THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANULTAP2015/0005

BETWEEN

SUNDRY WORKERS

Appellants/Employees

and

ANTIGUA COMMERCIAL BANK LTD.

Respondent/Employer

Before

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Justin L. Simon, QC with him, Mr. Quamie Simon for the Appellants
Ms. C. Kamilah Roberts for the Respondent

2016: March 15;
2017: January 17.

Civil appeal – Contract – Plea of non est factum – Alteration in salary scales in collective agreement after agreement in principle signed –Whether union exercised reasonable care to ensure collective agreement was in a form satisfactory to them before signing it – Whether union bound by new scales in collective agreement

The appellants, employees of the Antigua Commercial Bank ("the bank"), were engaged in negotiations with representatives of the Bank for a new collective agreement covering the period 2005 to 2008 ("the Collective Agreement"). These negotiations were done through the Antigua and Barbuda Workers Union ("the Union"), the appellants' sole bargaining agent for dealing with the Bank. The negotiations led to the signing of a one page agreement on 6th November 2009 containing the salary scales for various categories of employees of the Bank ("the Agreement in Principle"). The first draft of the Collective Agreement was prepared by the Bank and forwarded to the Union on 11th November 2009. The appendices of the draft of the Collective Agreement included Appendix 1(c) which was in the same terms as the Agreement in Principle.

Representatives of the Union and the Bank engaged in further negotiations to finalise the terms of the Collective Agreement and on 19th November 2009 they signed the Collective Agreement. However, the Union later discovered that the salary scales in Appendix 1(c) had been changed from those that had been agreed in the Agreement in Principle and that the new scales in the revised Appendix 1(c) were less advantageous to the employees.

On 18th January 2010, the Union applied to the Industrial Court of Antigua and Barbuda to vary the terms of the Collective Agreement so that Appendix 1(c) would be replaced with the salary scales from the Agreement in Principle. The Industrial Court dismissed the application. The Union appealed this decision.

The appellants essentially plead non est factum and their position is that even though the Collective Agreement was signed by their representatives they should not be bound by Appendix 1(c) of the Agreement because the changes had not been not discussed with the representatives and they were unaware of them. The Bank's position is that after it received the draft Collective Agreement the further negotiations included discussions about the salary scales and Appendix 1 (c) was revised to reflect the new scales.

Held: dismissing the appeal, that:

1. The burden of establishing a plea of non est factum, including the fact that the signer took care, is on the person who is asking the court to be released from the consequences of signing an important document. The appellants had to prove that there was a radical or fundamental difference between the document that was signed and the document that they thought they were signing. Apart from the changes to Appendix 1(c), the document that was signed by the Union is the document that the Union intended to sign and it was the Union's intention to sign the document. The fact that there were changes to Appendix 1(c) falls far short of the fundamental difference between the two forms of a document that is required to ground a plea of non est factum.

   Saunders (Executrix of the Will of Rose Maud Galli`e, deceased) v Anglia Building Society (on appeal from Gallie v Lee) [1971] AC 1004 applied.

2. The Industrial Court was correct in not finding that there were no discussions regarding the salary scales after the Agreement in Principle was signed. The proper inference from the evidence is that such discussions did take place.

   Section 33 of the Eastern Caribbean Supreme Court Act Cap. 143, Revised Laws of Antigua and Barbuda 1992 applied.

3. The Industrial Court's rejection of the plea of non est factum was based on its findings of fact from the evidence and the proper application of the legal principles to those findings. There is no basis for this Court to interfere with the Industrial Court's decision.

JUDGMENT

[1] WEBSTER JA [AG.]: The appellants are employees of the Antigua Commercial Bank, a commercial bank operating in Antigua and Barbuda ("the Bank"). The appellants' sole bargaining agent for dealing with the Bank is the Antigua and Barbuda Workers Union ("the Union"). On 18th January 2010, the employees applied to the Industrial Court of Antigua and Barbuda ('the Industrial Court") to vary the terms of a collective agreement between the Bank and the Union (on behalf of the employees of the Bank). The Industrial Court dismissed the application. This is an appeal against the decision of the Industrial Court.

Background

[2] During the period leading up to November 2009 representatives of the Bank and the Union were engaged in negotiations for a new collective agreement between the Bank and the Union covering the period 2005 to 2008 ("the Collective Agreement"). The negotiations led to the signing of a one page agreement in principle on 6th November 2009 containing the salary scales for various categories of employees of the Bank ("the Agreement in Principle"). The scales in the Agreement in Principle were to be included in the Collective Agreement.

[3] The first draft of the Collective Agreement was prepared by the Bank and forwarded to the Union on 11th November 2009. The draft of the Collective Agreement comprised 24 pages divided into 24 articles and three appendices. The appendices included Appendix 1(c) which was in the same terms as the Agreement in Principle. The parties then engaged in further negotiations to finalise the terms of the Collective Agreement. The lead negotiator for the Union was Honourable Chester Hughes. He was supported by shop stewards Leonart Matthias and Thomas Greenaway. The lead negotiator for the Bank was Dr. Austin Josiah.

[4] On 19th November 2009, the Union was invited to a meeting at the Bank to sign the Collective Agreement. The representatives of the Union were presented

with the finalised Collective Agreement at the meeting. It was signed by the representatives of the Union and the Bank and the negotiations appeared to have been completed. However, the Union later discovered that the salary scales in Appendix 1(c) had been changed from those that had been agreed in the Agreement in Principle on 6th November 2009, and that the new scales in the revised Appendix 1(c) were less advantageous to the employees.

[5] It is at this stage that the cases for the two sides diverge. The Union's position is that the negotiations were limited to six points that its representatives had raised in correspondence with the Bank after it received the draft Collective Agreement. None of the six points relate to the salary scales. The representatives were unaware of the changes to the salary scales when they signed the Collective Agreement and they should not be held to the Agreement in that form. The original salary scales in the Agreement in Principle should replace the scales in the Collective Agreement. On becoming aware of the changes the representatives contacted Dr. Josiah who was overseas at the time. On 2nd December 2009, Dr. Josiah met with the representatives. Following the meeting he issued a memorandum "For the Record" to the representatives in which he told them that based on the position that they had taken he would recommend to the Bank that it return to the original salary scales as a gesture of goodwill and with the intention of working together to solve matters, but not as an amendment to the Collective Agreement.

[6] The Bank's position is that after it received the draft Collective Agreement the negotiations went beyond the six points raised in correspondence and included discussions about the salary scales. In fact the Bank asserts that agreement was reached on the new salary scales and Appendix 1(c) was revised to reflect the new scales and incorporated into the Collective Agreement.

[7] On 8th December 2009, the Collective Agreement was registered with the Labour Department in accordance with section K25(2) of the Antigua and Barbuda Labour Code[1] and by section K27 of the Code it became "…a legally

[1] Cap. 27, Revised Laws of Antigua and Barbuda 1992.

enforceable contract to the extent that the parties intended it to be enforceable..."

Proceedings in the Industrial Court

[8] The Union commenced proceedings in the Industrial Court on 18th January 2010 by a reference asking the Court to replace Appendix 1(c) in the Collective Agreement with the salary scales that were agreed in principle on 6th November 2009 because the new scales were not discussed and agreed with the representatives of the Union. Therefore, the Union should not be bound by Appendix 1(c) of the Agreement even though the Agreement had been signed by the representatives of the Union. This was in substance a plea of non est factum and treated as such by the Industrial Court. In a written judgment dated 12th April 2015, the court rejected the plea and found that the Collective Agreement was valid and binding. The Union appealed against the decision of the Industrial Court.

The Appeal

[9] The appellants listed six grounds of appeal in their notice of appeal which, with no disrespect, I have taken the liberty to group as follows:

> Grounds 1 and 2 – The Industrial Court erred in failing to find that there were no further negotiations between the parties regarding the salary scales to be inserted into the Collective Agreement after the Agreement in Principle was signed on 6th November 2009 and should have found that the negotiations after the signing of the Agreement in Principle were only in respect of other issues and discrepancies in the draft Collective Agreement that had been brought to the attention of the Bank's representatives prior to the signing of the final Agreement.
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> Grounds 3 and 5 – The Industrial Court should have found that in all the circumstances, including the nature of the negotiations which were progressing incrementally, that the Union's representatives had taken reasonable care and their failure to read the new Collective

Agreement before signing it on 19th November 2009 was not fatal for want of care on the part of the Union.

Grounds 4 and 6 – The Bank's failure to alert the representatives of the Union to the changes in the new Collective Agreement was contrary to the principles and practices of good industrial relations. Such conduct by the Bank also displayed a failure to negotiate in good faith and conscience and deliberately took advantage of the trust and good practice of the Union representing its members against the might of the Bank.

Grounds 1 and 2

[10] The issue in grounds 1 and 2 is whether the representatives of the Union and the Bank discussed the salary scales after the Agreement in Principle was signed. I will describe this as "the narrow issue". It forms a part of the wider issue that was before the Industrial Court of whether the salary scales were negotiated and agreed by the parties before the Collective Agreement was signed ("the wider issue"). The narrow issue was not a discrete issue that the Industrial Court was called upon to resolve. The importance of the narrow issue is that a finding that discussions or negotiations relating to the salary scales took place between the parties before the Collective Agreement was signed would have a negative impact on the appellants' plea of non est factum, whether or not the discussions resulted in an agreement. The mere fact that there were discussions would have increased the burden on the appellants to prove that the representatives of the Union were unaware of the changes to the salary scales, or that they did not need to verify the accuracy of the scales before they signed the Collective Agreement. Therefore, the appellants were anxious to satisfy the Industrial Court that there were no discussions about salary scales after the Agreement in Principle was signed, and, in any event, to satisfy this Court that the Industrial Court erred in not finding that there were no such discussions.

[11] The competing positions of the parties on the wider issue are set out in paragraphs 5 and 6 above. The Industrial Court dealt with the competing

positions at paragraphs 27 to 34 of the judgment and found at paragraphs 28 – 30 that :

> "28. It appears from the evidence that further discussions between the parties did occur after the agreement in principle was signed. What the Court has to determine is whether or not these discussions included an agreed amendment to the salary scales.
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> 29. The Court is inclined to believe that the Union, at some stage after the signing of the agreement in principle, became aware that a change had been made to the salary scales. Dr. Josiah's evidence is that on the day of the signing of the agreement, one of the shop stewards present attempted to bring the 'offending' appendix to the attention of the Union negotiator, the Honourable Chester Hughes, but he dismissed the attempt. This was not refuted by the Union. [Original emphasis]
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> 30. The evidence therefore suggests that a representative of the Union was aware of an amendment to The Appendix and attempted to have the matter addressed before the signing. This does not, however, mean that any change/amendment to The Appendix was negotiated. The Union insists that a change to The Appendix agreed in principle was not negotiated; the Bank insists that a change was negotiated after the signing of the agreement in principle."

I note from these paragraphs of the judgment that the Industrial Court found as a fact that the Union was aware that a change had been made to the salary scales.

[12] The Industrial Court then referred to the celebrated decision of the House of Lords in Saunders (Executrix of the Will of Rose Maud Gallie, deceased) v Anglia Building Society (on appeal from Gallie v Lee)[2] and noted that the burden of proof was on the appellants to prove all the circumstances necessary to establish the plea of non est factum. In my opinion this burden includes proving that the negotiations that took place after the Agreement in Principle was signed did not include discussions about the salary scales. The Industrial Court's finding in paragraphs 29 and 30 of the judgment that the Union and/or one of its representatives was aware that a change had been made to the salary scales suggests that there may very well have been discussions regarding the salary scales, and that the appellants had not discharged the

[2] [1971] AC 1004.

burden of proving to the Industrial Court that there were no discussions about the salary scales. In the circumstances, the Industrial Court did not err in not finding that there were no discussions about the salary scales. This is sufficient to dispose of grounds 1 and 2 of the appeal but I will deal with another aspect of what transpired between the parties after the Agreement in Principle was signed.

[13] The Industrial Court's finding that the Union was aware that a change had been made to the salary scales is amply supported by the evidence. In paragraph 9 of the witness statement of Honourable Chester Hughes he said:

> "On Sunday 15th November Dr. Josiah called the ABWU and ask [sic] for us to separate the supervisory scale from the line staff in the table. I asked him to send us a copy of the change. He did not. At no time did I or any officer signed [sic] off or agreed [sic] on any further changes to the table."

Mr. Leonart Matthias said at paragraph 13 of his witness statement that during a meeting with Dr Josiah on 2nd December 2009:

> "Dr. Josiah said that he had telephoned Chester Hughes and that they had agreed to make the change. Mr. Hughes replied that the changes he concurred with were regarding the S1 and NS1."

Finally, there is the finding in paragraph 29 of the Industrial Court's judgment that is set out in paragraph 11 above that the shop steward attempted to direct Mr. Hughes' attention to the disputed appendix, but Mr. Hughes dismissed the attempt.

[14] The essence of grounds 1 and 2 is that the appellants have asked this Court to find that the Industrial Court erred by not finding that there were no further negotiations between the parties regarding the salary scales after the Agreement in Principle was signed on 6th November 2009. The Industrial Court's finding that the Union was aware that a change had been made to the salary scales, supported by the evidence referred to in the preceding paragraph, suggests that the Industrial Court was satisfied that there was some discussion about the salary scales, although they did not make a specific finding on this discrete issue. In the circumstances, and relying on section 33

of the Eastern Caribbean Supreme Court Act[3] which gives this Court the power to draw inferences of fact in hearing appeals in civil matters, I find that there were discussions between the parties regarding the salary scales after the Agreement in Principle was signed. This finding is an additional reason for rejecting grounds 1 and 2 of the notice of appeal.

[15] In my opinion grounds 1 and 2 should be dismissed on the two bases outlined above, namely: the failure of the appellants to prove that the Industrial Court erred in not finding that discussions did not take place regarding salary scales after the Agreement in Principle was signed; and the positive finding by this Court that such discussions did take place. In either case grounds 1 and 2 of the appeal fail.

Grounds 3 and 5 – Non est factum

[16] The background to the signing of the new collective agreement on 19th November 2009 is set out in paragraphs 2-7 above. The Collective Agreement was signed by four representatives of the Union. On the appellants' case none of the four representatives paid any attention to Appendix 1(c) before signing the Agreement, but nevertheless the Industrial Court should release them from the Agreement in a limited way by deleting Appendix 1(c) and substituting the salary scales in the Agreement in Principle. This was essentially a plea of non est factum. The Industrial Court rejected the plea.

[17] I have already made the point that the burden of establishing a plea of non est factum, including the fact that the signer took care, is on the person who is asking the court to be released from the consequences of signing an important document, and that this principle was recognised and applied by the Industrial Court.[4]

[18] Mr. Justin Simon, QC, who appeared for the appellants submitted that the representatives of the Union were not negligent in signing the Collective

[3] Cap. 143, Revised Laws of Antigua and Barbuda 1992.
[4] See paragraph 12 above.

Agreement without reviewing it in detail because the negotiations after the signing of the Agreement in Principle did not include discussions about the salary scales, the Union had a long relationship with the Bank and could rely on the Bank's representatives not to change the terms of the documents, and the Bank's representatives did not direct the Union's representatives to the changes prior to the signing.

[19] Ms. C. Kamilah Roberts who appeared for the Bank, submitted that the appellants had failed to produce evidence to discharge the heavy burden that was theirs to satisfy the Industrial Court that they should be released from the Agreement that the Union had entered into on their behalf. Further, that the Industrial Court rejected the plea of non est factum on the basis of findings on fact and, on the usual principles relating to how an appellate court deals with findings of fact by a trial court,[5] this Court should not interfere with those findings.

[20] Ms. Roberts also relied on the House of Lords decision Saunders (Executrix of the Will of Rose Maud Galle, deceased) v Anglia Building Society[6] and submitted that to succeed on a plea of non est factum, the appellants had to satisfy the Industrial Court that:

(a) notwithstanding the failure of the Union's representatives to read the collective agreement completely before signing they exercised reasonable care in all the circumstances and the court should release them from the strict terms of the document; and

(b) that there was a radical or fundamental difference between the document that they signed and the document that they thought they were signing.

[21] The Industrial Court considered the issue of the Union's failure to read the agreement before signing it at paragraphs 35 to 42 of the judgment. The Court

[5] See for example the comments of Chief Justice Rawlins in Golfview Development Ltd. v St Kitts Development Corporation and Michael Simanac – St Kitts and Nevis Civil Appeal No 17 of 2004 at para. 24.

[6] Supra note 2.

relied on the statements of Viscount Dilhorne in Saunders v Anglia Building Society[7] that-

> "It is, I think, clearly established that the plea of non est factum cannot succeed if the signer of the document has been careless."

and that -

> "In every case the person who signs the document must exercise reasonable care, and what amounts to reasonable care will depend on the circumstances of the case and the nature of the document which it is thought is being signed. It is reasonable to expect that more care should be exercised if the document is thought to be of an important character than if it is not."

The Industrial Court then applied the law to the facts of the appellants' case and found that it was not reasonable for the Union's representatives to have assumed at the signing of the Collective Agreement that Appendix 1(c) was in the same form as they had agreed on 6th November 2009. In coming to this conclusion the court made the following findings of fact:

(a) The salary scales were the focus of the negotiations and a critical component of the collective agreement;[8]

(b) The Collective Agreement was itself an important document;[9]

(c) The representatives had the opportunity to read the Agreement before signing it;[10]

(d) The Union's representatives should not have assumed that the only changes to the document were those that were discussed after the Agreement in Principle.[11]

Two other factors, though not mentioned by the Industrial Court in this context, are relevant to the Industrial Court's finding. Firstly, the court's finding when dealing with the wider issue that one of the shop stewards was aware of the amendment to the appendix and tried, without success, to direct Mr. Hughes'

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[7] At p.1023
[8] Para. 40 of the lower court judgment.
[9] Para. 40 of the lower court judgment.
[10] Para. 39 of the lower court judgment.
[11] Para. 36 of the lower court judgment.

attention to the change before the agreement was signed. Secondly, this Court's findings in relation to grounds 1 and 2 that the appellants have failed to prove that the Industrial Court erred in not finding that there were no discussions about the salary scales after the Agreement in Principle was signed, and the further positive finding that there were discussions about the new scales before the Collective Agreement was signed. These findings, combined with the Court's other findings listed in the preceding paragraph, lead ineluctably to the conclusion that the Union did not exercise reasonable care to ensure that the Collective Agreement, including Appendix 1(c), was in a form that was satisfactory to the Union before they signed it.

[22] The other principle that the appellants must satisfy to succeed on a plea of non est factum is that there was a radical or fundamental difference between the document that the Union signed and the document that they thought they were signing. In the words of Viscount Dilhorne in Saunders v Anglia Building Society –

> "The difference must be such that the document signed is entirely or fundamentally different from that which it was thought to be, so that it was never the signer's intention to execute the document."[12]

I do not think any of the two principles contemplated by Viscount Dilhorne apply in this case. Apart from the changes to Appendix 1(c) the document that was signed by the Union is the document that the Union intended to sign – the Collective Agreement for the employees of the Bank, and it was the Union's intention to sign the document. The fact that there were changes to Appendix 1(c) falls far short of the fundamental difference between the two forms of a document that is required to ground a plea of non est factum. The obligation that the Union was under in signing the collective agreement is admirably summed up by the Industrial Court in the penultimate paragraph of the judgment -

> "It is the Court's conclusion that the Union, given its critical role as the sole bargaining agent of the employees of the Employer, a large financial institution on the island, had a responsibility to ensure that it signed a collective bargaining agreement which was in keeping with the terms and conditions it had negotiated. The Court finds that the

[12] Ibid at p. 1022.

> Bank is correct in its argument against the application of the *non est factum* doctrine. The Union is bound by the Agreement that it had signed and which was subsequently certified by the Labour Commissioner."

[23] In all the circumstances I find that the Industrial Court's rejection of the plea of non est factum was based on its findings of fact from the evidence and the proper application of the legal principles to those findings. There is no basis for this court to interfere with the Industrial Court's rejection of the plea of non est factum.

Grounds 4 and 6

[24] Grounds 4 and 6 are without merit. In ground 4 the appellants complain that the Bank's conduct in altering the agreed salary scales and not drawing the Union's attention to the changes is contrary to the practices of good industrial relations. The onus of proving this allegation was on the appellants and they failed to do so. The Industrial Court accepted and relied on evidence that representatives of the Union were aware that Appendix 1(c) had been changed and that one of the shop stewards attempted to direct Mr. Hughes' attention to the disputed appendix before the Collective Agreement was signed.[13] The Bank's evidence went further to assert that the parties had agreed on new salary scales and this position was not rejected by the Industrial Court. On this state of the evidence and the findings by the Industrial Court, I find that the appellants have fallen far short of proving that the Bank breached any practice of good industrial relations.

[25] The suggestion in ground 6 that the Bank did not negotiate in good faith and took advantage of the trust and good practices of the Union does not sit well with the appellants' case on the non est factum plea that the Union's representatives did not read the Collective Agreement completely because they trusted the Bank to make only the corrections that were agreed. The representatives would not have asserted that they trusted the Bank if they truly thought that the Bank was not negotiating in good faith and would make

[13] See para. 11 above.

unilateral changes to the Collective Agreement and not inform them of the changes. This is a case where the Bank and the Union had a long relationship of working together for the benefit of employees of the Bank and there is no evidence, other than the appellants' bald assertion that the Bank changed the salary scales unilaterally, to suggest that the Bank was not negotiating in good faith and would violate the good relationship that they have with the Union.

[26] Grounds 4 and 6 also fail.

Conclusion

[27] The representatives of the Union and the Bank signed an important Collective Agreement on 19th November 2009 regarding the working conditions of the employees of the bank, including the all-important issue of salaries. The appellants cannot escape the consequences of that Agreement because the representatives of the Union had not taken the time to read the document before they signed it. The appellants are bound by the Collective Agreement which is fully enforceable.

Order

[28] I would dismiss the appeal.

I concur.
Dame Janice Pereira, DBE
Chief Justice

I concur.
Anthony Gonsalves
Justice of Appeal [Ag.]

By the Court

Chief Registrar