the 1st May 2012. CCB admits in its defence that Ms. Benjamin's employment was terminated on the 12th August 2013.

[5] Counsel for the claimant submits that the relevant section of the Contract with reference to termination is Clause 16 which states as follows;

> *"Termination without Cause*
>
> *16. The Bank may terminate this Agreement without cause by giving the Managing Director three (3) months written notice. Upon termination, the Managing Director shall be entitled to all compensation and gratuity calculated for the term of the Agreement."*

[6] Pursuant to clause 16, Ms. Benjamin claims 3 months pay for failure of CCB to give her notice of termination, compensation for the unexpired balance of the employment contract and gratuity for the term of the Contract. She also claims outstanding vacation pay and relocation expenses as well as costs and interest.

[7] In response, CCB contends that the power to terminate under Article 5D of the Act supersedes the Contract, that clause 16 referred to above is a penalty clause and that the Contract was frustrated by the intervention of the ECCB.

The Effect of Article 5D

[8] CCB submits that there was implied into the Contract a term that the Contract could also be terminated by the ECCB without notice. In support of this submission, CCB relies on the business efficacy and officious bystander tests which determine whether or not a term can be implied into a contract based on the intention of the parties.

[9] CCB submits that the business efficacy test was explained by Bowen L.J. in The Moorcock (1886-90) All ER 53 where he stated as follows;

> *"In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each*

party promise in law as much, at all events as it must have been in the contemplation of both parties that he should be responsible for in respect to those perils or chances"

[10] Counsel also relies on the summarization by McKinnon LJ in Shirlaw v Southern Foundries (1939) 2 KB 206 at 277 of the officious bystander test where he stated;

"*Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!."*

[11] Counsel for CCB has asked that the court should imply into the Contract, a term that termination under Article 5D would end obligations by CCB to Ms. Benjamin under section 16 of the Contract for the following reasons;

(a) That the power to terminate conferred on ECCB cannot be taken away by contract
(b) That the intervention by ECCB would occur only when the institution is distressed and requires rehabilitation or restructuring
(c) All parties must be taken to be aware of the provisions of the Act
(d) If the parties were asked whether the contractual provisions were subject to the right of ECCB to terminate they would have said "Of course!"

[12] A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is if it is such a term that it can be confidently be said that if at the time the contract was being negotiated someone had said to the parties, "What will happen in such a case?", they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear".

[13] Whether a term will be implied is a question of law for the court. A term will not be implied so as to contradict any express term; and, in fact, a term ought not to be implied unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that there should be the suggested stipulation. Where a contract contains an express obligation by a party to the contract, it is for that party to show that there is some implied term which qualifies the obligation.

[14] The assumption of control of CCB and the termination of employees are both statutory powers of the ECCB so it may very well be that termination by ECCB can reasonably be implied into the Contract. I am not however persuaded that the premises on which CCB is asking the court to consider implying a term that a person can be dismissed without notice or in breach of the terms of a fixed term contract between the parties can assist CCB. Can the Court conclude that if Ms. Benjamin had discussed the possibility of ECCB control when negotiating the Contract, that she would have agreed to termination without notice and in breach of the Contract?

Paramountcy of Article 5D of the Act

[15] CCB posits that a financial institution cannot take steps to frustrate Article 5D of the Act. Counsel hypothesizes a situation where if on the eve of an anticipated intervention by the ECCB, the institution were to enter into contracts for a fixed term of years with several employees, that if ECCB were to terminate them and Article 5D does not supersede their contracts, then the institution would be obliged to pay out the employees for the balance of the fixed terms or keep them employed there at the annual cost to the institution which would in essence render the powers of the ECCB ineffective.

[16] I am not sure that this doomsday hypothesis represents realistically a position that an institution in the sort of difficulty that the Act envisages, would take. However, it seems to me that ECCB would have to deal with the contracts of CCB as it finds them in the absence of anything specific to the contrary. Further, Counsel may not have considered the question of whether contracts entered into under the particular circumstances envisaged by her, specifically to hamstring a pending assumption of control by ECCB, may very well be avoided on grounds of public policy.

[17] The issue of the paramountcy of Article 5D in my view is not in question. The pressing issue in this claim is whether Article 5D operates to negate the specific terms of the Contract with reference to termination.

Interpretation of Clause 16 of the Contract

[18] In considering the interpretation of Clause 16, I think it is also necessary to look at the other clauses providing for Termination under the Contract;

"*Termination for Cause*

"*14. The Bank may terminate for cause in accordance with the terms and conditions of the staff manual.*

15. If the Bank terminates for cause, they shall give the Managing Director thirty (30) days notice, the Managing Director shall be entitle to all compensation and gratuity accrued up to the date of termination.

Termination without Cause

16. The Bank may terminate this Agreement without cause by giving the Managing Director three (3) months written notice. Upon termination the Managing Director shall be entitled to all compensation and gratuity calculated for the term of the Agreement.

Resignation by Managing Director

17. If for any reason the Managing Director terminates the Agreement for reasons other than incapacity as set out in section 11, she shall give the Bank three (3) months written notice of such intention and upon resignation, the Bank shall pay all accrued compensation to the date of resignation and the gratuity calculated to the date of resignation."

[19] Counsel for CCB submits that the words "*for the term of the Agreement*" in the above clause means that if three months notice is given, then the term of the Agreement terminates upon the expiry of the notice and that the "*term of the Agreement*" would be from the date of the written notice to the end of the three month period. She states that it would make no commercial sense to provide for three months notice if in any event the employer would be liable to pay the entirety of the unearned salary to Ms. Benjamin. It is an attractive argument when considering the

commercial viability of such a term. However, bearing in mind that parties are free to negotiate terms of contracts and Ms. Benjamin's view of the contract it is necessary to examine its terms.

[20] In Reda & Anor v Flag Ltd(Bermuda) (2002) UKPC 38 the Privy Council rejected the argument that all contracts of employment are, as a matter of law, subject to an implied term that they are terminable on reasonable notice and that such a term can only be displaced only by clear words stating;

"The true rule, which is not confined to contracts of employment but applies to contracts generally, is that a contract which contains no express provision for its determination (emphasis provided) is generally (though not invariably) subject to an implied term that it is determinable by reasonable notice; see Chitty on Contracts (28th Ed.) at para 13-025. The implication is made as a matter of law as a necessary incident of a class of contract which would otherwise be incapable of being determined at all. Most contracts of employment are of indefinite duration and are accordingly terminable by reasonable notice in the absence of express provision to the contrary. Lefebvre v HOJ Industries Ltd was such a contract. But there is no need for the law to imply such a requirement in a case where the contract is for a fixed term. (my emphasis)"

[21] I note that the term of the Agreement is defined in Clause 1 of the Contract as for a period of three (3) years with an effective date of 1st May 2012. I do not agree that there is an alternative interpretation for the latter part of Clause 16 ie that "*Upon termination the Managing Director shall be entitled to all compensation and gratuity calculated for the term of the Agreement."* It has to be read with the terms of the Contract on a whole. It seemingly accords with a situation where the contract is brought to an end by CCB with no fault on the part of Ms. Benjamin. I agree with the application of the law by Hariprashad-Charles J; in Robelco Limited and Others v Svoboda Corporation and Others BVIHCV2007/0311 wherein she stated as follows at paragraph 38 of her judgment;

"In ascertaining the common intention of the parties, the following principles provide invaluable guidance, namely:

a. The "golden rule" is that the words used by the parties should be given their plain and natural meaning: …

b. *To arrive at the true interpretation of a document, a clause must not be considered in isolation but must be considered in the context of the whole of the document. In* ***Chamber Colliery Ltd v Twyerould****, Lord Watson said*

"I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible."

c. *The task of ascertaining the intention of the parties must be approached objectively: the question is not what one or the other of the parties meant or understood by the words used, but "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

d. *A contract should ordinarily be construed with regard to the circumstances which gave rise to it and the situation in which it is expected to take effect including the object or purpose of the contract…"*

[22] In applying these principles and in the absence of evidence to the contrary, I note the details of not only Clause 16 but also those that precede it. They are very specific as to when the Contract would end and what entitlements would accrue in relevant circumstances. CCB having drafted the Contract, had the facility and means, in my view to be specific as to whether the benefits referred to upon termination without cause of Ms. Benjamin would accrue only to the end of the three months notice. They did not.

[23] Alternatively, if I am wrong and the clause permits of an ambiguous interpretation, a long recognized rule of construction is that an ambiguous written instrument shall be construed against the person who made it; construction is contra preferentem. Ms. Benjamin in paragraph 13 of her witness statement states that CCB instructed legal counsel to draft the Contract. She was not cross-examined and neither was this statement refuted.

Frustration of the Contract

[24] CCB submits that as a result of the intervention by ECCB the functions of Ms. Benjamin left nothing for her to perform under the Contract and that because of the assumption of control by ECCB, the Contract was frustrated. CCB states that this means that the Contract cannot be said to have been terminated by a dismissal pursuant to a statute or contract of employment. CCB further states that as the termination occurred by operation of law independent of the Contract it gives Ms. Benjamin no right to damages.

[25] The test for frustration was restated by Lord Simon in National Carriers Ltd v Panalpina (Northern) Ltd (1981) AC 675; See Chitty on Contract (30th Ed.) at para. 25-013;

> *"Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."*

[26] Further, the case of Davis Contractors Ltd v Fareham Urban District Council (1956) 2 AER 145 referred to in Chitty on Contracts Volume 1; Paragraph 23-012 establishes that;

> *"Frustration occurs whenever the law recognizes that, without default of either party; a contractual obligation has become incapable of being performed because the circumstances in which performance is being called for would render it a thing radically different from that which was undertaken by the contract."*

[27] Can it be said then according to Counsel for CCB, that the event of ECCB intervening in the management and control of CCB significantly changed the nature of the contractual obligations to Ms. Benjamin? Counsel for the Claimant submits that this is not the case as ECCB had the discretion to retain the services of Ms. Benjamin and that the functions exercised by her under the Contract were still in existence at the time of her dismissal.

[28] It is significant in my view that CCB in seeking to rely on the doctrine of frustration states that when ECCB assumed control "*that as a result there was nothing left for the Claimant to perform under the Employment Contract, that her Contract of Employment was therefore inconsistent with the assumption of control by ECCB, and that as a result of it was frustrated."* Mr. Dinning was appointed and replaced Ms. Benjamin on 26th August 2013, two weeks after Ms. Benjamin was terminated. This persuades me, in the absence of anything to the contrary, that CCB cannot rely on the assumption of Ms. Benjamin's functions by Mr. Dinning as the frustrating event that led to her termination because at the time of her termination, those functions were still capable of being performed under the contract.

Damages or penalty clause

[29] Counsel for CCB states that Clause 16 is a penalty and relies on the principles enunciated by Lord Dunedin in Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited (1915) AC 79 where he stated that the essence of a penalty is a payment of money stipulated as in terrorem of the offending party, whereas the essence of liquidated damages is a genuine covenanted pre-estimate of damage. Lord Dunedin also stated that the question of whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each contract judged at the time of the making of the contract and not at the time of breach. To assist with construction he refers to various tests;

"a. It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach..

b. It will be held to be a penalty if the breach consists only in not paying a sum of money and the sum stipulated is a sum greater than the sum which ought to have been paid…

c. There is a presumption (but no more) that it is a penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all

of several events, some of which may occasion serious and others trifling damage…

d. *It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre- estimated damage was the true bargain between parties."*

[30] It does not assist that Counsel for CCB did not elaborate to show how this case assisted in finding that Clause 16 was a penalty. The burden is on CCB to show that Clause 16 is a penalty but no evidence has been offered in this regard. In Murray v Leisure Play (2005) IRLR 946 Lord Justice Clarke at paragraph 106 said:

> *"…It is not for the Claimants to justify the payment but for the Defendant to show that the payment is extravagant and unconscionable, and not a genuine pre-estimate of loss."*

CCB in submissions however states that Clause 16 cannot be a genuine pre-estimate of damages and further submits that "*If the Claimant was given three months notice on September 1, 2012, the Contract would terminate on December 1, 2012. To be entitled to salary until August 2015 would be out of all proportion to the damages likely to be suffered by the Claimant."*

[31] I note that CCB has given no evidence in relation to mitigation. Assuming that the issue of mitigation is relevant to this claim, the onus is also on CCB to show that Ms. Benjamin has not done so. What is reasonable for a person to do in mitigation of damages is not a question of law but rather a question of fact in the circumstances of each case. So even if it could be said that Ms. Benjamin was obliged to mitigate her loss, no evidence was adduced and no attempt was made through cross-examination to show that she had not done so. See Chitty on Contracts (op cit) paragraph 26-103;

> *"The onus of proof is on the defendant , who must show that the claimant ought, as a reasonable man, to have taken certain steps to mitigate his loss, and that the claimant could thereby have avoided some part of his loss."*

[32] I respectfully disagree with Counsel for CCB that the damages likely to be suffered by Ms. Benjamin would be limited to three months. The general principle in cases of wrongful dismissal is

that the measure of damages will be that which is necessary to put the injured party in the position he would have been in had the contract been duly performed. Where the injured party is engaged under a fixed term contract, the measure of damages will be the wages the injured party would have received during the unexpired portion of the fixed term.

Conclusion

[33] Having heard the evidence and considered the submissions and authorities of Counsel, I am not satisfied that CCB has shown that there was an implied term that qualified the obligations to Ms. Benjamin upon termination by ECCB and as such the claim that termination under Article 5D operates to extinguish all rights accruing to Ms Benjamin pursuant to her Contract. In the absence of a definition of termination under the ECCB Agreement Act, the Court will not readily imply such a qualification where the parties have entered into a carefully drafted written agreement containing detailed terms.

[34] I also agree with Counsel for the Claimant that there is no incompatibility between the discretion of the ECCB to terminate or retain employees of the distressed financial institution, and the lawful consequences of the decision to terminate Ms. Benjamin in accordance with the Contract. If the consequences of termination under the ECCB Agreement Act were meant to have such a negative impact on CCB's contractual obligations under the Contract, in my view, it is something that should have been either specifically legislated in the Act or provided for in the Contract.

[35] I find no reason to conclude other than that the second part of Clause 16 was to be read in conjunction with the first part and also that the clause on a whole meant anything other than what it states; ie that if the Contract was brought to an untimely end by CCB through no fault of Ms. Benjamin, she would be entitled to the outstanding balance of her contract and gratuity.

[36] It therefore follows that if Ms. Benjamin were terminated without cause, she would be entitled to what was stipulated in Clause 16 ie all compensation and gratuity calculated for the term of the Agreement. That Ms. Benjamin was wrongfully dismissed is also clear as ECCB terminated her services on a ground that was not disclosed or provided for in the Contract. So in my view, the

damages likely to be suffered by Ms. Benjamin upon her wrongful dismissal and in breach of the Contract would be all compensation and gratuity calculated for the term of the Agreement. I find this to be a genuine pre-estimate of her loss.

Interest

[37] *CPR Part 8 rules 8.6(4) and (5) are in the following terms:*

> *"(4) A claimant who is seeking interest must –*
>
> *(a) say so expressly in the claim form; and*
>
> *(b) include, in the claim form or statement of claim, details of the -*
>
> *(i) basis of entitlement;*
>
> *(ii) rate; and*
>
> *(iii) period for which it is claimed.*
>
> *(5) If the claim is for a specified sum of money, the total amount of interest claimed to the date of the claim and the daily rate at which interest will accrue after the date of the claim must be expressly stated in the claim form."*

[38] Ms Benjamin's statement of claim and claim form clearly make an express claim for interest, but equally clearly fail to comply with sub-rule 8.6(4)(b) and sub-rule 8.6(5). The Judgments Act of Anguilla R.S.A c. J10 of Anguilla provides that every judgment debt shall carry interest at the rate of 5% per annum from the time of the entering up of such judgment and such interest may be recovered in the same manner as the amount of such judgment. As such I therefore propose to award post judgment interest only.

[37] In conclusion, the Court makes the following declarations;

(a) That the termination of Ms. Benjamin is in breach of her contract of employment.

(b) That termination under Article 5D of Eastern Caribbean Central Bank Agreement Act does not supercede the provisions for termination under Ms. Benjamin's contract of employment with CCB.

And the Court orders;

(a) That Ms. Benjamin be paid compensation and gratuity in accordance with Clause 16 of the Contract together with all outstanding vacation pay and relocation expenses as stipulated in the Contract including a one way airline ticket to her place of residence calculable from the 12th August 2013.

(b) That CCB pay interest at the rate of 5% per annum until the judgment is satisfied.

(c) That CCB pay the prescribed costs of the claim.

Cheryl Mathurin

High Court Judge