CIVIL APPEAL NO. 28 OF 2005

Between:

DUNDEE LEEDS MANAGEMENT SERVICES et al
Appellant

- and -

NITIN AGGARWAL
Respondent

Before: **Zacca, P**
Evans, JA
Ward, JA

Date of Hearing: 6 & 7 June 2007
Date of Reasons: 15 June 2007

JUDGMENT

Evans, JA

1. Between 1993 and 1998 Nitin Aggarwal, the Plaintiff in the action and Respondent to this Appeal ("Mr. Aggarwal"), established and developed the Leeds Group of companies. There were three companies, located in Bermuda, the BVI and Cayman Islands respectively. Their business was providing accounting and administrative services and related functions for a client base comprising hedge funds and mutual funds, most of which were managed from the United States.

2. In 1998 Mr Aggarwal agreed to sell the three companies to the Dundee Bank, a subsidiary of Dundee Bancorp Inc. registered in Toronto. The sale was effected by a Share Purchase Agreement dated May 25, 1998 to which Mr. Aggarwal, the three Leeds Group companies and the Dundee Bank were parties. It was a measure of Mr. Aggarwal's success in developing the business that the shares of the three companies were valued at U.S. $8,750,000 for the purpose of calculating the consideration for the share transfer. The Share Purchase Agreement and two other Agreements that were incorporated in it, an

Employment Agreement and a Profits Participation Plan, contained detailed provisions as to how the consideration was to be paid.

3. In outline, there was a cash payment of $5,000,000 plus a number of shares in Bancorp, initially 83,015 valued at $1,562,500 but ultimately somewhere between 43,000 and 44,000. Mr. Aggarwal was to receive further payments under the Profit Participation Plan, and he continued as an employee, described as the "Executive", of each of the Leeds Group companies at a salary of $200,000 per annum. He said in evidence that the amount of the Profit Participation payments which he was entitled to receive represented 25% of a total purchase price of $8,750,000 ($6,562,500, the total of the cash and shares elements, is 75% of that figure). However, for present purposes it is sufficient that the method of calculating the Profit Participation payments was clearly set out in Article Two of the Plan.

4. Article 2.02 provided that he would become entitled to receive 25% of the profit of the Leeds Business for each financial year. Article 2.01 stated that the purpose of the Plan was "to advance the interests of the Leeds Business by providing a performance incentive to the Executive". The Plan took effect for "the entire financial year of the Leeds Business ended December 31, 1998" (Article 2.03) and in each subsequent year.

5. The Agreements were implemented, Mr. Aggarwal continued as the "Executive" in charge of the businesses of the three companies, they were profitable and the Profit Participation Plan was duly implemented. No problems appear to have arisen until 2002. During that year, however, some negotiations took place between Mr. Aggarwal and the President and the Chief Financial Officer of Bancorp, Mr. Goodman and Ms. Ferstman. These culminated in Wakefield Quin, Bermuda Attorneys acting for the three companies and also for Dundee Bank, giving written notice to terminate his employment by the companies, immediately and for cause. Their letter was dated 30 December 2002 and was stated to be delivered by hand, but he and his family were abroad on their Christmas vacation and he heard about it when he telephoned in to his office on that day.

6. We should record that the Dundee Bank was joined as Fourth Defendant in these proceedings, but the Judge held that Mr. Aggarwal had no claim against the Bank in respect of the termination of his employment by the companies, and that claim was dismissed

(paragraph 18). The Appellants therefore are the three companies by whom he was employed under the Employment Agreement from 1998.

7. The reason given by Wakefield Quin in the Termination Letter for Mr. Aggarwal's dismissal was that "our clients have had serious concerns regarding your commitment to the company and that you have been placing your personal goals before that of the objectives of Leeds." The letter continued that "As a most recent example" he had failed to inform the Directors of the companies that the Bank of Bermuda had made an offer to purchase the companies in a letter dated 18 September 2002.

8. The learned Judge gave short shrift to this allegation and to the Appellant's contention that it merited Mr. Aggarwal's dismissal for cause. He accepted Mr. Aggarwal's evidence that he had, in fact, informed both the President of Bancorp, Mr. Goodman, and the Chief Financial Officer, Ms. Ferstman, of the letter, had given them a copy and had discussed it with them. Neither they nor any other witnesses were called for the Defendants, and the Judge held on this issue as follows –

> "34. Hence I reject the Defendants` complaints in regard to the Bank Letter, and find that there was nothing in Mr. Aggarwal's actions following receipt of the letter which provide any justification for the termination of his employment. Indeed, I am satisfied that the Defendants had by this time resolved to part company with Mr. Aggarwal because they feared that he would give notice of termination of his employment, and were seeking to avoid the substantial payment to Mr. Aggarwal which would follow this by dismissing him for cause."

9. With regard to the suggestion that the allegation concerning the Bank Letter was "the most recent example" of matters justifying the dismissal, the Judge concluded –

> "36. In my judgment, there can be no question of these general and unparticularised complaints constituting cause sufficient to justify dismissal. Most importantly, there was no evidence whatsoever adduced to support those complaints. Having rejected the complaints in regard to the Bank Letter, I similarly reject the general complaints that preceded the one specific complaint. Thus I find that there are no grounds in the Termination Letter justifying Mr. Aggarwal's dismissal for cause."

10. This part of the judgment is not appealed from. The issues raised in the appeal were considered by the Judge under the heading "Post Termination Complaints". The background to these was as follows.

11. After the dismissal, and following an investigation by their accountants, the Defendants alleged that Mr. Aggarwal had been guilty of serious financial wrongdoing in relation to the companies` accounts. Moreover, they contended that he had done this with the deliberate intention of inflating the companies` profits so that the 25% profit share to which he was entitled under the Profit Participation Plan would be increased, and therefore he had acted for his own personal gain. They alleged that he had acted dishonestly and alternatively that, even without dishonesty, the wrongdoing was sufficiently serious to justify his immediate dismissal, in any event.

12. The companies were unaware of these matters when the dismissal notices were given, but they relied upon them *ex post facto* as, it was common ground, the common law entitles them to do:
Boston Deep Sea Fishing Co. v. Ansell [1888]39 Ch.D.339.

13. Counsel for Mr. Aggarwal contended that this common law rule has been disapplied in relation to employment contracts by section 25 of the Employment Act 2000. The Judge rejected this contention and held that the common law rule was not displaced. It entitles the Defendants "to rely as justification for Mr. Aggarwal's dismissal on matters of which they were unaware at the date of the Termination Letter" (paragraph 50). The Respondent cross-appealed against this part of the Judgment but, as will appear below, it was not necessary for this Court to hear the Cross-Appeal. We therefore express no view as to whether or not the Judge was correct.

14. In paragraphs 37 to 43 of his Judgment, the Judge set out the history of the Post Termination Complaints. They were all alleged accounting irregularities and it appears that a total of ten such allegations was pleaded at different stages of the proceedings. However, the majority of these were abandoned before and during the trial, and in the result only three remained for decision by the Judge, together with the central allegation of dishonesty which the Defendants maintained throughout. The three were –
    (A) Mr. Aggarwal's treatment of "Receivables" in the accounts for 2000, 2001 and 2002;
    (B) his handling of the companies` Master Card account in 2002; and

(C) the Payroll Tax returns he made on behalf of the companies in 2000, 2001 and 2002.

(D)

The Judgment

15. In summary, the Judge found that there were deficiencies in Mr. Aggarwal's accounts as regards "one, or possibly three" out of some thirty allegations made regarding Receivables, and in his handling of the Credit Card account and in the Payroll Tax returns. These will be considered in detail below. Crucially, however, he also found that Mr. Aggarwal did not act dishonestly in any way. As regards Receivables, he concluded-

> "…..I do not believe there is any justification for saying that the failure on Mr. Aggarwal's part was, as the Defendants contend, part of a dishonest design to inflate profits and thereby profit personally……Neither is this the sort of matter which comes remotely close to providing justification for summary dismissal in the absence of dishonesty….."(paragraph 87).

16. On the Credit Card issue, the Judge held –

> "..I am not satisfied that the Defendants have discharged the burden of proof required for me to conclude that Mr. Aggarwal's conduct in relation to the payment of credit card expenses was indeed dishonest, in terms of representing a deliberate and intentional course of conduct designed to inflate profits." (paragraph 93)

It was not, however, "the sort of judgment one would expect from someone of Mr. Aggarwal's business experience…" (ditto).

17. The Judge expressed his conclusion regarding the Payroll Tax issue in more general terms –

> "110. Mr. Aggarwal gave evidence for almost six days, and he was cross-examined for almost half of that time. It seemed to me that he took care to answer all questions put to him fully and fairly, and I accept that he was a witness of truth. He did not shy away from admitting deficiencies of his system of payroll tax returns (though it could be said that he could hardly deny them). I accept his evidence that he did not make these errors in respect of the payroll tax returns intentionally, and I so find."

18. The Judge therefore held –

> "113. In this case, the Defendants have failed to establish the dishonesty on which they sought to rely, and neither have they

established any form of deliberate conduct which I would regard as being incompatible with the employment contract….

114……the matters complained of by the Defendants which I have referred to above as post termination complaints are not sufficient to justify Mr. Aggarwal's summary dismissal."

19. He therefore awarded Mr. Aggarwal the sum of $858,335 which became due to him under the Profit Participation Plan in the event of his employment being terminated without cause (see the provisions set out below), which was calculated as ten times the average net income of the Leeds Group for the years 2001 and 2002. In this connection, he found that the net income for 2002 was $263,533, not $25,962 as the Defendants asserted following their accountants` review in 2003, but also substantially lower than the profit of $411,258 shown by Mr. Aggarwal's management accounts for the first eleven months of the year (judgment paragraph 56).

Issues on the Appeal

20. The Defendants as Appellants challenged the Judges conclusions with regard to the three specific matters referred to above, and his overall finding that Mr. Aggarwal did not act dishonestly nor inconsistently with his duties towards his employers.

21. They contended, correctly, that there is little if any dispute regarding the primary facts. The accounting errors were admitted by Mr. Aggarwal or not challenged by cross-appeal. He agreed in evidence that the payroll tax errors were "serious". Therefore, the Defendants submitted, the Judge's findings with regard to the allegations of dishonesty and seriousness were matters of inference, which the Court of Appeal is able, indeed bound to re-assess for itself. It was clear, they contended, that the Judge's conclusion was wrong, and that Mr. Aggarwal acted dishonestly and for his own personal gain, conduct which was incompatible with his obligations as the companies` employee.

22. There was no significant difference between the parties as to the correct approach for the Court of Appeal to adopt, nor as to the test which the Courts apply in deciding whether an employee's conduct was such as to justify his dismissal 'for cause' and without notice.

The Court of Appeal's approach

23. In Assicuriazioni Generali SpA v. Arab Insurance Group [2003] 1 W.L.R. 579 (Court of Appeal, England and Wales) Clarke L.J. said that "in cases in which the court was asked to reverse a judge's findings of fact which depended on his view of the credibility of the witnesses, it would only do so if satisfied that the judge was plainly wrong. He cited the judgment of Stuart-Smith L.J. in The Ikarian Reefer [1995] 1 Lloyd's Rep. 455 in which reference was made to the speeches of Lord Sumner in SS Hontestroom v. SS Sagaporak [1927] A.C. 37 and of Viscount Cave LC in Mersey Docks and Harbour Board v. Proctor [1923] A.C.253. Viscount Cave said that "In such a case ….. it is the duty of the Court of Appeal to make up its own mind not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liability to draw its own inferences from the facts proved or admitted and to decide accordingly" (p.258). Stuart-Smith L.J. added "(3) When a party has been acquitted of fraud the decision in his favour should not be displaced except on the clearest grounds" (p.459).

24. This Court, in Lathan v. Lathan [2003] Bda.L.R.59, adopted the observations of Lindley M.R. in Coghlan v. Cumberland [1898] Ch. 704, as follows –

> "Even where……the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re hear the case, and the Court must consider the materials before the judge with such other materials as it may have decided to admit, the court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong……and when the question arises which witness is to be believed rather than another, and that question turn[s] on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witness. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

25. The matter has recently been examined in some detail by the High Court of Australia in Fox v. Percy [2003] HCA 22. It was a road

accident case in which the Judge accepted the evidence of the injured Plaintiff that she was on her correct side of the road and that the Defendant was driving on his wrong side, notwithstanding the presence of skid marks which demonstrated that he was not. The Court of Appeal reversed his judgment, and the High Court held that it was entitled, indeed right to do so. In the leading judgment, Gleeson C.J. remarked-

> "28.Over more than a century, this Court, and courts like it, have given instruction on how to resolve the dichotomy between the foregoing appellate obligations and appellate restraint. From time to time, by reference to considerations particular to each case, different emphasis appears in such reasons. However, the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings……..
>
> 31. Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearance of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical."

26. We do not attempt to redefine or even restate those principles, but we can record that counsel for the Appellants accepted that the relevant question to be asked in the present case could be expressed as "was the admitted wrongdoing so serious that it must have been dishonest?". If the Court answers that question "yes", it is obliged to reverse the judge's finding, notwithstanding the fact that the judge reached the opposite conclusion after observing the witness give evidence during a lengthy hearing.

Justification for Summary Dismissal

27. In Wheatley v. Control Techniques plc (30 September 1999) [1999] All E R (D) 1044, Ebsworth J. summarised the principles which, she said, were common ground in that case-

> "(1) It is for the Defendants, on the ordinary civil burden of proof, to justify the dismissal.
>
> (2) Whether the misconduct justifies summary dismissal is a question of fact in each case; although there is no fixed standard defining the degree of misconduct which will justify instant dismissal the conduct must be of a sufficient degree of gravity to justify it. I must decide first whether there has been misconduct and secondly whether it was serious or gross. There is no need for the employer to establish dishonest conduct, and that is not a feature of this case, the key question is whether the employee's conduct is inconsistent with the relationship of trust and confidence which must exist between employer and employee. In Laws v. London Chronicle (Indicator Newspapers) Ltd. [1959] 1 WLR 698 Lord Evershed MR said:
>
> > "The question must be – if summary dismissal is claimed to be justified – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service" (p.700).

28. Ebsworth J. also referred to the report and award made by Lord Jauncey in Neary v.Dean of Westminster [1999] IRLR 288. In that case there was no allegation of dishonesty. The Abbey (employer)`s case was based on impropriety, not dishonesty, and the issue was whether that amounted to gross misconduct sufficient to justify dismissal in the circumstances of that case (paragraph 15). In the course of a detailed consideration of the correct approach, Lord Jauncey observed that "It has long been recognised that there exists between master and servant a fiduciary relationship of trust and confidence" (paragraph 18); that the extent of the duty is dependent on the facts of each case (paragraph 19); that "whether misconduct justifies summary dismissal is a question of fact" (paragraph 20); and he rejected a submission that "gross misconduct justifying summary dismissal almost invariably involved dishonesty in some form or other" (ibid.). Asking the question "What degree of misconduct justifies summary dismissal?" he answered it "conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment" (paragraph 22).

29. We were also referred to a particularly clear and helpful analysis of the decided cases in Bartholomew v. L K Group Ltd. [2003] All E R (D) 340 by John Slater QC sitting as a Deputy High Court Judge. He noted that in the decided cases "there is something of a thread running through them and [they] do typically involve either actual or near dishonesty, disobedience or incompetence…….typically though not exclusively one is looking for something that could be called dishonesty or similar however that is further defined" (paragraph 32). However, it was common ground between the parties that "the ordinary law of contract applies, although in the context of employment a repudiatory breach is often referred to as gross misconduct" (paragraph 31), and he concluded, correctly in our view, that "there is no real distinction to be drawn between gross misconduct and the wider label of repudiatory breach", the test being that stated by Lord Jauncey in Neary (above) (paragraph 36).

30. That test, in our respectful view, restates rather than answers the question, but it emphasises the basic importance of the relationship of trust and confidence between the two parties in the particular case. The Court asks itself whether the misconduct relied upon was sufficiently serious to be regarded as repudiatory of that relationship; if it was, the employee was justified in bringing it to an end.

The events of 2002

31. As stated above, some negotiations took place between Mr. Aggarwal and Mr. Goodman and Ms. Ferstman during 2002. They have to be seen against the background of the relevant provisions of the Employment Agreement and the Profit Participation Plan. These were-

Employment Agreement

"**Termination:**

> The termination of the Executive shall be solely governed by the terms of the Profit Participation Plan. Upon termination, the Executive shall be entitled to receive only such severance as provided for in the Profit Participation Plan."

Profit Participation Plan

Article Two

Profit Participation

Section 2.04 Calculation of Profit Participation Payments:

The Profit Participation Payments shall be calculated after the end of each financial year of the Leeds Business and verified by the Auditors in the course of the annual audit of the Leeds Business. The determination of the Auditors shall, in the absence of manifest error, be final and binding……

Section 2.06 Purchase of the Profit Participation

The Leeds Group shall have the right, at any time and on written notice to the Executive, to purchase the Profit Participation from the Executive at a price equal to ten times the simple average of the Profit Participation Payments paid to the Executive for the two financial years of the Leeds Business immediately preceding the purchase of the Profit Participation……

Article Three

Termination Payments

Section 3.01 Termination of the Employment of the Executive

(a) Termination Other than for Cause: In the event of Termination for any reason other than for cause,

(i) the Executive shall be paid a Termination Payment in an amount equal to ten times the simple average of the Profit Participation Payments for the financial year of the Leeds Business in which the Termination occurs and the financial year of the Leeds Business immediately prior to the year of Termination; and

(ii) the Profit Participation shall be deemed to be cancelled in respect of the financial year of the Leeds Business in which Termination occurs and in respect of all future years.

(b)Termination for Cause

The employment of the Executive may be terminated forthwith, without notice and without compensation in lieu of notice, for any cause which, at law, would allow the services of the Executive to be terminated for cause without either notice or compensation in lieu of notice. In the event of termination of the Executive for cause, the Executive shall not be entitled to be paid a Termination Payment and the Profit Participation shall be deemed to be cancelled in respect of [the current year and all future years]. For the purposes of this paragraph, cause shall include, but not be limited to:

(i) the persistent failure or refusal of the Executive to perform his duties and responsibilities, following the notification in writing of the Executive in respect thereof……..;

(ii) any dishonesty on the part of the Executive affecting the Leeds Group or the Leeds Business;…….

(v) any wilful and intentional act on the part of the Executive calculated to have or reckless as to whether it will have the effect of materially injuring the reputation, business or business relationships of the Leeds Group or the Leeds Business."

Section 3.02 Termination by the Executive:

(a) Termination Other than by Death or Disability prior to the Vesting Date: In the event of Termination by the Executive other than by death or disability prior to the Vesting Date …….. the Executive shall not be entitled to be paid a Termination Payment……..

(Note the Vesting Date was defined as May 25, 2002 (Section 1.01 (ee). That date was four years after the Closing Date of May 25, 1998 (Section 1.01 (e)).)

(b) Termination Other than by Death or Disability after the Vesting Date:

(i) *Non compete Termination Payment*: In the event of Termination by the Executive other than by death or disability after the Vesting Date and the Executive elects not to Compete, the Executive shall be paid a Termination Payment in an amount equal to ten times the simple average of the Profit Participation Payments for the financial year of the Leeds Business in which Termination occurs and the financial year of the Leeds Business immediately prior to the year of Termination.

(ii) *Compete Termination Payment*: [the same wording except that the amount was five times the simple average figure].

Section 3.04 Calculation of Termination Payment: The Termination Payment shall be calculated after the end of the financial year in which Termination occurs [etc. as in Section 2.04 above]."

32. On 5 August 2002 Mr. Aggarwal wrote to Mr. Goodman, copy to Ms. Ferstman, as follows –

> "Dear Ned
>
> As you are probably aware I have reached the end of my initial four year term with Dundee and I thought that as I have not heard from you that it might be appropriate to arrange a meeting to discuss future plans for Leeds Management.
>
> …….
>
> I would be grateful if you could spare some time soon to meet with me to discuss the future of Leeds and also my future with the organisation. I am willing to meet with you at any time that will fit in with your schedule and look forward to hearing from you in the near future."

33. The meeting eventually was arranged for 24 October 2002 in Toronto. Mr. Aggarwal said in evidence that he wanted to resolve the issue of his salary, which was unchanged after more than four years, and the Profit Participation Plan, as well as to secure help from Bancorp on operating issues and staffing difficulties (Judgment paragraph 21).

34. The issues as to Mr. Aggarwal's future salary and his rights under the Profit Participation Plan were discussed at the meeting and in subsequent exchanges of emails. On 21 November 2002 he emailed Ms. Ferstman "I know you must be very busy but my salary review and purchase of profit share issue is very important to me. Please let me know when I could expect to receive some notification from you." Having received no reply, he wrote to Mr. Goodman a Memorandum dated 3 December 2002 –

> "I understand that you have……not had a chance to seriously consider my request to purchase the profit participation and review my salary package…….
>
> My understanding has always been that Dundee purchased a 100% of the Leeds group of companies and only paid 75% of the purchase price, the remainder of which was subjected to a profit participation agreement. This appears to be different to your understanding of the transaction. Nevertheless there are provisions in the agreement that allow me to terminate and request that Dundee purchase a 100% of the profit share at the appropriate multiple. I wish to exercise that option now.
>
> [the letter continued with compromise proposals regarding the purchase of profit share and his future salary]."

35. This letter was acknowledged but not replied to before Mr. Aggarwal left on vacation. The next development was the Termination letter from Wakefield Quin dated 30 December 2002.

36. It is apparent from these exchanges that Mr. Aggarwal was under the mistaken impression that Section 2.06 of the Plan gave him a right to require the Leeds Group to buy out the Plan for the stated multiple of earnings, whereas as he accepted at the trial the right was given only to the Leeds Group and not to him. Therefore, the "option" which he purported to exercise in his Memorandum dated 3 December was not one that he was entitled to exercise and Section 2.06 was not brought into effect. But there was never any question of Mr. Aggarwal seeking to terminate his employment, and the Judge found "Mr. Aggarwal emphasised in his evidence that at that point he wanted to keep his employment relationship" (paragraph 22). It follows from this that Mr. Aggarwal's rights regarding a Termination Payment depend entirely on the provisions of Section 3.01 of Article Three of the Plan and the issue is whether the Termination "for cause" was justified or not. He never sought to terminate his employment himself, and the only relevance of Section 3.02 is that, if he had sought to do so, the Defendants would have become liable to make a Termination Payment under that clause.

37. It is unclear whether like Mr. Aggarwal the Defendants were under the mistaken impression that he was entitled to require them to buy him out under Section 2.06 of the Plan. He said in evidence that Mr. Goodman and Ms. Ferstman did not disabuse him of his belief at the meeting on 24 October but that they would take legal advice on the point. Whether they did so or not, the position on 30 December was that "the Dundee Bank as parent of the Leeds Group had (and no doubt was aware that it had) a significant monetary exposure in the event that Mr. Aggarwal chose to give notice, and that would only be avoided by a termination for cause" (judgment paragraph 33). It was in that context that, the Judge found, there was no foundation for the Bank's assertion in the Termination letter that they were not informed of the Bank of Bermuda's approach and that it was "much more realistically…a position fabricated after the event for the express purpose of trying to justify Mr. Aggarwal's dismissal" (ibid.) Unless the dismissal "for cause" could be justified, when his employment ended he became entitled to a Termination Payment under Section 3.01(a).

38. It is important to note that the amount of a Termination Payment under Section 3.01(a) is calculated by reference to the annual profit of the Leeds Group companies for the year in which Termination occurs and in the previous year. The calculation under Section 2.06 is different. It depends on the two previous years, thus excluding the year in which the companies` right to buy out the Plan is exercised. This is of some but only marginal relevance in the present case, where the Defendants allege that Mr. Aggarwal was dishonestly inflating the profits so that he would benefit from a Termination Payment, when one came to be made. The right he was claiming under Section 2.06 and which the Defendants knew him to be claiming would have resulted in a payment calculated by reference to the two previous years, that is, 2000 and 2001. The figures for those years were already established and so he had no incentive to increase the profit for the current year, 2002, if that was his aim. The calculation under Section 3.01(a) does include the year of Termination, 2002, but the profit for that year was not relevant to the amount of a Termination Payment unless Mr. Aggarwal contemplated that his employment would cease during that year. He had no intention of terminating it himself (paragraph 36 above) and it can be inferred that he had no expectation that the Defendants would terminate it "without cause".

39. The learned Judge gave some weight to the fact that, unless Mr. Aggarwal intended to terminate his employment during 2002, any increase in profits for that year would be matched by the appropriate correction in the following year's accounts, with the result that overall the amount of his Profit Participation would not be increased. He called this the "timing issue" (judgment paragraph 65). In our view he undoubtedly was entitled to take this factor into account to the extent that he did, but it is less important than the question whether Mr. Aggarwal had any incentive to inflate the 2002 figures when he did not contemplate any circumstances which would make them relevant to the calculation of a Termination Payment during that year.

40. We bear in mind also Mr. Pachai's submission for the Defendants that the contractual formula meant that any increase in the relevant annual figure would be multiplied by up to ten times when the amount of a Termination Payment came to be calculated.

The accounting errors

(A)Receivables

41. Initially, the Defendants alleged that provision should be made in the 2002 accounts for Receivables totalling $283,149 which Mr. Aggarwal had not written off as he should have done. This figure related to a total of 32 client accounts (Wakefield Quinn's letter dated 24 September 2003 and enclosures). In the result, only "one, possibly three" items remained for decision by the Judge, totalling about $80,000. The Judge found that only one of these allegations was "truly sustainable" and that nothing under this head came "remotely close to providing justification for summary dismissal in the absence of dishonesty" (judgment paragraph 87). The amount involved in the one item which he found proved was $12,717, an invoice addressed to a client named Aristocrat in the last quarter of 2000.

42. As regards that invoice, he found that "It should have been obvious to anyone, and certainly to anyone of Mr. Aggarwal's qualification and experience that the last quarter's billing was unsustainable, and should have been reversed as soon as the notification from CIMA came through". CIMA (Cayman Islands Monetary Authority) gave notice on 3 October 2000 that it had assumed control of Aristocrat's affairs. In relation to earlier outstanding invoices totalling $25,054, Mr. Aggarwal said in evidence that the fund had $300 million of assets and there was a chance the company might recover something. But the last quarter's invoice was unsustainable because in fact no work was done on the account following the CIMA notice, and Mr. Aggarwal himself had noted "don't send this out yet".

43. The judge's finding was "On any basis, there can be no justification for the billing for the last quarter of 2000 not having been written off at year end 2001, and there is nothing in the documents disclosed to suggest any justification for any belief on Mr. Aggarwal' part that this receivable remained collectible in 2002". This finding was not seriously challenged by Mr. Marshall for Mr. Aggarwal, and he accepted that Mr. Aggarwal had adopted what he called an "aggressive policy" as regards receivables. We uphold the judge's finding on this issue and also his view that "there might have been some basis for leaving the receivable of $25,054 on the books" (judgment paragraph 81).

44. The other two allegations regarding Receivables to which the judge referred related to two clients named Cygnet and Assets Mondial. Both funds were managed by a Mr. Napoli who was a friend of Mr. Aggarwal'. There was no prospect of either fund paying outstanding invoices which were for about $20,000 in each case, but Mr. Napoli gave some indications that he would make payments in part-settlement though he was under no liability to do so. There were emails as late as mid-2002 which, the judge found, "appear to give some justification for Mr. Aggarwal's evidence that he expected to get some funds from Mr. Napoli and that he did not view it as prudent to write off the fees because of the continuing discussions" (paragraph 84). Under cross-examination, Mr. Aggarwal said "it was not written off because I felt there was a reasonable chance of collection". This finding clearly was supported by the evidence and we have no reason to depart from it.

45. The judge dealt briefly with a further item, relating to a client named Innovision. Paragraphs 76-77 of the judgment refer. His finding was appealed against but scant reference was made to it in oral submissions at the hearing of the appeal. We uphold the judge's finding.

(B) Credit Card Expenses

46. From February 2002, Mr. Bedford who was Mr. Aggarwal's Vice President had the benefit of a MasterCard Account. For the first five months until 15 July 2002 the monthly accounts were paid in full and before the due date. The total amount was about $30,000 averaging about $6,000 per month.

47. In July 2002 the pattern changed. On 24 July the total billed to the companies for payment by 18 August was $29,010.55. Nothing was paid in August and on 23 August a further $4,355.37 plus interest charges of $387.36 became due for payment by 17 September. On that date, a minimum payment of $2,995.41 was made. The 24 September billing showed $36,884.41 due after giving credit for that payment, for settlement by 19 October, but no payment was made that month. The 23 October statement showed a debit balance of $40,440 and a credit limit of $45,000. Payment was due by 17 November. Before that date, on 5 and 13 November, payments totalling $54,658.30 were made, but the card was also used to make a payment of $24,839 to Advent Software, a supplier of IT goods. On 22 November the debit balance was in excess of $24,000.

48. A clear picture emerges from Mr. Aggarwal's handling of this Credit Card account. The July billing included three payments by MasterCard to Advent Software totalling $20,443. By November a further $33,000 approx. was due from the companies to Advent. The payments totalling $54,658.30 made to MasterCard in November corresponded with the payments that MasterCard had made or would make in settlement of Advent Software's invoices. Mr. Aggarwal showed these in the companies` accounts as payments for fixed assets. As such, they were not debited to the profit and loss figures. The other sums due to MasterCard were not debited to the profit and loss account until payments were made, in accordance with the accounting policy he adopted. The companies had sufficient cash balances in hand to pay the monthly balances in full, and the cost of obtaining credit from MasterCard was of course considerably greater than any additional interest which the companies earned. This was not, as Mr. Dovey agreed (the expert witness called by Mr. Aggarwal, mainly in relation to calculating the amount of the Termination Payment due to him), it was not a sensible form of cash management.

49. The Defendants contended that Mr. Aggarwal dealt with the MasterCard account in this way so as to avoid the debit balances affecting the companies` profits until they were paid, meanwhile obtaining unnecessary credit from MasterCard and at a considerable cost. He said that he delayed making the payments until he was able to obtain details from Mr. Bedford of which items could be charged to clients, resulting in no loss to the companies, and we were told that in the result most of the cost was recovered in this way. The amount of the Advent invoices was paid, the Defendants suggested, because Mr. Aggarwal was able to treat them as capital items not affecting the profit figures.

50. The Judge's findings on these matters were adverse to Mr. Aggarwal. He said "I did not find Mr. Aggarwal's explanation for the delay in making the credit card payments to be convincing (paragraph 92) but he added "So while I do not regard Mr. Aggarwal's explanations for the non-payment of the credit card during the latter part of 2002 as making any sort of good business sense, I can see some justification for ensuring that there were funds available to discharge the Advent invoices" (paragraph 92). His conclusion, however, was that the Defendants had not discharged the burden of proving that Mr. Aggarwal's conduct "was indeed dishonest, in terms of representing a deliberate and intentional course of conduct designed to inflate profits.

As I have said, that is an allegation of the utmost seriousness against a professional, and although I do not regard the pattern shown by the credit card payments as representing the sort of judgment one would expect from someone of Mr. Aggarwal's business experience, I would not conclude on the balance of probabilities that his treatment of those credit card expenses was as alleged by the Defendants" (paragraph 93).

51. We adopt the Judge's findings as to the primary facts of these transactions and we shall consider them further in relation to the issues of dishonesty and whether the notice of termination 'for cause' was justified.

(C) Payroll Tax Returns

52. Here, there is no dispute as to the primary facts. For each of the years 2000, 2001 and 2002, Mr. Aggarwal made Payroll Tax returns on behalf of the companies which did not include (1) the payments he received under the Profit Participation Plan: he regarded these as payments of capital, not income; (2) sums paid by cheque to part-time employees: he based the returns on spreadsheets which listed the salaries paid by standing order to full time employees only; (3) bonus payments, and adjustment payments made at the commencement or conclusion of employment; and (4) the grossing-up exercise which was necessary in some cases.

53. The Judge addressed the question whether these failures were intentional. Mr. Aggarwal accepted that they were serious. The Judge was more critical –

> "It has to be said that these failures on Mr. Aggarwal's part were relatively fundamental, and not of a type which one would expect someone of Mr. Aggarwal's qualifications and experience to make. [Except as regards the Profit Participation payments]…….it is hard to see how Mr. Aggarwal made the mistakes that he did…… [there were] obvious deficiencies [of] his returns." (paragraphs 108-109).

He concluded in paragraph 110, already quoted, "I accept his evidence that he did not make these errors in respect of the payroll tax returns intentionally, and I so find."

54. The judgment does not refer to a matter which Mr. Pachai submitted is relevant to the assessment of Mr. Aggarwal's credibility on this issue in particular. His counsel's Written Opening Submission asserted that

"the First Defendant was randomly audited by the Tax Commissioner's office in the latter part of 1990s/2000 and no adverse findings were made in regard to payroll tax returns". That assertion was incorrect, and the Tax Commissioner had recovered a 30% penalty in respect of undeclared remuneration, which was not reported by Mr. Aggarwal though paid by the company. The Commissioner's letter was put to Mr. Aggarwal in cross-examination, but it had not been previously disclosed as it ought to have been.

55. We were also referred to the provisions of the Taxes Management Act 1976, section 16 of which authorises the Collector to assess further and additional tax when the original return was inaccurate or incomplete. The Act's penal provisions are contained in Part VI. It is an offence to furnish a return which is "known to be false in any material particular" (section 36), and to evade tax "by any wilful act or wilful default or by any fraud, art or contrivance whatever" (section 37).

56. We bear in mind also that the amount of tax underpaid by reason of the under-declaration was about $13,000. Although Mr. Aggarwal's profit participation for the years in question was increased by only one quarter of this amount, for the purposes of calculating a Termination Payment the total could be in excess of $30,000.

57. The learned judge concluded that the payroll tax errors were not intentional (paragraph 110, above). This necessarily implies that they were not dishonest or deliberate, and as he stated in paragraph 109 there were no external factors which assist the Court; "no inconsistency with other documents, previous statements or other evidence".

58. We hold that the judge was entitled to base his finding largely as he did on the impression he formed of Mr. Aggarwal as a witness. We do not consider that the errors were such as necessarily to connote dishonesty or deliberate, even intentional conduct, and we therefore uphold his finding.

CONCLUSIONS

59. In the light of the authorities to which we have referred, it is necessary for the Court to consider whether the Termination Letter dismissing Mr. Aggarwal was justified on either of two grounds. First, because he had acted dishonestly, in the manner submitted by the Appellants; or

secondly, because he was guilty of gross misconduct or repudiatory breach of his contract of employment with the Defendants.

60. It is not suggested that the Judge misdirected himself as to the correct approach to these issues as a matter of law, nor that he was wrong to take account of the impression he formed of Mr. Aggarwal as a witness. The authorities show that, the Appellants undertake a difficult though not impossible task when they assert that the Judge's conclusions as to his credibility and honesty were wrong.

61. We conclude that on all the evidence, and taking account of the view which the judge formed of him, Mr. Aggarwal did not act dishonestly and the judge's finding was correct. Indeed, we have difficulty in identifying any part of the evidence which could be said unequivocally to support the allegation that he was dishonest, at any stage.

62. More difficult is the second question, whether his conduct overall was such as to amount to gross misconduct sufficient to justify his dismissal without cause. We find this more difficult because the errors contained in the payroll tax returns were admittedly serious, and because they were of a kind which, as the judge found, a person of Mr. Aggarwal's qualifications and experience would not be expected to make. His errors in relation to the Credit Card payments, and in one case of the disputed Receivables, although less serious were equally not to be expected of him, and were not satisfactorily explained. On the other hand, we take account of the following –

    1. these errors, even cumulatively, fall far short in our view of proving that Mr. Aggarwal was engaged in the course of conduct motivated by personal gain which the Defendants alleged against him;
    2. the scheme of the provisions in Section 3.01(b) of the Profit Participation Plan, incorporated in the Employment Agreement, is such that misconduct falling short of dishonesty (sub-clause (ii)) and wilful or intentional behaviour (sub-clause (v)) even when it can be described as "persistent failure or refusal to perform [his] duties and responsibilities" (sub-clause (i)) has to follow a notice in writing before it can justify dismissal for cause;

3. there was no evidence that the Defendants suffered damage or were prejudiced by the misconduct which they alleged against Mr. Aggarwal. They called no evidence to support their allegation that it justified them in terminating Mr. Aggarwal's employment forthwith, and in our view such evidence would have been admissible, if tendered, having regard to the relationship of mutual trust and confidence which they allege was breached; and
4. in relation to the payroll tax issue, there was no evidence of the effect, if any, which the under-declarations had upon the companies as taxpayers; there was evidence, moreover, that the returns for 2003, the year following Mr. Aggarwal's dismissal, were rendered in the same way as he had done.

63. For these reasons, we uphold the judge's findings and this appeal is dismissed.

Costs

64. By agreement of the parties:

1. Two (2) counsel certified
2. Costs on the main appeal to the Respondent
3. No order for costs on the cross-appeal

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Zacca P

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Evans, JA

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Ward, JA