THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP 2014/0009

BETWEEN:

CARIBBEAN COMMERCIAL BANK (ANGUILLA) LIMITED

Appellant

and

STARRY BENJAMIN

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Louise E. Blenman — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal

Appearances:

Mr. Emile Ferdinand QC, and with him, Ms. Kiesha Spence and Ms. Navine Fleming for the Appellant
Ms. Tara Carter and Mr. Kerith Kentish for the Respondent

2015: March 25.
Reasons for Decisions
delivered 23rd July 2015

Civil appeal – Summary Dismissal – Interpretation of Statute –Interpretation of Contract – Implied Terms – Penalty – Frustration of Contract

The respondent Ms. Starry Benjamin was an employee of the respondent, the Caribbean Commercial Bank (Anguilla) Limited (CCB) until 12th August 2013. The appellant is a licensed banking institution operating in the Island of Anguilla under the supervision of the Eastern Caribbean Central Bank ("the Central Bank") pursuant to the Eastern Caribbean Central Bank Agreement Act (ECCBA).

On 12th August 2013, the Central Bank took control of the CCB pursuant to emergency powers granted to the Central Bank under the provisions of the ECCBA. Those provisions

allowed the Central Bank to assume control of the affairs of the CCB having determined it was in a distressed state.

The respondent's employment was terminated without reason or compensation and the respondent brought proceedings seeking compensation based on the terms of the contract of employment.

On 19th November 2013, the respondent filed a claim against CCB for a declaration that she was summarily dismissed without cause or notice and compensation.

The appellant, admitted that the respondent's employment was terminated but denied the appellant was entitled to any compensation as the contract was nullified or frustrated by the Central Bank's termination of the contract pursuant to Article 5D of the ECCBA. The appellant also contended that clause 16 of the contract was in any event a penalty.
Judgment was granted in favor of the respondent. The court declared that;

(a) The termination of Ms. Benjamin (the respondent) is a breach of her contract of employment

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

The court accordingly ordered the appellant to pay compensation and gratuity in accordance with the contract; interest at 5% per annum and costs of the claim.

The appellant appealed.

Held: dismissing the appeal and awarding costs to the respondent that:

1. While Article 5D of the ECCBA gives to the Central Bank the power to terminate an employee, that power does not extend nor is it capable of being read to include a power to vitiate or render the terms of an employment contract, null and void upon such termination. The Central Bank, being creature of statute, is confined to the parameters of the statute and to go beyond such powers will be acting ultra vires.

2. Article 5D could not be implied into the Contract so as to permit the termination of the Contract with the effect of releasing CCB from all obligations thereunder. Neither the officious bystander test nor the business efficacy test would result in such an implied term.

3. When the Central Bank elected to terminate Ms. Benjamin the termination was in effect the action of the CCB and as such was a termination of the Contract. The Contract of employment was terminated pursuant to the power contained in article 16 of the Contract as the Central Bank, on exercise of its emergency powers assumed all rights and obligations of the CCB.

4. The phrase 'term of the agreement 'contained in article 16 was to be construed as found in clause 1 of the contract; "This agreement shall be for a period of three (3) years…" and not three months.

5. There was nothing unconscionable or disproportionate about clause 16 of the Contract to render it a penalty.

6. The Contract was not frustrated as there was no period when it may be said that the tasks of the respondent and Mr. Dinning (appointed Conservator) overlapped. As a matter of law a subsequent event cannot amount to frustration where the termination of the contract had already occurred. Mr. Dinning was hired after Ms. Benjamin's employment was already terminated.

JUDGMENT

[1] **PEREIRA, CJ:** On 25th March 2015 the court heard arguments on this appeal. At the end of that hearing the court was of the unanimous view that the appeal should be dismissed and dismissed the appeal. The parties consented to a costs order in the following terms: that the costs on the appeal shall be paid to the respondent, such costs to be agreed within 21 days or, failing agreement, the respondent to have prescribed costs fixed at two thirds of the prescribed costs on the claim in the court below. The Court promised to provide written reasons for its decision. We now do so.

[2] This appeal engages the construction of two instruments. One is the Eastern Caribbean Central Bank Agreement Act[1] ("the ECCBA") and the other is a contract of employment dated 29th August 2012 ("the Contract") between the appellant ("CCB") and the respondent ("Ms. Benjamin"). More specifically, it raises the issue as to whether Article 5D of the ECCBA which gives to the Eastern Caribbean Central Bank ("the Central Bank") the power to terminate employees of a financial institution where the Central Bank takes over the control and management of a distressed financial institution, nullifies the contractual obligations between the financial institution and an employee of that institution on the exercise by the

[1] Chapter E5, Revised Statutes of Anguilla.

Central Bank of the power to terminate an employee. The issue arises against the following background.

The Background

[3] (a) CCB is a licensed banking institution operating in the island of Anguilla and comes under the supervision of the Central Bank pursuant to the ECCBA. CCB's Managing Director until 12th August 2013 was Ms. Benjamin pursuant to the Contract, being a contract in writing, and which was stated to be for a fixed term of three years commencing as from 1st May 2012[2].

(b) On 12th August 2013, the Central Bank assumed control of the affairs of CCB having determined that it was in a distressed state. This was done under the emergency powers granted to the Central Bank under the provisions of the ECCBA.

(c) On the same day, representatives of the Central Bank summarily terminated Ms. Benjamin's employment with CCB. No reason was given for the termination although it was argued that by the appointment of one Mr. Dinning as Conservator, approximately some two weeks later, the role and functions of the Managing Director and that of the Conservator were incompatible with each other.

(d) CCB failed to pay any compensation to Ms. Benjamin on the termination of her employment.

(e) The Contract, among other clauses dealing with termination in various specified circumstances, stated in clause 16 as follows:

> "The Bank [CCB] 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."

[2] Under the heading "Term" the Contract stated: "This Agreement shall be for a period of three (3) years with an effective date of 1 May, 2012".

(f) Ms. Benjamin launched proceedings seeking, among various declarations, compensation to which she asserted she was entitled under the Contract. CCB contended that she was not so entitled having regard to the assumption of control of the bank (CCB) by the Central Bank who it says exercised the power of termination under Article 5D the ECCBA which, in effect, either nullified the Contract or frustrated it. Additionally, CCB argued that Clause 16 of the Contract was in any event a penalty.

(g) Article 5D of the ECCBA states as follows:

> "Where the Bank [the Central Bank] 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".

The decision of the Court below

[4] The learned trial judge gave judgment for Ms. Benjamin on her claim with prescribed costs against CCB. Her conclusions are succinctly summarized at paragraphs [33] to [37] of her written judgment delivered on 3rd October 2014. Importantly, she concluded, so far as relevant to this appeal, that:

(a) CCB failed to establish that a term was to be implied in the Contract which qualified the obligations of CCB to Ms. Benjamin on termination of the Contract by the Central Bank pursuant to Article 5D of the ECCBA. In essence, that Article 5D did not operate so as to extinguish all rights accruing to Ms. Benjamin under the Contract absent a clear provision in the ECCBA to this effect.

(b) The court would not readily imply a term into a contract which had been carefully drafted detailing the terms of the contract.

(c) There was no incompatibility between the discretion of the Central Bank 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 terms of the Contract.

(d) If the consequences of termination under the ECCBA were meant to have such a negative impact on CCB's contractual obligations under the Contract such must be either specifically legislated or provided for in the Contract.

(e) The Contract had been terminated pursuant to Clause 16 which provided for termination without cause (no other ground having been provided); that Clause16 means what it says, and that failure to pay the compensation stipulated in the said clause was in breach of the Contract.

(f) the compensation provided for under clause 16 of the Contract was not a penalty but was a genuine pre-estimate of the loss that Ms. Benjamin would suffer on such early termination of the Contract and that accordingly she was entitled to all compensation and gratuity calculated for the term of the Contract – in effect, the unexpired portion of the term of the Contract.

CCB's Appeal

[5] CCB sought by its appeal to set aside the entire decision of the trial judge and in its notice of appeal containing some twenty grounds, in which it has sought to detail the ways in which it says the learned trial judge erred, either in applying the principles of construction to the ECCBA and the Contract, or of her having regard to issues which it says were not before her. However, the grounds of appeal essentially boil down to a re-run of the essential issues which were before the learned judge for determination. They may be summarized as follows:

(1) Whether Article 5D of the ECCBA, is paramount to the Contract and more specifically whether the exercise of the power by the Central Bank to terminate pursuant to Article 5D has the effect of extinguishing CCB's contractual obligations under the Contract;

(2) Akin to issue (1), whether a term was to be implied to this effect into the Contract.

(3) Whether the phrase "term of the Agreement' as used in the Contract and specifically in Clause 16 should be construed as meaning the "period of notice" – that is three months as set out in Clause 16 of the Contract, for the purpose of calculating the compensation payable under the Contract .

(4) As a corollary of (3), whether Clause 16 operates as a penalty; and

(5) Whether the Contract was frustrated by the appointment of Mr. Dinning by the Central Bank as Conservator of CCB.

The principles of construction

[6] The four primary issues stated above involves in large measure a construction exercise. The legal principles engaged in such an exercise have been refined over the years and are well established. It is a trite principle of construction, whether interpreting a statute or a contract that words, unless specially defined, are to be given their natural and ordinary meaning. In relation to statutes the case of **Inco Europe Ltd v First Choice Distribution**[3] is instructive. There, Lord Nicholls had this to say:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross' admirable opuscule, Statutory Interpretation (3rd edn, 1995) pp 93–105. He comments (p 103):
>
> > 'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'

[3] [2000] 2 All ER 109.

> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation (see per Lord Diplock in Jones v Wrotham Park Settled Estates [1979] 1 All ER 286 at 289).[4]

[7] In relation to contracts, the principles to be applied in construing provisions in a contract were fairly recently restated by the UKSC in **Rainy Sky SA v Kookmin Bank**[5] and subsequently summarized by Gross LJ in the English Court of Appeal in **Al Sanea v Saad Investments Co Ltd.**[6] as follows:

> "(i) The ultimate aim of contractual construction is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The reasonable person is taken to have all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.
>
> (ii) The court has to start somewhere and the starting point is the wording used by the parties in the contract.
>
> (iii) It is not for the court to rewrite the parties' bargain. If the language is unambiguous, the court must apply it.
>
> (iv) Where a term of a contract is open to more than one interpretation, it is generally appropriate for the court to adopt the interpretation which is most consistent with business common sense. A court should always keep in mind the consequences of a particular construction and should be guided throughout by the context in which the contractual provision is located.

[4] Ibid at p. 115.
[5] [2010] EWCA Civ. 582.
[6] [2012] EWCA Civ. 313

(v) The contract is to be read as a whole and an "iterative process" (at 28) is called for ". . ....involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences."[7]

These principles were recently applied by this Court in **Kenneth Krys and Anr. (Liquidators of Value Discovery Partners LP) v New World Value Fund et al**[8]

[8] It is also useful, for reasons which will become clear later, to adopt some passages from the judgments of Lord Hoffman in **Attorney General of Belize and Others v Belize Telecom Ltd and Another**[9] and Lord Neuberger LJ in **Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd.**[10] In **Belize Telecom** Lord Hoffman said this:

> 'The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means.'

In **Skanska Rashleigh Weatherfoil,** Neuberger LJ said this:

> "…it seems to me right to emphasise that the surrounding circumstances and commercial common sense do not represent a licence to the court to re-write a contract merely because its terms seem somewhat unexpected, a little unreasonable, or not commercially very wise. The contract will contain the words the parties have chosen to use in order to identify their contractual rights and obligations. At least between them, they have control over the words they use and what they agree, and in that respect the words of the written contract are different from the surrounding circumstances or commercial common sense which the parties cannot control, at least to the same extent."

[9] With these principles in mind the issues raised in this appeal which calls for interpretation of the ECCBA and in particular Article 5D and the provisions of the Contract will be addressed. It is common ground that the Contract was the result of serious and careful negotiators on both sides. A useful staring point is with Article 5D of the ECCBA.

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[7] Ibid at para. 31.
[8] BVIHCMAP2013/0017 judgment delivered on 26th May 2014.
[9] [2009] 1 WLR 1988.
[10] [2006] EWCA Civ. 1732.

Article 5D- ECCBA – its paramountcy

[10] It is not in dispute that the entire tenor and scheme of the ECCBA is to allow the Central Bank to take control of financial institutions which are considered to be in a financially distressed state and to take such measures as may be necessary to stabilize that institution so as to avoid financial failure which can have severe repercussions not only for its depositors, and investors but also because the adverse rippling effect can spawn across those states of the Eastern Caribbean Currency Union with economically harmful results for the citizenry of the Union. Accordingly, the ECCBA seeks to put at the disposal of the Central Bank various emergency tools for this purpose. Thus there is power to assume management and control of a financial institution and to appoint a receiver and the like. It would also not be unusual to find in the ECCBA the power, in the Central Bank to decide whether employees of a distressed institution should remain employed by the institution or terminated as may be required by the Central Bank's rescuing efforts upon assumption of control.

[11] Article 5D of the ECCBA on its plain and ordinary reading clearly gives to the Central Bank the power to terminate or retain the services of directors and employees as the Central Bank may deem necessary. Article 5D is unambiguous. It is not suggested that a drafting error has occurred in the language used or that according the language of the Article its plain and ordinary meaning leads to an absurdity such that it compels the conclusion that the language used was not what the legislature intended. Indeed, in reality no issue as to the paramountcy of Article 5D in relation to the Contract arises. The respondent accepts, in our view rightly, that the Central Bank, having assumed control of the appellant in the circumstances described in the Gazette Notice was fully clothed with the power by virtue of Article 5D, to terminate employees and therefore could lawfully terminate the employment of the respondent. The real issue, as the learned judge found at paragraph 17 was not the paramountcy of Article 5D, (it being accepted as paramount) but rather whether the exercise of the paramount power to terminate the Contract was lawfully done by the Central Bank.

[12] It is clear, on a plain reading of Article 5D of the ECCBA that while it gives to the Central Bank the power to terminate an employee, that power does not extend nor is it capable of being read to include a power to vitiate or render the terms of an employment contract, null and void upon such termination. That the Central Bank having assumed control of CCB had the power to terminate an employee or a director cannot be disputed. That power is given in Article 5D. But Article 5D goes no further. It does not provide that upon the exercise of the power of termination that CCB, by virtue of the power exercised by the Central Bank standing, in its shoes, so to speak, is thereby released from all its obligations under an employment contract. No such language is contained in Article 5D and if such was to be the case then clear language to this effect would have been added or inserted in the provision. The Central Bank cannot exercise in respect of CBB or indeed any other financial institution powers which are beyond the remit given by the statute, in this case the ECCBA. The Central Bank being a creature of statute with various powers provided for by statute is confined in the exercise of its powers 'to *the four corners of the statute'*[11] If it goes beyond the powers contained in its enabling statute it will be acting ultra vires.

[13] It is not the function of the Court to legislate or to fill some convenient gap which, on hindsight, may be viewed by a party as being deficient, but rather to interpret the language that parliament has used to express its will. Where the language used is clear, the court must apply it. Furthermore, a reading of Article 5D in and of itself leads us to the irresistible conclusion that a termination of employment in a manner contrary to the terms of an employment contract was simply not what was contemplated or intended by Article 5D. Firstly, the power to terminate is discretionary. There is no automatic termination of employees or directors on the assumption of control by the Central Bank. The provision also expressly gives the power to retain the services of employees and directors. It is accepted that the employees whose services are retained continue on the same terms and conditions of their contracts. Accordingly it could not be seriously argued, as

[11] Llewellyn Smith v Antigua Port Authorities ANUHCV 2005/0105, (delivered 28th March 2007, unreported).

counsel for CCB sought to do, that an employee or director whose services are terminated could lawfully be terminated otherwise than in accordance with the terms of their contract. There is no rational basis for making such a distinction as between retained employees and those who are terminated. Article 5D does not provide for such a distinction. To the contrary, its language supports the view that retention or termination accords with the terms of the employment contract. Secondly, such a reading would collide with the laws of the land regulating labour relations such as the **Fair Labour Standards Act of Anguilla**[12], which governs, among other things, the bases and manner in which employees may be dismissed. No reference is made in Article 5D or any other provision of the ECCBA to the Fair Labour Standards Act. Indeed in order for Article 5D to have this far reaching effect, clear expressed language would have been employed, thereby removing any doubt as to its invalidating effect on employment contracts and the disapplication of the Fair Labour Standards Act. As counsel for Ms. Benjamin has pointed out, it is not unusual for Parliament to provide for how various statutes may interrelate with each other or the effect of certain contracts and their interrelation with a specific statute. By way of example, the Fair Labour Standards Act of Anguilla provides in section 3(2):

> 'Any provision in any agreement, … shall be void in so far as it purports to exclude or limit the operation of any provision of this Act."

Accordingly, if it was desired that all contracts of a financial institution were to be considered as being rendered null and void upon the assumption of control by the Central Bank under its emergency powers then the Legislature would have plainly and expressly so provided. The Legislature in enacting the ECCBA did no such thing and the court cannot and should not arrogate to itself the role of lawmaker in the face of plain and unambiguous language which on any view is perfectly sensible and viable both as to its meaning and its application. Accordingly, the learned trial judge was correct in holding that such a term which nullified the contractual provisions of the Contract would require being expressed in the ECCBA itself and also in the Contract.

[12] Chapter F15, Revised Statutes of Anguilla.

Implying a term

[14] This point can be dealt with fairly shortly. CCB argues that the learned judge either conflated the two tests for implying a term or utilized the business efficacy test rather than the "officious by-stander" test for implying into the Contract that Article 5D permitted termination of the Contract with the effect of releasing CCB from all obligations thereunder. In essence that the exercise of the power of termination rendered the Contract void and of no further legal effect. The learned judge rejected the argument that there was any basis shown for implying such a term into the Contract. In paragraph [10] of her judgment the learned judge set out the *"officious bystander test"* as formulated by McKinnon LJ in the celebrated case of **Shirlaw v Southern Foundries**[13] in these terms:

> *"*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.'
>
> Thus, 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.""".[14]

At paragraph [12] the learned judge opined as follows:

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

This formulation of the test is usually called the '*business efficacy'* test as expounded by Bowen LJ in the well-known case of **The Moorcock**[15] .

[15] This court in the case of **Blackburn v LIAT (1974) Ltd**[16] applied and adopted the test as formulated by the Privy Council in **Reda & Anor v Flag Ltd (Bermuda).**[17] in which the Privy Council stated that the test for implying a term is that of

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[13] (1939) 2 All ER 113.
[14] Ibid at p. 124.
[15] (1886-90) ALL ER 530.
[16] ANUHCVAP 2004/0031 (delivered 16th September 2008, unreported).
[17] (2002) 61 WIR 118

necessity: *" … the term sought to be implied must be one without which the whole transaction would become inefficacious, futile and absurd"*[18] In our view the test of necessity embodies both former formulations which are in reality two sides of the same coin: whether it be said that a term is to be implied because it is so obvious as to need not be expressed, or that without it the transaction would be devoid of efficacy. The purpose of the implication is to enable the viability of the transaction without which it would be rendered futile.

[16] At paragraph [14] the learned judge had this to say:

> "The assumption of control of CCB and the termination of employees are both statutory powers of the ECCB [the Central Bank] 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?"

[17] Whether it is said that the learned judge applied the '*business efficacy'* test rather than the '*officious bystander' test* or that she conflated them does not assist CCB. She was clearly of the view that no basis had been shown for implying a term into what was as between the willing and able parties 'a *carefully drafted written agreement containing detailed terms.'* In any event, were the court to apply either of the tests as urged by CCB the result would be no different. It certainly cannot not be said that if the *officious bystander* had said *"and if the ECCB takes control and terminates the Contract, CCB would be discharged from any obligations thereunder'* both parties would immediately reply *"Oh, of course."* It would more likely be met with a frown of incredulity. As regards the business efficacy test, it cannot be said that the Contract would lack business efficacy unless a term for termination without notice or contrary to the terms were not implied. Indeed the Contract provided in detail for the various methods of termination. Furthermore, to imply such a term as urged would run afoul of the expressed terms of the

[18] See dictum in Blackburn v LIAT, supra n. 16.

Contract. Such a course is not permissible and for good reason as it would be beyond doubt that the implication of such a term is wholly unnecessary and would be tantamount to altering the parties' bargain; also a course not open to the courts to adopt on the facts and circumstances of this case.

Clause 16 of the Contract

[18] Counsel for CCB urges that the Contract was not terminated pursuant to the power contained in Article 16 of the Contract but in essence was an exercise of the Central Bank's power acting pursuant to Article 5D of the ECCBA and thus could not be a breach of the Contract: in essence that the exercise of the power of termination by the Central Bank trumps contractual rights. This in our view is another version of the Article 5D paramountcy argument put another way. This proposition in the court's view is a startling proposition in light of the fact that Article 5D does not provide for the vitiation or nullification of contractual rights of CCB. While the Central Bank may not be said to be the agent of CBB, on the exercise of its emergency powers in relation to CCB it effectually stepped into the shoes of CCB and assumed all of CCB's rights and obligations. Put another way, the Central Bank's assumption of control and management of CCB does not thereby bring CCB's contractual rights or obligations with third parties to an end. It is simply that the Central Bank is empowered to exercise those rights and honour those obligations as effectively as if it was CCB. CCB did not cease to exist by virtue of the Central Bank's assumption of control and powers of management. Furthermore, such a proposition as urged by counsel would mean that upon the Central Bank's assumption of control, CCB's business of whatever kind grounded in contractual relations all came to an abrupt end as at 12th August, 2013. This would on any view be a disastrous consequence and one which is clearly not contemplated by the very purpose of the emergency powers in respect of a financial institution. The emergency powers from their tenor are designed to rescue the financial institution rather than bringing about its collapse.

[19] When the Central Bank elected to terminate Ms. Benjamin the termination was in effect the action of CCB and as such was a termination of the Contract. In as

much as no cause for termination was given, the termination can only be treated as a termination without cause as provided for under clause 16 of the Contract. Counsel's further argument on Clause 16 is that the phrase *"term of the agreement"* used in the second sentence of clause 16 should be construed to mean the term of the three months' notice period referred to in the first sentence of clause 16. Otherwise they say that the provision therein for three months' notice would serve no useful purpose and any other construction of clause 16 would be absurd. We do not agree. In our view and as found by the learned judge, Clause 16 is clear. It means what it says and the court must apply it. Where the Contract was to be terminated by CCB without cause it provided that three months' notice be given to Ms. Benjamin. It went on further to provide that on such termination Ms. Benjamin was entitled to all compensation and gratuity calculated for '*the term of the agreement'.* The term of the Contract is set out in Clause 1 and under the heading **"Term"** reads as follows:

> "This Agreement shall be for a period of three (3) years with an effective date of 1 May, 2012."

This means that the Term of the Contract was fixed for a period of three years and thus was to run as from 1st May 2012 to 30th April 2015 unless earlier determined by one of the methods specified in the Contract. The fact that CCB (by the Central Bank) did not give to Ms. Benjamin three month's written notice as required by clause 16 simply means as a matter of law that she must be compensated for those three months in lieu of the required notice period stipulated. This principle is now trite in employment law.[19] Compensation for '*the term of the agreement'* as stipulated under the second part of clause 16 simply means compensation for the unexpired portion of the term of the Contract. Had Ms. Benjamin been given three months' notice as required, the unexpired portion of *'the term of the agreement'* would begin to run as from the date of expiry of the three month notice period to the end of the term. However, no notice having been given, the unexpired portion of *'the term of the agreement'* for the purposes of calculation of compensation runs

[19] See: Selwyn's Law of Employment pp 417-419; See also Delaney v Staples (trading as De Montfort Recruitment) [1992] 1 AC 687.

from the date of termination namely from 12th August, 2013 and thus subsumes the compensation payable in lieu of notice. There is neither absurdity nor futility according clause 16 this meaning which is plain based on the language used. If the parties intended that *'term of the agreement'* was to be construed as the *'term of the three month notice period*' as urged by counsel for CCB, this could have easily been so stated. Further, there would have been no need to include the second part of Clause 16 as that purpose would have been achieved on the first part by merely providing for three months' notice without more.

[20] Quite apart from what has been stated above, if there was any doubt or ambiguity as to the meaning of clause 16, (which in our view there is not) then the learned judge was quite right to construe clause 16 in the context of the entire contract and to engage, as was said in **Rainy Sky,** in an iterative process of **'**checking each of the rival meanings against other provisions of the document and investigating its commercial consequences.' As the learned judge, having noted the clauses preceding clause 16, opined in paragraph [22] of her judgment: "… *They are very specific as to when the Contract would end and what entitlements would accrue in relevant circumstances.."* In our view the Contract provided a series of well calibrated circumstances and entitlements, each differing from the other, in relation to earlier termination of the Contract. For example, Clause 15 provided for termination for cause and in that circumstance CCB was entitled to give one (1) months' notice and the compensation and gratuity payable accrued up to '*the date of termination'.* This formula is different and the terminology used is different to the terminology used in clause 16 which provided for compensation and gratuity for *"the term of the agreement.'* Similarly clause 17, provides for termination by resignation. In that circumstance Ms. Benjamin was required to give to CCB three (3) months' notice and the compensation and gratuity payable to her by CCB was to be calculated up to *'the date of resignation'*. Again the terminology employed in clause 17 is different to that employed in Clause 16. Adopting such an iterative process leads inexorably to the conclusion that the parties were careful with the language employed and were careful to set out the basis of entitlement which each type of termination would attract. In our view the parties clearly provided for

the consequence of termination by CCB without cause to pay compensation to Ms. Benjamin equivalent to what she would have earned had the Contract run its course to the expiry of its stated term. There is nothing commercially unwise or insensible about such a provision and is quite commonly found in many contracts of employment of a managerial nature.

Is Clause 16 of the Contract a Penalty?

[21] CCB contends that clause 16 of the Contract ought to be viewed as a penalty clause having regard to the distressed circumstances of CCB. There is no assertion or evidence that at the time of entering into the Contract CCB was considered to be in a financially distressed state. CCB has helpfully in their skeleton arguments referred to a passage from the case of **Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company limited**[20] where Lord Dunedin stated and which we adopt as follows:

> "the question 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 particular contract, **judged of as at the time of the making of the contract, not as at the time of the breach"** (**emphasis added**).[21]

Also quite helpfully, CCB has set out a passage in their written submissions from the case of **Talal El Makdessi v Cavendish Square Holdings BV**[22] where Clarke LJ to the like effect as Lord Dunedin said that "The contract must be examined as a whole in the circumstances and context in which it was made". Accordingly, CCB cannot pray in aid its current distressed state as a circumstance which has not been shown to be prevailing at the time of the making of the Contract.

[22] The party asserting that a clause is a penalty has the burden of so proving.[23] A penalty is said to be a payment of money stipulated as '*in terrorem'* of the offending party; whereas liquidated damages is said to be a genuine covenanted

[20] [1915] AC 79.
[21] At p. 86-87.
[22] [2013] EWCA Civ.1539
[23] See: Tullett Prebon Group Limited v Ghaleb El- Hajjali [2008] EWHC 1924 (QB)

pre-estimate of damage.[24] At paragraph 71 of the his judgment, Clarke LJ in ***Talal El Makdessi*** usefully summarized the various principles to be used as guides in determining whether a sum is a penalty or a genuine pre estimate of damage culled from the authorities on the subject. We repeat them here:

> "(i) A sum will be penal if it is extravagant in amount in comparison with the maximum conceivable loss from the breach;
>
> (ii) A sum payable on the happening or non-happening of a particular event is not to be presumed to be penal simply because the fact that the event does or does not occur is the result of several breaches of varying severity;
>
> (iii) A sum payable in respect of different breaches of the same stipulation is not to be presumed to be penal because the effect of the breach may vary;
>
> (iv) The same applies in respect of breaches of different stipulations if the damage likely to arise from those breaches is the same in kind;
>
> (v) But a presumption may arise if the same sum is applicable to breaches of different stipulations which are different in kind;
>
> (vi) There is no presumption that a clause is penal because the damages for which it provides may, in certain circumstances, be larger than the actual loss; and
>
> (vii) Where there is a range of losses and the sum provided for is totally out of proportion to some of them the clause may be penal."

[23] CCB relies heavily on the 7th principle and after suggesting a scenario where the contract is terminated at say 31st August 2012 (just three months after it began) posits that under Clause 16 damages would be payable until 30th April 2015 (a period of 32 months) which it says is manifestly out of all proportion to the likely damages to be suffered by Ms. Benjamin. No reason has been put forward however as to why this would be manifestly disproportionate. Furthermore, it misses the point that Clause 16 relates to a termination actuated only by CCB and not Ms. Benjamin and thus if CCB elected to terminate so soon after entering the Contract for no cause then it must be taken to have done so in full appreciation of

[24] Ibid.

its own willingly agreed stipulation as to the consequence of such action. Lastly, the 7th principle does not assist CCB as here there is no range of losses being considered.

[24] In **Tullett,** the court at paragraph 26 had this to say:

> "The courts have been reluctant to interfere with the terms of a contract agreed between two parties well capable of protecting their respective commercial interests. One instance where at common law they will interfere with such a bargain however is where the contract contains a clause which is properly to be regarded as imposing a penalty for its breach rather than a genuine estimate of the loss likely to be sustained in the event of a breach.".

The question then is whether the compensation stipulated under Clause 16 is a genuine pre-estimate of the loss which Ms. Benjamin would suffer on an earlier termination of the Contract without cause. It is common ground that the Contract is one for a fixed term. Therefore, absent earlier termination Ms. Benjamin would have accrued all benefits due to her were the Contract to run its course until its expiry date. It follows that where the Contract is earlier terminated by CCB her loss would be the equivalent of what she would have obtained had it run its course to expiry in accordance with the term. This is precisely what Clause 16 seeks to do – that is compensate her for the loss she will have sustained due to earlier termination. This represents, having regard to the first principle, her maximum conceivable loss from the breach. In our view this is a genuine pre estimate of her loss which was specifically stipulated for by the parties. There is nothing either unconscionable or disproportionate about it which warrants it being treated as a penalty.

[25] In **Ingraham v Ruffincs Crstal Palace Hotel Corp Ltd.**[25] Osadebay, Sr. J put it this way:

> "The general principle governing the calculation of damages 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 as intended. Where the injured party is engaged under a fixed term contract the measure of damages will

[25] BS 2000 SC 18 Suit No. 808 of 1997(unreported).

be the wages the injured party would have received during the unexpired portion of the fixed term."

Malone J in **John Edwards v Grand Bahama Development Co. Ltd** [26] a decision of the Supreme Court of the Bahamas was of the same view.

Frustration of the Contract

[26] CCB argues that the appointment of Mr. Dinning following the Central Bank's assumption of control of CCB was a frustrating event. This they say is because as Conservator his role included those performed by the Managing Director and thus an inconsistency of roles existed. It is necessary to point out that Ms. Benjamin was terminated on the 12th August, being the date the Central Bank assumed control. Mr. Dinning was not appointed Conservator until approximately some two weeks later on 26th August, 2013. Thus there is no period when it may be said that the tasks Ms. Benjamin and Mr. Dinning performed overlapped. Reliance is placed on the case of **Griffiths** v **Secretary of State for Social Services**[27] which is referred to here only for this reason. The **Griffiths** case deals with circumstances where there may be said to be automatic termination where it is found as fact an inconsistency of roles. It is highly questionable in the circumstances of this case whether it could be found as a fact that the roles of Ms. Benjamin and those of Mr. Dinning were inconsistent as Ms. Benjamin was already terminated some two weeks prior to Mr. Dinning's appointment. In **Griffiths,** Lawson J was addressing the circumstances in which it may be said that the appointment of a receiver and manager not by order of the court but by debenture holders may amount to automatic termination of all contracts of employment previously made and subsisting between the relevant company and all its employees. The third circumstance or situation is relied on by CCB to ground its argument in frustration. Lawson J said as follows at page 486:

> "The Third situation … is where… the continuation of employment of the particular employee is inconsistent with the role and functions of a receiver and manager. …. So my conclusion is that unless such an

[26] Common Law Action No. 48 of 1979.
[27] [1974] Q.B. 468.

> inconsistency of roles be found, as a matter of fact, then one is not concerned with the termination of a subsisting contract of employment as of the date when the receiver and manager is appointed because it is right to assume that, in the absence of a finding of inconsistency of roles, the old contract of employment continued notwithstanding the appointment of the receiver and manager."

[27] In CCB's skeleton arguments[28] it is stated that Lawson J stated the relevant test as to whether a contract is discharged by frustration. With utmost respect to counsel however, the court has been unable to discern anywhere in the judgment of Lawson J that he was considering or discussing the law of frustration. Rather, he was discussing circumstances where it may be said that a contract of employment may have terminated automatically as a matter of law. Indeed there is no reference or suggestion by Lawson J that automatic termination equates to frustration of a contract of employment. Frustration of a contract and automatic termination of a contract of employment are mutually exclusive concepts. Frustration results in mutual discharge of the parties' obligations. Automatic termination does not. It could be the case that a frustrating event brings about the automatic termination of a contract, but not all contracts which are automatically terminated may be considered as having been frustrated. This authority does not assist CCB's case in seeking to show that the Contract was frustrated.

[28] In any event the issue of automatic termination is not engaged here because, as Counsel for Ms. Benjamin has pointed out, Article D of the ECCBA does not provide for automatic termination. Rather the Central Bank has a discretionary power whether to terminate or not.

[29] In **Davis Contractors Ltd. v Farham Urban District Council**[29] the classical principle of frustration is stated thus:

> "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

[28] Para. 44 Appellant's submissions.
[29] [1956] AC 696 @ pg. 729.

called for would render it a thing radically different from that which was undertaken by the contract." (Emphasis added)

The circumstances of this case are clearly inapplicable to this principle for these reasons:

(a) Firstly, the Central Bank had a discretion and thus could elect whether or not to terminate the Contract. Article 5D of the ECCBA clearly gave the power to the Central Bank on the assumption of control to manage the affairs of CCB. Any directors of CCB including the Managing Director would have become subject to the directions of the Central Bank. Thus the Managing Director would also have been subject to the control of the Central Bank. There is nothing to suggest that the Managing Director's tasks and functions were not still in existence and to be performed upon the assumption of control. A party to a contract may not elect to terminate a contract and then pray in aid of its election the doctrine of frustration. As succinctly stated by counsel for Ms. Benjamin, the very essence of frustration is that it should not be due to the act or election of the party seeking to rely on it.[30]

(b) Secondly, counsel for CCB states that the appointment of Mr. Dinning whose role and function they say created an inconsistency with the role and function of the Manager, amounted to a frustrating event. But this simply does not follow as a matter of law as Mr. Dinning's appointment post-dated the termination of Ms. Benjamin. A subsequent event cannot amount to frustration where the termination of the contract has already occurred. Simply put, the frustrating event must be the event which brings about the end of the contract and not the other way around. Accordingly, no basis exists or has been established by CBB for relying on the doctrine of frustration.

[30] Chitty on Contracts Vol. 1 paras. 23-061

Conclusion

[30] For the foregoing reasons, the appeal was dismissed. The Court is grateful to the parties for their assistance.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal