IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2006: No. 31
(Commercial List)

BETWEEN:

ALLISON THOMAS

Plaintiff

-v-

FORT KNOX BERMUDA LIMITED

Defendant

JUDGMENT

(in Court)

Date of Hearing: August 30, 2010

Date of Judgment: October 1, 2010

Mr. Mark Diel, Marshall Diel & Myers, for the Plaintiff

Mr. Ben Adamson, Conyers Dill & Pearman, for the Defendant

Introductory

1. The Plaintiff claims $205,000 in respect of deferred salary and $67,500 representing nine months salary allegedly due for breach of an implied term that the termination of his employment was subject to the giving of reasonable notice, both claims arising out of the termination of his employment with the First Defendant by letter dated November 1, 2005.

2. The claims against the Second and Third Defendant were struck out by consent on July 12, 2010. Paragraph 8 of the Statement of Claim provided as follows: "*Further and in the alternative the termination of the Plaintiff's employment is in breach of the Employment Act 2000*". By Summons dated September 24, 2009, the Defendants applied to strike out paragraph 8 of the Statement of Claim. Bell J acceded to this application on December 3, 2009: *Thomas-v-Fort Knox* [2009] Bda LR 67. The Court of Appeal upheld Bell J's decision that the only remedy for a breach of the Employment Act 2000 was to pursue the statutory remedies for unfair dismissal before the Employment Tribunal: *Thomas-v-Fort Knox* [2010] Bda LR 17.

3. At the commencement of the trial, the Plaintiff applied to amend his Statement of Claim to (non-controversially) delete the original paragraph 8 and to (controversially) add the following new averments:

> "*8. (a) Alternatively the termination of the Plaintiff was in breach of contract in purporting to do so without any or any proper cause or without compliance with the provisions of the Employee Handbook.*
>
> *(b) The Plaintiff was unemployed from the date of termination to April 2006 when he commenced working for himself with no income for forty-eight months.*"

4. The prayer was also amended to claim damages for breach of contract in the amount of $90,000 per annum, apparently for the four year period pleaded in draft paragraph 8(b) of the draft Amended Statement of Claim. I reserved until the present Judgment my decision on the application for leave to amend. Accordingly, the main issue at trial on the un-amended pleadings was whether the Plaintiff could establish that his employment was terminated in breach of an implied term that he was entitled to be given reasonable notice (the express contractual notice provisions notwithstanding). Assuming leave to amend could properly be granted, the secondary (but related) question was whether the First

Defendant ("the Company") was entitled to terminate the Plaintiff's contract without cause and/or in a procedurally impermissible manner and, if not, whether this rendered the termination unlawful at common law (as opposed to constituting a statutory claim which could only be pursued before the statutory tribunal).

5. The key averments in the Company's Defence were the following. Firstly, it was denied that no sums "*covered by the Company's Deferred Payment/Work for Shares scheme*" were actually due and payable (paragraph 4). Secondly it was averred that the parties had agreed that the minimum notice of termination the Company had to give was one month's notice so that no breach of contract had occurred.

The contract of employment: key documents

6. A letter evidencing the Plaintiff's contract of employment dated February 27, 2002 was sent to him by Shari Poe and apparently signed by the Plaintiff on February 14, 2002. The letter confirms his position as Chief Operating Officer, his monthly salary as $7500 of which $4500 was deferred. The letter expressly incorporated into the contract of employment the terms of the Employee manual including "Notice periods". The Plaintiff's signature appeared on page 3 of the letter underneath a caption which read as follows:

> "*I have read and understand the terms of employment set out in the above letter. I have also been given a copy of the Fort Knox Bermuda handbook, which covers in detail all areas of my employment with Fort Knox Bermuda. I have read the Handbook and agree to the terms and conditions stated therein.*"

7. The Employee Handbook dated May, 2001 states at page 13 as follows:

> "*Should it become necessary for the company to terminate employment for reasons other than cause…monthly paid employees will receive one month's notice or payment in lieu of notice…*
>
> *If an employee feels that he has been terminated for improper reasons, he shall have the right to appeal that decision through the employee complaint procedure…*"

8. In addition to the termination provisions relating to notice, the issue of deferred compensation was evidenced by the following documents. Firstly, by a Memorandum dated September 1, 1999 and signed by Troy Symonds, Allison Thomas, Hugh Hollis and Ricardo Swan, it was contemplated that full time staff would be paid $4000 monthly of which $2000 would be in cash and $2000 would be deferred. This agreement was approved by the Board on December 12, 2001 for the period May 1 to August 31, 2000. On February 15, 2002, when the Board also accepted the resignation of Hugh Hollis, a February 11, 2002 "Deferred Payment/Work for shares-Scheme" was approved by the Board. This document was signed by the three remaining employees, and provided for: (a) the Plaintiff (COO) to be paid $90,000 per year at the rate of $3000 per month in cash

and $4500 deferred (September 1, 2001-August 31, 2002), and (b) for the Plaintiff to be issued 49,600 shares in respect of deferred salary for the period September 1, 2000 to August 31, 2001. The 2002 agreement stated as follows:

> "*…The Board of Directors reserve the right to award either the deferred cash value, common shares, or a combination of the two for the total deferred value outstanding for the period.*"

9. Thirdly, the issue of deferred compensation was referred to in the Company's unaudited accounts. Although it was unclear what relevance the accounts had to the Plaintiff's claims in the present action (as opposed to his separate pending minority shareholder oppression petition), Mr. Symonds was cross-examined extensively on various aspects of the accounts. These records clearly show, and the Company does not deny, that the deferred compensation claimed by the Plaintiff is still due and owing to him and others, totaling $407,398.35.

Termination of employment - key documents

10. In an Interim Report to the Board dated October 17, 2005, the CEO under "Operations" asserted as follows:

> "*A.T., whilst very capable is the most despondent member of the team and is progressively less involved in the management of FK. He has expressed a need to sell his stock and move on. He has been directly involved with all of the major losses of the company…It is my observation that whilst able to discuss future opportunities, he is not willing to commit to the implementation of the any plan.*
>
> *It is my recommendation that we explore ways of allowing A.T. to exit the company as Vice-President and Chief Operations Officer.*"

11. The Board met on October 24, 2005 when a lawyer's letter sent on behalf of the Plaintiff and another director was tabled. After these two directors left the meeting, the Board accepted the CEO's October 17, 2005 recommendations and revoked the appointment of the Plaintiff as Vice-President of the Company. On November 1, 2005, the CEO on behalf of the Company wrote the Plaintiff in the following diplomatic terms:

> "*Fort Knox Bermuda Ltd. is now at a critical period in its development. The company is challenged with the need to raise capital and deliver upon a business plan in a very competitive environment. The next 12 months will require a team that is focused, cohesive, communicative and highly accountable.*
>
> *In reflection of the past years' accomplishments and failures, I have concluded that you are not positioned to serve the company adequately moving forward. Over the past few years the inefficiencies that have been caused by our inability to work cohesively have caused the company tremendous loss both in terms of*

revenue and opportunity. As I prepare for the upcoming challenges, I am charged with installing a team of professionals who can deliver upon the business plan and the demands of this highly competitive environment. I do not believe that you are suited for this team.

As a result, I have decided that it is in the best interests of all concerned to terminate your employment with effect from today. You will be paid salary and benefits up to and including 1 months' salary in lieu of notice in accordance with your entitlement under the Employment Act 2000 and your health insurance will remain in effect for forty five (45) days following the date of termination.

I wish to personally thank you for the efforts that you have made to serve the company and would like to wish you the very best in your future endeavors."

Witness evidence

12. The Plaintiff and Troy Symonds each gave oral evidence. The Plaintiff in his Witness Statement mainly disputed the "reasons" given for his termination, implicitly acknowledging that the Company claimed not to have terminated him for cause. He also asserted that he was out of full-time work for 48 months after his termination. Under cross-examination, the Plaintiff admitted that he had not pursued a claim with the Employment Tribunal in respect of the termination of his employment. He admitted that he had initially agreed to the deferred pay package with which he was intimately involved as one of the largest shareholders.

13. The Company's CEO in his Witness Statement asserted that: (a) it was agreed by all concerned that deferred salary would only be paid when the Company was in a position to do so and no one had been paid deferred salary; (b) although it was agreed that shares would be issued for years 1 and 2, this had not yet been done for financial reasons but was now being pursued. However, as no dividends had ever been declared, no loss had been caused by the delay in this regard; (c) no one had ever suggested that on leaving the Company a founding shareholder would be entitled to receive all deferred pay; the Board decided to terminate the Plaintiff's employment based on the CEO's report. Under cross-examination Mr. Symonds agreed that no warnings had ever been given to the Plaintiff about the matters he said contributed to the termination decision.

Counsel's submissions

14. Mr. Diel firstly submitted that the Company's case as pleaded could not now be fortified by belated reliance on reasons for termination. The Employment Act 2000's provisions, especially section 18, meant that the contractual notice provision "is of no effect". Section 18 makes it unlawful to terminate save for cause, except for cases where the employee (a) is employed on a fixed term contract which has expired, or (b) for the duration of a project which is completed: section 18(2).

15. The Defendant's counsel disputed this analysis and contended that this interpretation of the Act would lead to "commercially bizarre" results. It was also inconsistent with the common law right for an employer to dismiss for any reason upon giving contractual notice: *Wise Group-v-Mitchell* [2005] ICR 896. Mr. Adamson's secondary response was that section 18 created statutory duties the breach of which could be remedied only under the statutory regime itself.

16. On the deferred salary aspect of the Plaintiff's claim, Mr. Diel submitted as follows:

> "*It must be an implied term that the deferred salary to be paid within a reasonable time, or, in the circumstances, if the employment with the company was terminated. See AG of Belize and Others v Belize Telecom and another [2009] UKPC 10, Haycock v Cooper [2010] SC (Bda) Civil (5 July 2010). And New Law Journal 3 July 2009 'An Implied Role'*".

17. Mr. Adamson countered that: (a) no implied term that deferred salary was payable on termination was pleaded; (b) the stringent tests for the implication of such an implied term were not met; and (c) "*31.The factual matrix behind the agreement to defer salary was a start-up company with little working capital. Immediate payment upon termination makes absolutely no sense in such a context.*"

Legal findings: impact of the Employment Act 2000 on the common law right to terminate an employment contract for any reason subject to meeting the applicable contractual notice periods

18. Section 18 of the Employment Act provides as follows:

> "**Termination of employment**
>
> *18.(1)An employee's contract of employment shall not be terminated by an employer unless there is a valid reason for termination connected with—*
>
> *(a)the ability, performance or conduct of the employee; or*
>
> *(b)the operational requirements of the employer's business.*
>
> *(1A)An employee's contract of employment shall not be terminated by an employer under subsection (1), unless the notice requirements under section 20 and the provisions under section 26 or 27 have been complied with.*
>
> *(2)Subsection (1) does not apply where an employee is employed—*
>
> *(a) for a fixed period of time which has expired;*
> *(b) for the duration of a project which is complete.*
>
> *(3)An employee's contract of employment may be terminated by the employee for*

any reason in accordance with the notice requirements of section 20.

(4)Notwithstanding subsections (1) and (1A), an employee's contract of employment may be terminated by the employer without notice, for serious misconduct, under section 25."

19. The terms of section 18(1) are clear beyond serious argument. The subsection prohibits the termination of employment contracts by the employer for reasons unrelated to either (a) performance, or (b) operational requirements. The only exception to this prohibition is contracts of limited duration, fixed term or otherwise (subsection (2)), which expire at the end of the contract period. Apart from the expiry of contracts of limited duration and termination without notice for serious misconduct, premature termination of an unlimited term contract by the employer is only permissible where:

    19.1 the reason for termination is valid within the terms of section 18(1);and

    19.2 the employer complies with the "procedural" requirements of sections 20, 26 and 27, in accordance with section 18(2).

20. Section 20 provides in salient part as follows:

"**Notice periods**

20.(1)A contract of employment may be terminated in accordance with this Part by the employer on giving the following minimum periods of notice in writing ("the statutory notice periods")—

(a)one week, where the employee is paid each week;

(b)two weeks, where the employee is paid every two weeks;

(c)one month, in any other case.

(2)The statutory notice periods shall not apply—

(a)where the employer is entitled to summarily dismiss an employee under this Act;

(b)where the employee has reached the age at which he is required to retire,

(c)pursuant to his contract or otherwise;

(d)where periods of notice are regulated by contract, by collective agreement or otherwise by agreement between the employer and employee;

(e)where the giving of longer periods of notice is customary given the nature and functions of the work performed by the employee.

(3)A notice of termination shall not be given by an employer during an employee's absence—

(a)on annual vacation, maternity leave or bereavement leave;

(b)on sick leave, unless the period of sick leave extends beyond four weeks.

(4)… [notice to be given by employee]…"

21. Not only does section 20(1) prescribe one month's notice for employees paid monthly. Section 20(2) (c)-(d) makes it clear that these periods may be modified by contract. There is no apparent inconsistency between the notice period contractually agreed and that prescribed by the Act. It seems obvious that only section 20 need be complied with for a termination to be valid under section 18(1)(b). Sections 26 and 27 must also be complied with for a termination based on conduct or performance to be valid for the purposes of section 18(1)(a):

"**Termination for repeated misconduct**

26. (1) Where an employee is guilty of misconduct which is directly related to the employment relationship but which does not fall within section 25, the employer may give him a written warning.

(2)If, within six months of the date of the warning, the employee is again guilty of misconduct falling within subsection (1), the employer may terminate the employee's contract of employment without notice or the payment of any severance allowance.

(3)An employer shall be deemed to have waived his right to terminate under subsection (2) if he does not do so within a reasonable period of time after having knowledge of the repeated misconduct.

Termination for unsatisfactory performance

(1)Where an employee is not performing his duties in a satisfactory manner, the employer may give him a written warning and appropriate instructions as to how to improve his performance.

(2)If the employee does not, during the period of six months beginning with the date of the written warning, demonstrate that he is able to perform his duties in a

satisfactory manner and is in fact doing so, the employer may terminate his contract of employment without notice or the payment of any severance allowance."

22. Section 18 must also be read with section 28 of the Act to fully understand the statutory scheme. This provision sets out various prohibited grounds of termination and states that they (a) "*do not constitute valid reasons for dismissal or the imposition of disciplinary action*" (section 28(1)), and (b) "*dismissal of an employee is unfair if it is based on any of the grounds listed in subsection (1)*" (section 28(2)). So section 18 does not abolish the common law right of an employer to terminate a contract for any reason upon giving the contractual notice. Rather it modifies that right by providing a statutory remedy of unfair dismissal if an employer terminates a contract of employment:

    22.1 before it expires according to its terms;

    22.2 for misconduct or non-performance falling short of serious misconduct (to which section 25 applies) without following the statutory fairness criteria; and/or

    22.3 on grounds which are either (a) not 'connected to' operational requirements as required by section 18(1)(b,)or (b) prohibited by section 28(1).

23. To the above extent I accept the submissions of Mr. Diel to the effect that a contractual arrangement purporting to authorize termination without cause would be inconsistent with section 18 of the Act. No inconsistency would arise, however, if there were an express or implied term that permitted the employer to terminate on any ground whatsoever connected to the employer's operational requirements but not based on misconduct, under-performance or any ground prohibited by section 28 of the Act. Such an interpretation is in my judgment consistent with the broad policy aims of the Act in promoting fair employment practices primarily for the benefit of employees while preserving the right of employers to terminate contracts of employment on grounds which do not stigmatize the employee in any way but which are genuinely grounded in business concerns.

24. Although (for reasons which are considered below) the common law position may be viewed as being unchanged in the context of common law claims pursued before the courts, the Employment Act does not permit termination without cause for no reason whatsoever. Where the validity of a termination not falling within section 18(1)(a) is challenged under the Act by reference to the reasons for the employer's decision, it will likely be easy for the employer to establish that, *prima facie*, the termination is valid because the reason for the decision falls within section 18(1)(b). Section 38(2) provides that in "*any claim arising out of the dismissal of an employee it shall be for the employer to prove the reason for the dismissal, and if he fails to do so there shall be a conclusive presumption that the dismissal was unfair.*" Section 18(1)(b) permits terminations for reasons "*connected with…the operational requirements of the employer's business*", a

very broad term indeed. This appears designed to embrace the common law concept of dismissal otherwise than for cause to enable employers to terminate contracts of employment for an array of *bona fide* business reasons without having to prove an actual breach of contract on the employee's part. However, the scope of legitimate termination reasons is expressly limited by the prohibited grounds set out in section 28.

Findings: are the notice provisions in the Plaintiff's contract of employment with the Company invalid for inconsistency with section 18 of the Act?

25. I am bound to reject the almost tortuous argument that the notice provisions which were contractually agreed are invalid because they are inconsistent with section 18 of the Act, with the result that the Plaintiff is entitled to damages for breach of an implied term as to reasonable notice.

26. There is no conflict with the Act in parties agreeing that one month's notice should be given of termination in relation to an unlimited term employment contract. This is not to diminish or sidestep the force of the contention that the Plaintiff's contract defines the one month notice period as being applicable where it is "*necessary for the company to terminate employment for reasons other than cause*" (emphasis added). But any inconsistency with the Act does not relate to the period of notice *per se*; rather it is the deployment of the traditional common law concept of dismissal *otherwise than for cause* as distinguished from termination *for cause*. Under the Employment Act regime, the correct distinction would be between (premature) termination *for reasons relating to conduct and/or performance* as distinguished from termination on *operational requirement grounds*. The Plaintiff's argument is in substance a drafting complaint; there is no tenable basis on which the use of inappropriate wording to describe the circumstances in which termination may occur otherwise than on conduct or performance-related grounds can fairly be construed as impeaching the validity of a legally permissible notice period.

27. In any event, the Plaintiff's original pleaded case was simply that there was an implied term that his employment could only be terminated upon giving reasonable notice, and the implied term contended for was wholly inconsistent with the express terms of the contract and was accordingly not supported by any credible evidence.

Findings: should the Plaintiff be granted leave to amend to assert an unlawful termination claim implicitly based on section 18 of the Employment Act?

28. Having considered the true character of the Plaintiff's application for leave to amend, I find that it is not arguable that this Court may entertain the proposed claim for damages for termination "*without any or any proper cause*". This is an attempt to advance through the back door the breach of Employment Act claim originally pleaded in paragraph 8 of the Statement of Claim and which was struck out by Bell J on December 3, 2009: *Thomas-v- Fort Knox Bermuda Ltd et al* [2009] Bda LR 67. This decision was upheld by the Court of Appeal for Bermuda: *Thomas -v- Fort Knox* [2010] Bda LR 17.

29. It is clear from paragraph 6 of Bell J's Judgment, that the section 18(1) argument advanced before him was essentially the same as the point advanced before me at trial in support of the proposed amended pleading. The proposed amendment seeks to characterize the new claim in breach of contract terms, but in reality it is in substance a statutory claim. The following observations of Bell J apply with equal force to the above-quoted portions of the reformulated draft paragraph 8(a) of the Statement of Claim:

> "36. *Although paragraph 8 of the statement of claim does not refer in terms to the unfair dismissal provisions of the Act, there can be no other reason for relying upon the Act save to found a claim for unfair dismissal. Such a claim is unknown to the common law. It is a creature of statute and can only be pursued following the procedures provided for in the Act...*"

30. This decision was unanimously upheld by the Court of Appeal at the interlocutory stage of the present case; it cannot be revisited by this Court. The improper reason point is not an obviously strong one in any event. The documentary record strongly suggests that the reasons for the termination of the Plaintiff's employment were valid and fell within section 18(1)(b) of the Act.

31. It remains to consider the breach of Employee Handbook aspect of the proposed new claim, which is arguably separate and distinct from the draft "*without any proper cause*" plea.

Findings: should the Plaintiff be granted leave to add a claim for wrongful termination based on a breach of the Employee Handbook?

32. I refuse leave to amend to add a new claim at trial that "*the termination of the Plaintiff was in breach of contract in purporting to do so…without compliance with the provisions of the Employee Handbook*". This claim is not arguable, but for different reasons.

33. Bell J in his Judgment on the strike-out application in this case held (at paragraph 20f.) that "*claims for wrongful dismissal (dismissal in breach of the terms of the employment contract) can be ...brought*" before the courts, in contrast with unfair dismissal claims which cannot. He also helpfully considered the core distinction between the common law claim of wrongful dismissal, which does not afford a compensatory remedy for a dismissal which is procedurally unfair, and the statutory claim for unfair dismissal which does. The following passage in his Judgment merits reproduction in full:

> "*14. Before turning to the effect of the passing of the Act, it is no doubt helpful to remind oneself of the position as it was immediately prior to the passing of the Act, at common law. I will do this by reference to the two cases cited by Mr. Adamson, both of which set out the common law position in the United Kingdom. In GAB Robins (UK) Ltd –v- Triggs, Rimer LJ summarised what Lord Hoffmann had said in Johnson –v- Unisys, in these terms:*

'Lord Hoffmann explained, at para 35, that the first question was whether the implied term of trust of confidence owed by an employer to an employee also applied to a dismissal. The problem lay in the fact that the common law entitles an employer to dismiss an employee without giving him a hearing and for unreasonable and capricious motives, and that the employee in such a case has no remedy at common law unless the dismissal is in breach of contract. The consequence is that a common law action for wrongful dismissal can at most yield compensation measured by reference to the salary that should have been paid during the contractual period of notice.'

15. And Lord Hoffman himself in Johnson –v- Unisys referred to a judgment of the Supreme Court of Canada, in the following terms:

'39 The effect of such a provision at common law was stated with great clarity by McLachlin J of the Supreme Court of Canada in Wallace –v- United Grain Growers Ltd (1997) 152 DLR (4th) I, 39:

"The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal…A 'wrongful dismissal' action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given.""

34. This analysis was affirmed in this same case by Evans JA, delivering the leading judgment of the Court of Appeal for Bermuda:

"*22. The common law background may be summarized as follows…the employer is entitled to terminate the employment, as distinct from the contract, forthwith, whether or not good cause exists…and when the employer has failed to give the contractual notice, the employee's remedy is limited to recovering damages representing his loss of remuneration and other benefits during the period of notice denied to him.*"

35. Accordingly the proposed plea that the termination of the Plaintiff's employment was in breach of contract for non-compliance with the Employee Handbook is itself liable to be struck out on at least two plain and obvious grounds. Firstly, to the extent that the draft

plea complains of procedural unfairness (as the Plaintiff's Witness Statement suggests), it fails to disclose a reasonable (common law) cause of action. To the extent that it is intended to support the legally viable complaint that insufficient notice was given in breach of contract, it is evidentially unsustainable and bound to fail. One month's notice was agreed; the Plaintiff received one month's pay in lieu of notice (the issue of deferred compensation apart). Leave to amend must in these circumstances be refused.

Findings: did the Plaintiff's employment contract contain an implied term that deferred compensation would become payable forthwith upon termination?

36. There is no dispute as to the applicable test for the implication of terms into a contract. The Defendant contends that it is explicit that deferred compensation would be paid when the start-up Company could afford to do so; the Plaintiff, without (or without vigorously) dissenting from this proposition, contends that it ought to be implied that the parties agreed that if an employee's tenure as such came to an end, the deferred compensation then outstanding would become immediately due.

37. Mr. Diel for the Plaintiff relied upon the law as set out in, *inter alia*, the Judicial Committee of the Privy Council case of *Attorney-General of Belize-v-Belize Telecom* [2009] UKPC 10. I am guided by the following passages in Lord Hoffman's judgment on behalf of the Board:

> *"[21] It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*
>
> *[22]There are dangers in treating these alternative formulations of the question as if they had a life of their own. Take, for example, the question of whether the implied term is "necessary to give business efficacy" to the contract. That formulation serves to underline two important points. The first, conveyed by the use of the word "business", is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which Equitable* Life Assurance Society v Hyman *[2002] 1 AC 408 was decided.*

The second, conveyed by the use of the word "necessary", is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.

[23]The danger lies, however, in detaching the phrase "necessary to give business efficacy" from the basic process of construction of the instrument. It is frequently the case that a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean. Lord Steyn made this point in the Equitable Life case (at p. 459) when he said that in that case an implication was necessary "to give effect to the reasonable expectations of the parties."

[24]The same point had been made many years earlier by Bowen LJ in his well known formulation in The Moorcock *(1889) 14 PD 64, 68:*

> *'In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men."*

[25]Likewise, the requirement that the implied term must "go without saying" is no more than another way of saying that, although the instrument does not expressly say so, that is what a reasonable person would understand it to mean. Any attempt to make more of this requirement runs the risk of diverting attention from the objectivity which informs the whole process of construction into speculation about what the actual parties to the contract or authors (or supposed authors) of the instrument would have thought about the proposed implication. The imaginary conversation with an officious bystander in Shirlaw v Southern Foundries (1926) Ltd *[1939] 2 KB 206, 227 is celebrated throughout the common law world. Like the phrase "necessary to give business efficacy", it vividly emphasises the need for the court to be satisfied that the proposed implication spells out what the contract would reasonably be understood to mean. But it carries the danger of barren argument over how the actual parties would have reacted to the proposed amendment. That, in the Board's opinion, is irrelevant. Likewise, it is not necessary that the need for the implied term should be obvious in the sense of being immediately apparent, even upon a superficial consideration of the terms of the contract and the relevant background. The need for an implied term not infrequently arises when the draftsman of a complicated instrument has omitted to make express provision for some event because he has not fully thought through the contingencies which might arise, even though it is obvious after a careful consideration of the express terms and the background that only one answer would be consistent with the rest of the instrument. In such circumstances, the fact that the actual parties might have said to the officious bystander "Could you please explain that again?" does not matter.*

[26]In BP Refinery (Westernport) Pty Ltd v Shire of Hastings *(1977) 180 CLR 266, 282-283 Lord Simon of Glaisdale, giving the advice of the majority of the Board, said that it was "not ... necessary to review exhaustively the authorities on the implication of a term in a contract" but that the following conditions ("which may overlap") must be satisfied:*

> *'(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying' (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract'.*

[27]The Board considers that this list is best regarded, not as a series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of "necessary to give business efficacy" and "goes without saying". As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant."

38. A term may, in essence, only be implied if it can clearly be inferred from the express terms of the contract to have formed part of the original agreement. In my judgment it is only obvious that the deferred salary agreement was entered into both (a) as an incident of the key employees' status as investors and shareholders in the Company, and (b) because the Company was not as a start-up able to adequately compensate its employee/investors in cash. Inherent in the agreement was the hope that the company would prosper but the awareness that it might not. The Plaintiff was primarily an investor, not an ordinary employee. Moreover, the express terms of the various deferred compensation agreements make it clear that the Company retained the discretion as to whether or not to award cash or shares at the end of each compensation period.

39. The express terms of the contract, moreover, make no reference to the scenario where an employee entitled to deferred compensation ceases to be an employee. The deferred compensation aspect of the Plaintiff's contract of employment expressly referenced the fact that the Plaintiff was a substantial shareholder of the Company. Accordingly, the package was agreed in a factual matrix within which the parties knew or must be deemed to have known that even if the Plaintiff left the employ of the Company, he would retain the option to monitor the Company's financial status and ability to pay the deferred compensation through the pursuit of shareholder remedies.

40. In these circumstances, there is no credible basis for the implication of the term contended for by the Plaintiff. In my experience this sort of contractual term (providing for the crystallization of deferred compensation rights upon termination of employment) is ordinarily dealt with through express agreements, not left to implication. I find that the only term which can be fairly implied to give efficacy to the Plaintiff's employment contract is that on termination of employment, the key employees such as the Plaintiff are entitled to be paid as soon as reasonably practicable subject only to the ability of the Company to make such payments in the form of cash and/or equity.

41. The Plaintiff's case in the present action was directed towards demonstrating that the amounts admittedly due were presently due in cash by virtue of his termination. The rejection of this claim (accepting the Company's contentions that a contingent or prospective claim does exist) leaves open for future determination, whether in the pending section 111 of the Companies Act 1981 proceeding or otherwise, the general question of whether and when the Company is able to actually pay the deferred compensation either by issuing shares or as a money debt which is presently due and owing. Until then, it remains a contingent obligation.

Summary

42. The Plaintiff's claims for damages for wrongful termination of his employment are dismissed. His application at trial for leave to amend to add what was in substance a recycled version of the statutory claim which was struck-out at the interlocutory stage is refused.

43. As far as the claim for damages in lieu of reasonable notice is concerned, this claim fails because the parties validly agreed that the Plaintiff was entitled to one month's notice upon termination otherwise than for misconduct or non-performance. Any claim for breach of the Employment Act (whether challenging the adequacy of the reasons for or fairness of the termination) could only have been brought before an Employment Tribunal under the Act.

44. As far as the Plaintiff's claim for deferred compensation is concerned, there is no proper basis for finding an implied term in the deferred payment agreement that such compensation would become immediately payable to the Plaintiff upon termination of his employment with regard to the Company's ability to make the relevant payments. The Plaintiff has not established in the present action that any presently due debt is owed to him in this regard. The issue of when the relevant obligation crystallizes remains open for future determination.

45. Subject to hearing counsel, it is difficult to see why the Defendant ought not to be awarded the costs of the present action.

Dated this 1st day of October, 2010 _____
KAWALEY J