BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(CIVIL DIVISION)

[Unreported]

Suit No: CV0233 of 2007

BETWEEN:

GEOFFREY TUCKER **PLAINTIFF**

and

SOUTHWINDS HOTEL & BEACH CLUB LIMITED
(trading as DIVI SOUTHWINDS) **DEFENDANT**

Before:
The Honourable Madam Maureen Crane-Scott Judge of the High Court

Appearances:
Miss. Alicia A. Archer in association with Miss. Lisa R. Greaves for the Plaintiff
Mr. Marcel El-Daher in association with Miss. Amanda Mohammed of Hanschell & Company for the Defendant

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2009: November 16, 17
December 3
2013: August 23

DECISION

[1] **Crane-Scott J:** This is an action for breach of an employment contract instituted by Geoffrey Tucker ("the Plaintiff") against Southwinds Hotel & Beach Club Limited trading as Divi Southwinds ("the Defendant") his former employer, seeking damages in the sum of $99,892.86 together with interest and costs.

[2] ***Background:*** By a written agreement dated November 24, 2004 (hereinafter called "the initial employment contract") the Defendant agreed to employ the Plaintiff as the General Manager of its two beach resorts in Barbados, namely, the Divi Southwinds Beach Resort and its affiliate, the Divi Southwinds Beach Villas Resort.

[3] The initial employment contract did not expressly provide a fixed date as to when the Plaintiff's term of engagement would commence. It did, however, stipulate under the sub-heading "*Term*" that the Plaintiff would be employed for a term of 6 months which term would be automatically renewable for successive 6-month periods unless either party notified the other of their intention not to renew at least 30 days before the end of a given term. The contract also expressly provided that the Plaintiff's overall term of employment under the initial employment contract would in no event extend beyond 3 years, at which time the parties were free to discuss the execution of a new written contract of employment.

[4] Although it was clear from the evidence that the Plaintiff did not take up his position as General Manager until December 6, 2004, both sides accept, and the pleadings confirm, that the parties operated as if the Plaintiff's contract had commenced on January 1, 2005 and, further, that this thereby rendered the initial employment contract automatically renewable on June 30, 2005.

[5] ***The amended employment contract:*** In May 2005, a few weeks prior to the expiry of his initial term of 6 months, the Plaintiff approached the Defendant concerning the terms of his existing contract. He indicated that he was interested in purchasing a home but had been unable to obtain a mortgage from a Bank while having an employment contract of a

fixed term of 6 months. He therefore requested from the Defendant a new contract that either ran for a 1-year term or which contained no fixed term, as he had been informed that either contract would facilitate his ability to satisfy the requirements for obtaining a residential mortgage.

[6] To facilitate the Plaintiff's request, the parties commenced negotiations during the period May and June of 2005 regarding the terms which would govern the Plaintiff's continued employment as the Defendant's General Manager. The final terms and conditions were settled on or about June 29, 2005 and the amended contract (hereafter referred to as "the amended employment contract") was ultimately signed by both parties and dated July 1, 2005.

[7] The terms of the Plaintiff's amended employment contract were virtually identical to his initial employment contract except that the former provided that the Plaintiff would be employed for a fixed term of one (1) year, which term would be automatically renewable for successive one year periods unless either party notified the other of their intention not to renew, at least thirty (30) days before the end of a given term. The amended employment contract also substantially altered the compensation package offered to the Plaintiff.

[8] With respect to the Plaintiff's term of engagement, the amended employment contract contained a stipulation (identical to that found in the initial employment contract) that the term of the Plaintiff's employment agreement would in no event extend beyond three (3) years, at which time the parties were at liberty to discuss the execution of a new employment agreement.

[9] Additionally, the amended employment contract contained an "entire agreement" clause (also found in the initial employment contract) that provided, *inter alia*:

> *"This agreement and attached exhibits contains the entire agreement and understanding of the parties with respect to the subject matter contained herein and supersedes all prior agreements and negotiations of the parties (oral and written). This agreement may only be changed by an agreement in writing signed by the party against whom enforcement is sought…."*

[10] As was the case under the initial employment contract, the amended employment contract did not expressly stipulate a date on which it would enter into force. Under the rubric "*Wages*", the amended contract, however, specifically stated at sub-paragraph a. that the Defendant company would provide the Plaintiff with an amended compensation package, the gross wages of which were to be received by him "*effective beginning the 1st day of January 2005."*

[11] Details of the amended compensation package to the Plaintiff under the amended employment contract were set out at sub-paragraphs a., b. and c. under the rubric "*Wages*". Sub-paragraph a. dealt specifically with the Plaintiff's monthly gross wages, while sub-paragraph b. detailed his entertainment, travel and housing allowances. Sub-paragraph c. was devoted solely to specifying the food and beverage allowances to which he was entitled.

[12] Under the initial employment contract, the Plaintiff's monthly gross wages had been $5,166.67 USD but this sum was increased to $6,291.86 USD under the amended employment contract. In contrast, the entertainment, travel and housing allowances to which the Plaintiff had been entitled were not increased, but were instead reduced from $650.00 USD, $600.00 USD and $333.33 USD respectively under the initial employment

contract to $326.63 USD, $301.51 USD and $167.50 USD respectively under the amended contract. No change was made to the monthly food and beverage allowance of up to $400.00 USD which the Plaintiff received under the initial employment contract.

[13] Unlike sub-paragraph a. dealing with the increase in the Plaintiff's gross monthly wages, no date was stipulated under the amended contract as to when the reduced entertainment, travel and housing allowances payable under the new contract would become effective.

[14] In addition to the compensation package described above, both contracts also provided under the sub-heading "*Benefits*" that the Plaintiff was entitled to the use of a cellular phone and a motor vehicle provided by the Defendant during the term of his employment. The Defendant also agreed to provide the Plaintiff with basic medical, dental, vision and life insurance coverage through an insurance programme organized by the Barbados Hotel Association.

[15] Particulars of the Plaintiff's amended monthly remuneration, including the allowances and other benefits to which he was entitled under the amended employment contract, were contained in paragraph 8 of his Statement of Claim. The accuracy of these particulars is not disputed by the Defendant and they are therefore reproduced hereunder as follows:

Particulars of monthly remuneration

Gross salary ($6,291.86 USD)	-	$	12,646.64 BDS
Entertainment ($ 326.63 USD)	-	$	656.53 BDS
Travel ($ 301.51 USD)	-	$	606.04 BDS
Housing ($167.50 USD)	-	$	336.68 BDS
Food & Beverage ($ 400.00 USD)	-	$	804.00 BDS
Company Vehicle ($ 692.00 USD)	-	$	1,390.92 BDS
Cellular phone	-	$	200.00 BDS
Insurance	-	$	8.00 BDS

Total - $ 16,648.81 BDS

[16] As is clearly evident from page 4 of the amended employment contract, *[Tab H of the Agreed Bundle]* the Plaintiff duly agreed to and accepted the Defendant's offer of continued employment on successive one (1) year terms, together with the amended compensation package, by affixing his signature thereto on July 1st, 2005, the very date on which he received the same.

[17] ***The relationship sours*****:** Following the signing of the amended employment contract by the Plaintiff and its faxed delivery to the Defendant's Legal Department on July 1st, 2005 at 4:06 pm *[See Tab H]*, the employment relationship between the parties continued into the year 2006 without any reported difficulties.

[18] Then by letter dated May 5th, 2006 *[Tab N]*, the Plaintiff informed the Defendant of his intention not to renew his 1-year contract. He also informed the Defendant that it was his intention to fulfill his duties under the amended employment contract until the expiry of its term, which occurred (according to his calculations) in December 2006.

[19] By letter dated May 10th, 2006, *[Tab P]* the Defendant through its General Legal Counsel purported to accept the Plaintiff's election not to renew his contract. The company, however, informed him that (according to the company's calculations) his 1-year contract would expire on July 1st, 2006 and not December 2006.

[20] The Plaintiff subsequently wrote to the Defendant on May 19th, 2006 *[Tab R]*. He informed the Defendant that having checked his records and taken legal advice, the effective date of his amended employment contract was June 1st, 2006. He further stated

that his contract would not expire on December 31st, 2006 as he had originally advised, but would expire instead on May 31st, 2007.

[21] The Plaintiff explained that the effective date of his initial employment contract had been December 6th, 2004. He contended that as neither party had given notice of non-renewal at least 30 days prior to the end of the initial 6 month term, the term of the initial employment contract had automatically been renewed as of June 1st, 2005. This, he said, was the effective date at which the amended employment contract commenced.

[22] The festering discontent between the parties reached its climax some days later when the Defendant by letter dated May 24th, 2006 *[Tab W]* while maintaining that the proper expiration date of the current term was June 30th, 2006, purported to terminate the Plaintiff's services with immediate effect. The Defendant also notified the Plaintiff that it would not be renewing his contract regardless of whether a different expiration date was determined or whether his election not to renew was rescinded or was ineffective for any reason.

[23] Citing concerns about the Plaintiff's job performance, the Defendant also informed the Plaintiff that it had decided that his continuance as General Manager through the end of June 2006 was not in the company's best interests. He was requested to remove his personal belongings from the resort by the end of the day. The Defendant informed him that it was the company's intention to pay his wages, including all accrued vacation through June 30th, 2006. He was also informed that the company would pay his entertainment, travel and food allowances along with the housing allowance until the end of June 2006. The letter also documented the Plaintiff's preference for a cash payment in

lieu of the use of the vehicle and set out the company's intention to pay him a pro-rated cash-in-lieu payment for the use of the vehicle from the remaining days of May to the end of June 2006.

[24] By letter dated August 22nd, 2006 *[Tab Y]* the Plaintiff made a formal demand through his attorney-at-law for the sum of $99,892.86 being six (6) months remuneration for the period July 2006 through December 2006. The Plaintiff contended that the effective date of his amended employment contract was January 1st, 2005 and that as neither party had given notice of non-renewal before the yearly term expired on December 31st, 2005, the contract was automatically renewed on January 1st, 2006 for a 1-year term on the same terms and conditions.

[25] The Plaintiff contended that in the light of the Defendant's letter of May 24th, 2006 informing him that it was the company's intention not to renew his contract, he was entitled under the contract to six (6) months remuneration for the period July 2006 through December 2006 when the 1-year term would have come to an end.

[26] Finally, on February 12th, 2007, not having received a satisfactory response to his demand, the Plaintiff instituted the current proceedings claiming the sum of $99,892.86 as damages for breach of contract, together with interest and costs.

[27] ***The Evidence before the Court***: The Plaintiff testified before the Court at trial and was cross-examined by Counsel for the Defendant. He called no other witnesses in support of his case.

[28] In his examination-in-chief, the Plaintiff briefly explained how he came to be employed by the Defendant as its General Manager. His employment, he said, was governed by a

written contract which he admitted negotiating directly with the Defendants without seeking any legal advice. He pointed out that although the initial employment contract had been signed by him on November 24th, 2004, he did not commence working with the Defendant until December 6th, 2004.

[29] The Plaintiff also discussed the circumstances which led to his request for and the subsequent negotiations for the amended employment contract between himself and the Defendant. With respect to the negotiations, the Plaintiff testified that the contract had been neither drafted by him nor drafted jointly by the parties, but had instead been prepared by the Defendant. In re-examination, however, he clarified he had only been involved in the negotiation and drafting of the clause pertaining to the period of vacation to which he would be entitled. He specifically pointed out that he did not in any way participate in drafting the clause regarding his gross wages or the date from which they were to be paid.

[30] It was the evidence of the Plaintiff that his wages had been increased and backdated not because he was a member of the union, but because of a favourable performance review he had received. This review had been conducted by the President of the Defendant Company just prior to the execution of the amended employment contract and it had rated his performance as very good. The Plaintiff explained in cross-examination that the purpose of a performance review was to assess an employee's performance and determine whether he was doing a good job. He accepted that favorable performance reviews led to a salary increase but asserted that the retroactive increase of his gross wages was not necessarily as a result of his favourable review.

[31] The Plaintiff was unable to recall whether he was paid the difference between his wages in the initial employment contract and the amended employment contract for the 6 month period beginning from January 2005 and ending in June 2005 which would have been governed by the retroactive wage increase. He could not say whether that amount had been paid to him in July 2005.

[32] The Plaintiff outlined all the terms of the amended employment contract. He stated that the contract was automatically renewable unless notice was given of an intention not to renew. He explained that by his letter of May 5, 2006 *[Tab N]*, he had sought to give such notice and stressed that the letter in question was not in any way a letter of resignation. Cross-examined as to why he had given the Defendant more than 6 months notice of non-renewal rather than the 30 days required by the contract, the Plaintiff said that he had done so because he was a professional and wanted to ensure that he gave the Defendant more than enough time to locate a replacement.

[33] Although the Plaintiff conceded that just prior to his letter of May 5th, 2006 he had been involved in a dispute with a staff member and that the trade union had taken action because of it, he firmly denied any suggestion that his decision not to renew had been due to issues relating to his performance as General Manager or because he was under pressure to resign as a consequence of that incident. He also denied a suggestion that the management of the resort had been unhappy with the manner in which he had handled the dispute and stated that he had not been told that that was the case. He explained in re-examination that he had dealt with the dispute in accordance with instructions received directly from the President of the Defendant Company. However after industrial action

had been taken by the union, he said, management proceeded to retract their instructions and had refused to back the decision he had already taken.

[34] The Plaintiff further testified that before he received the letter dated May 24th, 2006 *[Tab W]* from the Defendant by which the Defendant sought to terminate his employment, he had received an email dated May 21st, 2006 *[Tab T]* which had made him aware that a replacement had been found for the position in which he was then still employed. The email, he said, had been inadvertently sent to him by Maarten Van Wijk.

[35] The Plaintiff detailed how he had tried – without success – to find employment in the hotel industry in Barbados, as well as in Canada and other Caribbean countries, after he had ceased working for the Defendant. He testified that he had become self-employed since December 2007 and remained so. At the time of giving evidence he was working within the restaurant business in Florida.

[36] Mrs. Ebbie Whitleg-Hendren, who had been employed by the Defendant as its Human Resources Director since 2003, and Ms. Patricia Vance, the First Controller and Deputy General Manager of the Defendant, were both called to give evidence on the Defendant's behalf.

[37] Mrs. Whitleg-Hendren explained that as Human Resources Director she had been involved in the recruitment of the Plaintiff. She had also assisted in the drafting of both the initial employment contract and the amended employment contract using a template for employment agreements provided by the Defendant's in-house legal counsel. Her evidence was that the Plaintiff was involved in negotiating the amended employment contract. The President, Ray Hobbs, had also participated and it had been the President,

she said, who had determined the gross wages to be paid to the Plaintiff under the amended employment contract and the date from which these increased wages were to be paid.

[38] Mrs. Whitleg-Hendren maintained that, although the increase in gross wages was to take effect from January 1, 2005, the "effective date" of the contract was the date of its execution. She conceded that although the initial employment contract was executed on November 24, 2004, it had not actually commenced until the first full week in December and that the Plaintiff was not paid for the period between the execution of the contract and when he actually took up employment. Although the Plaintiff began working with the Defendant on November 24, 2004, Mrs. Whitleg-Hendren insisted that the initial employment contract began on January 1, 2005.

[39] In answer to a question as to whether she was aware of the Plaintiff's exit from the Defendant company, the witness asserted that she had received a copy of the Plaintiff's letter dated May 5, 2006 and described this letter as a resignation letter since, according to her, the letter advised that the Plaintiff would vacate his position as General Manager. In cross-examination, however, she admitted that she was unfamiliar with the difference between a letter of resignation and a notice of intention not to renew, although she maintained that from a human resources perspective the effect of both would be the same.

[40] The Defendant's Financial Comptroller and Deputy General Manager, Miss. Patricia Vance testified at the trial on the Defendant's behalf. She explained that in early July 2005, when she was about to prepare the payroll for the month of July 2005, she learned by an e-mail from the Plaintiff that he had been awarded a salary increase retroactive to

January 2005. After verifying the amount by reference to his amended employment contract, Miss Vance said she had included an amount for the retroactive pay due to the Plaintiff for the period January to June 2005 and had added it to his increased basic monthly salary for July.

[41] According to Ms. Vance, she had verified the Plaintiff's pay increase by referring to the amended employment contract and specifically paragraph a. under the heading "*Wages*" of that contract which had stated that the Company would provide the Plaintiff with an *amended* monthly compensation package *"effective beginning the 1st day of January, 2005."*

[42] Ms. Vance confirmed that she made payments to the management staff as she was instructed to do and was not in any way involved in the negotiation of pay increases and that the reasons behind the increase were not her concern.

[43] ***The Case for the Plaintiff*:** In her legal submissions at the trial, Counsel for the Plaintiff, Miss. Alicia Archer, contended that due to the inclusion of the "*entire contract*" clause, the full contractual terms governing the employment relationship between the parties are to be found solely within the four walls of the amended employment contract. In support of this submission, she cited the English case of ***Intrepreneur Pub Co. (GL) v. East Crown Ltd [2000] 2 Lloyd's Rep. 611*** and urged the Court to rely solely on a construction of the terms of the amended employment contract to determine the intention of the parties.

[44] Citing ***Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 W.L.R. 896,*** Miss. Archer also urged the Court, when construing the amended contract ,

to have regard to all the background facts which were available to the parties at the time of its execution, including the 'genesis' or 'aim' of the amended contract, which had been to afford the Plaintiff a contract of one (1) year's duration as opposed to 6 months in order to enable him to obtain a mortgage and satisfy a pressing housing need.

[45] Miss. Archer submitted that the expression *"effective beginning the 1st day of January, 2005"* in the amended employment contract under the rubric *"Wages"*, could only have one meaning, namely, that the entire contract was intended to come into effect or operation or have full contractual force on the date specified in that expression.

[46] She further submitted that the insertion of the expression *"effective beginning the 1st day of January, 2005"* introduced a retrospective element to the amended employment contract in that, notwithstanding that it was signed by the parties on July 1st, 2005, it was meant to come into operation with effect from the earlier date specified, namely, January 1st, 2005.

[47] In pointing out that parties to an agreement are free to give retrospective effect to a contract, Counsel for the Plaintiff cited ***Morgala v. McDermott Scotland (1987) S.L.T. 482*** and ***Northern & Shell plc v. John Laing Construction Ltd [2003] 90 Con. L.R. 26.*** She argued that the retrospective effect of a contract is more readily seen when there is a prior contractual relationship between the parties, but conceded that the existence of such a relationship was not necessary.

[48] Counsel for the Plaintiff maintained that if the clause in question is examined against the background of the Plaintiff's request for expansion of the contractual period and against the background also of the request having been made prior to the expiration of the initial

employment contract, a reasonable person would conclude on a balance of probabilities that the parties intended to make the entire contract retroactive to January 1st, 2005.

[49] According to Miss. Archer, the expression in question had only two possible interpretations and it was the task of the Court to determine whether the expression made the document retrospective or whether it failed to do so. She submitted that where there was doubt with respect to the construction of words in a written contract, either because of competing interpretations or due to ambiguity, the words were to be construed *contra proferentum* or against the party seeking to avoid liability. To buttress this submission, she cited ***Youell & Others v. Bland Welch & Co. Ltd & Others [1992] 2 Lloyd's Rep. 127 at 134*** and urged the Court to apply the *contra proferentum* rule of construction in favor of the Plaintiff and find that the entire contract took effect on January 1st, 2005.

[50] Finally, Counsel for the Plaintiff argued that if the Court were to find that the amended contract took effect on 1st January, 2005 for a one (1) year period, as no notice had been given by either party of their intention not to renew, the contract had been automatically renewed for a further period of one year commencing on January 1, 2006 and expiring on the December 31, 2006.

[51] On the issue of whether the amended employment contract granted the Defendant the power to dismiss, Miss. Archer accepted that where an employment contract is silent on the question of dismissal, the law normally implies into the contract a term allowing dismissal on the provision of reasonable notice or upon an act of gross misconduct by the employee. However, relying on the decision of the Privy Council in the Bermudian case of ***Nicholas Reda, Jamal Abdul-Jalil v Flag Limited [2002] UKPC 38 at paras 57-8***, she

submitted that this general rule did not apply to a fixed term contract of employment, such as the contracts the Plaintiff had with the Defendant, and no power of dismissal was imported into such contracts where they were not explicitly stipulated therein.

[52] Miss. Archer accordingly submitted that the letter dated May 24, 2006 by which the Defendant informed the Plaintiff that his services were no longer required and directed him to remove his personal effects from the resort by the end of that day amounted to a wrongful dismissal and was in breach of the Plaintiff's employment contract.

[53] Miss. Archer denied that the Plaintiff's notice of intention not to renew dated May 5th, 2006, which had been given pursuant to the terms of the contract, could be legally regarded as a repudiation of the contract, even if purportedly accepted by the Defendant. She submitted, on the basis of ***Waithe v Caribbean Airways (1987) 39 WIR 61*** and ***Hackett v Caribbean Examinations Council (1988) 40 WIR 38***, that the Plaintiff was entitled to be placed in the same position he would have been in if the contract had not been breached and was therefore entitled to all salary and emoluments due to him under the unexpired portion of the contract.

[54] ***The Case for the Defendant*:** Counsel for the Defendant, Mr. El-Daher, submitted that on July 1, 2005 (i.e. the date on which the amended employment contract was made) the Plaintiff had been in the employ of the Defendant pursuant to the initial employment contract.

[55] According to Mr. El-Daher, the amended employment contract was an entirely new contract which, by its terms, had expressly superseded any previous contract or negotiation between the parties. He submitted that the terms of the amended employment

contract had been negotiated just prior to the expiration of the initial employment contract and that negotiations had been ongoing up to June 29, 2005.

[56] Referring to the "entire agreement" clause, which had been included in the amended contract, Mr. El-Daher submitted that it expressly provided that all prior negotiations and discussions were superseded upon execution of the amended employment contract.

[57] Counsel for the Defendant indicated that the amended employment contract also stipulated that either party could give notice of their intention not to renew the contract within 30 days before the end of the one (1) year term. He contended that the Defendant's letters dated May 10, 2006 and May 24, 2006 respectively were consistent with the terms of the amended employment contract pertaining to notice.

[58] Citing dicta from decided cases including ***Inland Revenue Commissioners v. Raphael [1935] A.C. 96 at 142*** and ***Grey v. Pearson (1857) 6 H.L.C. 61 at 106***, Mr. El-Daher submitted that contractual terms were to be given their plain, ordinary meaning. He contended that applying the plain and natural meaning to the word "*effective*" as it was employed in the amended employment contract under the rubric "*Wages*", the expression *"You will receive gross wages of US$ 6,291.86 effective beginning the 1st day of January, 2005"* simply meant that the parties were making the Plaintiff's gross salary payments retroactive to January 1, 2005.

[59] Counsel for the Defendant urged the Court to apply a common sense business approach when interpreting the contractual terms and determining the parties' intentions. He submitted that if the common sense business approach were employed and the expression given its plain and ordinary meaning, the Court should find that the words: *"You will*

receive gross wages of US$ 6,291.86 effective beginning the 1st day of January, 2005" in the amended employment contract only referred to the retroactive payment of the wages stipulated under that contract. It cannot, he submitted, be read as referring to such a fundamental term of the contract as its commencement date or "*effective date*".

[60] Addressing the Plaintiff's submission that the expression introduced a retrospective element to the entire contract, Mr. El-Daher contended that it did not follow logically that the parties intended to have the amended employment contract retrospectively take effect from January 1, 2005 because the initial employment contract was already in place covering that period.

[61] Mr. El-Daher also referred to the parole evidence rule and the dictum of Lawrence, J. in ***James v. Batavia and General Plantations Ltd [1924] 1 Ch. 287***. He cited the dictum of Bayley J in ***Williams v. Jones 5 B & C. 108*** and an extract from ***Treital, The Law of Contract, 8th Edition at p. 176*** and urged the Court not to permit the admission of parole evidence to add to, vary or contradict what he described as the clear terms of the written instrument.

[62] Turning to the issue of the commencement date of the amended contract Mr. El-Daher pointed out that although the contract had not expressly addressed the effective or commencement date, the evidence was that the amended employment contract had been signed and accepted on the 1st day of July, 2005. Citing an extract from ***Lewison, The Interpretation of Contracts (Second Edition) p. 258 at paragraph 9.03*** and ***Clayton's Case (1584) 5 Coke Reports*** and ***Styles v. Wardle (1825) 107 E.R. 1297*** per Bayley J, Counsel for the Defendant submitted that July 1, 2005 the date on which the amended

employment contract had been signed and dated, was the "effective date" of the contract and it was the Defendant's case that the contract would therefore have expired on June 30, 2006.

[63] It was also his submission that if the Court was not inclined to accept the date of execution appearing on the face of the document as the effective date of the agreement, Mr. El-Daher urged the Court to accept the date of delivery as the effective date. He submitted that as the date of delivery of the contract was also July 1, 2005 the Court could come to no other conclusion than that the Plaintiff became obligated to the Defendant as an employee under the amended employment contract on July 1, 2005.

[64] Turning finally to the measure of damages and the effect of the Defendant's notice of non-renewal of May 24, 2006, Mr. El-Daher referred the Court to ***Halsbury's Laws of England (Fourth Edition) Volume 16 at paragraphs 280-290*** and submitted that the amended employment contract had expressly provided that either party was at liberty to give Notice of Non-Renewal at least 30 days from the termination date of the new contract. As the expiration date of the amended employment contract was June 30, 2006, it was his submission that the Defendant's Notice of May 24, 2006 was sufficient notice of the Defendant's intention not to renew.

[65] He accordingly submitted that on date on which the Defendant's Notice was sent the Plaintiff would have been entitled to his salary for the months of May and June of 2006, being the portion of his 1-year contract which remained outstanding when notice had been given and which he would therefore have earned if his contract of employment had not been terminated. Counsel for the Defendant contended that as the Plaintiff had been

paid an amount equivalent to the salary and emoluments to which he was entitled for the months of May and June of 2006, he was entitled to nothing further and could not therefore claim damages of any sort.

[66] ***The Issues:*** For convenience, the several issues and questions which have arisen for the Court's determination are listed, in order of importance, as follows:

(i) What was the "effective date" of the Plaintiff's amended employment contract dated 1st July, 2005 and when did the 1-year term of that contract commence?

(ii) Did the Plaintiff's letter of May 5th, 2006 (which was accepted by the Defendant on May 10th, 2006) operate as a notice of non-renewal so as to effectively bring the amended employment contract to an end at the expiry date of the 1-year term?

(iii) What is the effect of the Defendant's letter of May 24, 2006? Did it operate to terminate the Plaintiff's amended employment contract with immediate effect and ahead of the expiry date of the 1-year term?

(iv) Can the Plaintiff's claim for damages in the amount of $99,892.86 as set out in his Statement of Claim in respect of the peremptory termination of his contract of employment on May 24th, 2006 ahead of its expiry date be sustained?

[67] *Issue No. (i) - What was the "effective date" of the Plaintiff's amended employment contract - When did the 1-year term commence?* The dispute in this case requires a determination as to what was the legal commencement date of the 1-year term provided for in the Plaintiff's amended employment contract and what meaning is to be ascribed to

the words: *"You will receive gross wages of US$6,291.86 per month, effective beginning the 1st day of January, 2005"* in paragraph a. of the Plaintiff's amended employment contract under the rubric *Wages."*

[68] On the one hand, the Plaintiff contends that the words "*effective beginning the 1st day of January, 2005"* amount to an express term that the "effective date" of the Plaintiff's 1-year contract was 1st January, 2005. On the other hand, the Defendant says that the expression was not intended to apply to the entire contract but operates narrowly, to simply give the Plaintiff an increase on his gross monthly salary paid under his initial employment contract retroactive to 1st January, 2005. The Defendant further contends that in the absence of an express term in the contract specifically stating when the agreement as a whole was to take effect, the effective date of the 1-year contract was July 1st, 2005- the date of its execution and delivery.

[69] As clearly appears from the pleadings, evidence and respective legal submissions, in order to arrive at the meaning to be given to the language used by the parties in the express terms of the amended employment contract, the Court must construe the agreement in accordance with the accepted principles of construction laid down by courts and as discussed in legal texts.

[70] The starting point in construing any written contract is that words are to be given their ordinary and natural meaning. Additionally, Courts generally assume that the parties have used language in the way reasonable persons ordinarily do. Accordingly,

> *"terms are '…to be understood in their plain, ordinary and popular sense, unless they have generally in respect to the subject matter…acquired a peculiar sense distinct from the popular sense of the same words…or unless the context evidently points out that they must …be understood in*

some other special and peculiar sense.'": ***Chitty on Contracts (Thirtieth Edition) Volume I at p. 824 - para 12-051.***

[71] The principle that words must be construed in their ordinary sense is, however, liable to be departed from where the application of the principle would give rise to an absurdity or create some inconsistency with the rest of the document. The principle may also be departed from where there has been an obvious linguistic mistake, or where, if the words were construed in their ordinary linguistic sense, they would lead to a very unreasonable result or impose upon the parties' obligations which they could not reasonably have intended to assume. See ***Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 at 913 per Lord Hoffman. Also Wickman Machine Tools Sales Ltd v. L.G. Schuler AG [1974] AC 235 at 251 per Lord Reid***.

[72] The dispute which has arisen between the parties in this case stems primarily from their radically different views as to the date on which the Plaintiff's amended employment contract that superseded his initial employment contract came into full force and effect.

[73] The Court is essentially asked to determine whether by including in the Plaintiff's amended employment contract under the rubric *"Wages"* a sub-paragraph which provided that the Plaintiff's gross wages were to be paid "*...effective beginning from January 1, 2005",* the parties intended the contract as a whole to take effect retrospectively from that date or alternatively, whether sub-paragraph a., understood in its plain and ordinary sense, was intended to operate in narrow confines and to effect an increase in the Plaintiff's gross wages retroactive to January 1, 2005 while the contract as a whole was intended to commence on July 1, 2005 when it was actually signed and delivered.

[74] Although in this action the Plaintiff is essentially asking the Court to decide upon the meaning of a specific expression located in paragraph a. of the contract under the rubric *"Wages"*, it is clear that the Court must construe the entire contract with reference to its object and the whole of its terms. In short, the intention of the parties must be arrived at by a consideration of the contract as a whole even though the immediate object of inquiry is the meaning of an isolated expression or clause. See ***Chitty (supra) at p. 848 - para 12-063.***

[75] In ***N.E. Railway v. Hastings [1900] 260 at 267***, Lord Davey explained the approach to be adopted in the following terms:

> *"The deed must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible."*

[76] Having examined the amended employment contract *[Tab H]* in its entirety as required, the Court found the following facts:

(i) In the opening paragraph of the contract, the Defendant as the employer expressly recognized the fact that the Plaintiff was already employed with the company and had been making contributions to the Divi Resorts Team. The contract also recognized that the success of the company had been "*positively impacted*" under the Plaintiff's direction and leadership.

(ii) Paragraph 2 referred to the parties' recent discussion and described the document as an "amended employment agreement." It also purported to describe the amended terms of the Plaintiff's employment as General

Manager of the Defendant's two resorts known as the Southwinds Beach Resort and the Southwinds Beach Villas Resort respectively;

(iii) The document declared that it described the current terms and conditions of the Plaintiff's employment and expressly provided that it *"...supersedes all former employment agreements with the company."* The fact that the parties intended the amended contract to supersede all prior agreements and negotiations between them was reinforced by the inclusion near the end of the document of what is known in law as an "entire agreement" clause. [See paragraph [9] above.]

(iv) Under the rubric *"Wages",* the document then made provision under three (3) separate sub-paragraphs a., b. and c. respectively, for the "*amended remuneration package*" which the Defendant had agreed to provide to the Plaintiff under the amended contract ;

(v) Sub-paragraph a. was specifically devoted to the gross wages to be paid to the Plaintiff. It provided expressly that the Plaintiff was to receive monthly in arrears, gross wages of US$6,291.86 per month, ***effective beginning the 1st day of January, 2005***;

(vi) Sub-paragraph b. made provision for the monthly entertainment, travel and housing allowances payable to the Plaintiff. In this regard, the Court took into account firstly, the fact that when compared with the allowances paid under his initial employment contract, all 3 allowances had been reduced. Secondly, the Court observed that unlike sub-paragraph a. dealing with gross

wages, no date was stipulated under the amended contract as to when the reduced entertainment, travel and housing allowances would take effect. [See paragraphs [11] to [13] above.];

(vii) Sub-paragraph c. made provision for a monthly food and non-alcoholic beverage allowance to the Plaintiff. In this regard, the Court found that no change was made under the amended contract to the monthly food and beverage allowance of up to $400.00 USD which the Plaintiff received under his initial employment contract.

[77] Apart from the foregoing facts, the Court observed that the first page of the amended contract bore the date July 1, 2005. The contract's attestation clause on page 4 also bore the signature ostensibly of Ray L. Hobbs, in his capacity as President of the Defendant Company and the Plaintiff's signature, as well as the date of 1st July, 2005 when the document was executed.

[78] The Court also noted that also visible at the top of each page of the 4-page document was a facsimile receipt notification suggesting that the signed copy of the Plaintiff's amended contract had been delivered to the Divi Resorts - Legal Department in North Carolina via Fax/Tel No: 919-419-2067 on July 1, 2005 at 4:06 pm.

[79] The Court was satisfied that, as was also the case under his initial employment contract *[Tab B]*, the Plaintiff's amended contract did not purport to stipulate a date certain on which it would enter into force.

[80] The Court is therefore asked to determine whether by including a clause that the Plaintiff's gross wages were to be paid *"...effective beginning from January 2005",* the

parties intended the contract as a whole to take effect retrospectively from that date or whether the parties intended the amended contract to take effect on July 1, 2005 when it was signed and delivered?

[81] It is clear (and undisputed) that there is no principle in law that a contract cannot in any circumstances have retroactive effect or that a contract having a retroactive effect will be a nullity: ***Trollope & Colls Limited v Atomic Power Contractors, The Atomic Power Constructions Ltd [1963] 1 WLR 340 at 341 per Megaw J.***

[82] A contract or a specific contractual clause will only have retroactive effect, however, where it is evident either from the express terms of the agreement itself or by way of implication from the surrounding circumstances and the need to effect business efficacy that retroactivity was the mutual intention of the contracting parties: ***Northern & Shell plc v John Laing Construction Ltd [2003] EWCA Civ 1035 at paras 51-52 per Nelson J***. While it is not necessary for the parties to have an existing or prior contractual relationship in order for the Court to find that a contract or a contractual clause has retroactive effect, the existence of such a relationship may make the intention to effect retroactivity more readily available: ***Ibid at paras 20 and 53***.

[83] As the amended employment contract is a written agreement, the Court is first required to interpret or construe the provisions of the written agreement in order to ascertain whether it was the mutual intention of the contracting parties for the entire contract to take effect retroactively on January 1, 2005. The mutual intention of the parties must, of course, be objectively determined from the ordinary and plain meaning of the words used when considered against the "*factual matrix*" or backdrop of surrounding circumstances, which

backdrop include the background knowledge reasonably available to the parties and the object of the contract, but excludes any previous negotiations as well as any declarations of subjective intent: ***Investors Compensation Scheme Ltd v. West Bromwich Building Society (supra) per Lord Hoffman***.

[84] In construing the terms of the contract, the Court is required to adopt the perspective of not only a reasonable person, but a reasonable businessperson because where the contract is commercial in nature, as the contract in this case, the law favors a "*commercially sensible construction*" which is not overly technical or literal as such construction is more likely to give effect to the intention of the parties as "*reasonable commercial persons*": ***Mannai Investment Co. Ltd. v. Eagle Star Assurance Co. Ltd [1997] 3 All E.R. 352 at 372***.

[85] While negotiations and earlier drafts of the contract being examined are excluded from the surrounding circumstances that may be examined by the Court, the Court is permitted, where relevant, to look at completed antecedent agreements between the parties: ***H.I.H. Casualty and General Insurance Ltd. v New Hampshire Insurance Co. [2001] 2 Lloyd's Rep. 161 cited in Lewison, The Interpretation of Contracts (Third Edition) para 3.05 at p. 58***.

[86] As to whether the Court may have regard to the conduct of the parties subsequent to their entry into the contract, it is the position of the English courts as confirmed by the House of Lords in ***L. Schuler A.G. v Wickman Machine Tool Sales Ltd (supra) at 261-2*** that the Court may not do so, but this principle has not been wholeheartedly embraced in other common law jurisdictions, which have quite sensibly held that subsequent acts may

illuminate what was intended to be the mutual intention of the parties where this is not immediately apparent from the written terms of their agreement: ***Lewison (supra) at para 3.12***.

[87] During the course of their submissions, both parties have highlighted the fact that the amended employment contract contains what is known as an "entire agreement" clause. The purpose of an "entire agreement" clause is to achieve by a somewhat circuitous route, the exclusion of liability for representations other than those set out in the written contract itself. By including an "entire agreement clause", the parties express their intention for the written document to contain ***all*** the terms of their agreement; comments and statements made during the course of their negotiations that are not reflected or given effect in the contract therefore hold no contractual value: ***Inntrepreneur Pub Co. (GL) v East Crown Ltd [2002] 2 Lloyd's Rep. 611 at 614 per Lightman, J***.

[88] The presence of the "entire agreement clause" serves to render inadmissible extrinsic evidence to prove the existence of terms other than those in the written contract. The clause does not prevent, however, the admission of extrinsic evidence to assist in the interpretation of the express contractual terms. Such evidence may, for example, be admitted to show that the parties intended that an instrument operate retrospectively from the occurrence of a specified act or event prior to the date of its execution: See ***Northern & Shell Plc v. John Laing Construction Ltd [2003] EWCA Civ 1035***.

[89] It is also well-established that where any term of the contract is ambiguous or capable of two contrasting interpretations, the *contra proferentum* rule requires that the contract be construed against the party who put forward the words and, thus, where the contract or

the particular clause in question resulted from joint efforts, the principle is of no relevance: ***Lewison (supra) at para 7.01***. It is clear from the evidence of the Defendant's own witness, Mrs. Whitleg-Hendren, and I therefore find, that the party who was primarily responsible for drafting the amended employment contract and determining its terms was the Defendant. The Plaintiff assisted solely in the drafting of the clause concerning the holiday period to which he was entitled. There is certainly no evidence that he had had any input at all into the drafting of the clauses concerning his remuneration. Accordingly, should there be any ambiguity or doubt as to meaning of a particular clause, I am required to adopt the interpretation which goes against the Defendant and favors the Plaintiff.

[90] There is one fundamental principle of interpretation that is of particular importance in this case and to which neither party referred in their submissions. It is the principle that an individual contractual clause or part thereof must not be considered in isolation but must instead be construed within the context of the clause and the contract in which it is located. In ***Halstead (Donald) v. Attorney-General of Antigua and Barbuda et al [1995] 55 WIR 98***, Sir Vincent Flossiac CJ pointed out that the interpretation of a phrase or word within a contract was to be derived from the common intention of the parties as inferred not only from the relevant surrounding circumstances but from the "*the whole or every part of the contract*".

[91] Lord Watson in ***Chamber Colliery Ltd v Twyerould (1893) [1915] 1 Ch. 268*** described the principle as

> *"…a well known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted to bring them into harmony with the*

other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible."

[92] The Court has accepted that prior to and during the negotiation of the amended employment contract, the parties' employment relationship was governed by the terms of an earlier contract, the initial employment contract. That contract, which had commenced more than a month after its execution, was for a fixed term of six months, which term both parties agree, began in January 1, 2005.

[93] It is not in dispute and the Court has also accepted that the primary purpose of drafting and entering into the amended employment contract was to increase the fixed term of the contract by which the Plaintiff was employed by the Defendant from six months to twelve months so as to improve the Plaintiff's chances of obtaining a loan from a financial institution.

[94] It appears that the Defendant, being pleased with the Plaintiff's performance as General Manager thus far, unilaterally decided to use the opportunity presented by the negotiation of the new contract to increase the Plaintiff's monthly salary. Unsurprisingly, the Plaintiff received this change with no complaint and this is the background against which the amended employment contract was executed.

[95] It has been argued that as the initial employment contract commenced on a date other than the date of execution, it was clear the Plaintiff and the Defendant had established a prior practice that the date on a contract and the date of its execution were clearly distinguishable from the effective date. Certainly this fact does lend some support to the Plaintiff's argument but it is in itself far from conclusive.

[96] The Court cannot ignore, for example, the fact that for the period January 1, 2005 until the execution of the amended employment contract on July 1, 2005, there was already in force a written contract governing the employment of the Plaintiff with the Defendant and there was therefore no need for a written contract that retrospectively covered this period. In other words, it was clearly not the parties' intention to enter into the amended employment contract for this purpose.

[97] The Court has found that comparing the initial employment contract to the amended employment contract and viewing the clauses contained in the latter in their context to be quite instructive. Aside from increasing the fixed term of the contractual relationship, there is little substantive difference between the provisions of the initial employment contract and the amended employment contract. In fact, the only other difference occurs in the clause governing financial remuneration, a clause of undeniable fundamental importance. Under the subsection "*Wages*", the amended employment contract provided as follows:

> ***"Wages***
>
> *The Company is pleased to provide you with the following amended compensation package, all of which shall be subject to applicable taxes and withholdings:*
>
> *a. You will receive gross wages of US$6,291.86 per month,* ***effective beginning the 1st day of January 2005****. Wages shall be paid monthly in arrears in accordance with the Company's usual payroll practices.*
>
> *b. You will receive an entertainment allowance of US$326.63 per month, travel allowance of US$301.51 per month and housing allowance of US$167.50 per month. Allowances shall be paid monthly in arrears in accordance with the Company's usual payroll practices. This allocation of allowances may be amended if necessary to comply with the minimum requirements of Barbados tax law.*
>
> *c. The Company will provide you a monthly food and beverage allowance (excluding alcoholic beverages) in the amount of US$400.00 at the Resorts for your personal consumption." [Emphasis Added]*

[98] Counsel for the Plaintiff has sought to urge the Court that the expression: "*effective beginning the 1st day of January, 2005*" referred, in the absence of a clear commencement date, to the entire contract. The interpretation urged upon the Court, although attractively argued, focuses too much on certain individual words of subsection a. of the clause on gross wages to the exclusion of the remainder of the clause in question, and indeed the rest of the agreement also.

[99] First, it cannot be ignored that "*effective beginning the 1st day of January, 2005*" is contained not in the opening paragraphs of the contract or in the section entitled "*Term*" or "*Miscellaneous*", but has been placed, quite deliberately, in the clause entitled "*Wages*". Moreover, the phrase is located not within the introductory paragraph of the *"Wages"* clause, but solely within subparagraph a. of that clause, which refers to gross wages. This can only lead a reasonable person to conclude that it was the intention of the parties to make the payment of gross wages retroactive only.

[100] Second, the Court finds it noteworthy that, as is evident from the comparison between the amended employment contract and the initial employment contract, the amended employment contract did not only increase the gross monthly wage to be paid to the Plaintiff, but also simultaneously decreased all the allowances to which he had been entitled under subsection b of his initial contract.

[101] In the course of his evidence-in-chief, the Plaintiff told the Court that his pay increase had resulted from a Performance Review which had been conducted by the company's President, Mr. Ray Hobbs prior to his having executed the amended contract on July 1, 2005. He told the Court that his performance had been rated as "very good" and that this

fact had been reflected in the opening words of the contract *[Tab H]* recognizing his contributions to the company. Under cross-examination, the Plaintiff agreed that he had been subject to Performance Reviews and agreed that if he received a favourable performance report he would receive a salary increase. He, however, denied Mr. El Daher's suggestion that the reference in the contract to January 1, 2005 had been a reference to the backdating of his wages pursuant to his favourable performance review.

[102] Counsel for the Plaintiff submitted that it would not make commercial business sense to backdate the monthly payment of wages to what would essentially be one month after the Plaintiff had been hired when that period was already governed not by an oral contract employment, but a written contract of employment and the Plaintiff had already been paid, albeit a lesser sum, for the work conducted. She argued that the inclusion of the expression: "*effective beginning the 1st day of January, 2005*" would make greater commercial sense only if it was intended for the amended employment contract itself to commence retroactively on that date.

[103] Applying a commercially sensible construction to the expression: "*effective beginning the 1st day of January, 2005*", the Court is satisfied on the balance of probabilities that in stipulating a retroactive date in sub-paragraph a. for the payment the Plaintiff's gross wages, the parties were simply seeking to provide a transparent basis for the payment to the Plaintiff of an increase in his wages following his favourable Performance Review which had been conducted prior to July 1, 2005.

[104] In this regard, the Court accepted the evidence of Ms. Patricia Vance, the Defendant's Controller and Deputy General Manager who testified that having been advised by the

Plaintiff in early July 2005 that he had received a pay increase, she had verified the increase by checking paragraph a. of the Plaintiff's amended contract under the heading *"Wages"* and had calculated the difference between his old wages and the new wages shown in the contract. Ms. Vance told the Court that when she prepared the payroll for July 25, 2005 she had included an amount for the Plaintiff's retroactive pay from January 1, 2005 and had added it to his basis salary.

[105] The Court found that at trial neither party enquired from Ms. Vance as to when the amended reductions in the allowances payable to the Plaintiff under the amended contract were to and did take effect. There is also no evidence that any effort was made by the Defendant to retroactively apply sub-paragraph b. to January 1, 2005.

[106] In this regard, the Court is satisfied that if the commencement date of the amended employment contract as a whole were to be read retroactively to January 1, 2005, this would necessarily result in the Plaintiff's entertainment, travel and housing allowances being effectively reduced from that date also. In short, if the contract as a whole is given retrospective effect, the Plaintiff would effectively owe the company the amounts overpaid on his entertainment, travel and housing allowances under his initial employment contract for the 6 month period between January and June, 2005. Such a result, in the Court's opinion, would result in a complete absurdity and clearly not make commercial sense.

[107] For this reason, the Court is unable to agree with Counsel for the Plaintiff that the parties intended sub-paragraph a. of the *"Wages"* section of the Plaintiff's amended contract to

operate as an express term that the contract as a whole would take effect from January 1st, 2005.

[108] The Court was satisfied that by the inclusion of the "*entire agreement*" clause, it was clear that both parties intended the initial employment contract to be superseded by the amended contract. The Court was also satisfied that the Defendant had also taken the Plaintiff's request for a 1-year term of engagement as an opportunity to expressly recognize the contribution which the Plaintiff had already made to the company following his favourable Performance Review by giving him an increase in his gross wages under the initial employment contract and making that increase retroactive to January 1, 2005.

[109] Finally, the Court is satisfied and finds that by effectively backdating the Plaintiff's gross wages to January 1, 2005 in sub-paragraph a. under the rubric *"Wages"* and making the payment *"effective beginning January 1, 2005",* the parties were thereby able to achieve a commercially sensible and transparent method of ensuring: (a) that the level of the Plaintiff's gross pay under his initial employment contract was effectively increased, notwithstanding that the initial contract had been superseded by the adoption of the new contract; and (b) that upon the entry into force of the amended contract following its execution on July 1, 2005, the Plaintiff would thenceforth be paid gross wages monthly in arrears at the new rate as stipulated in paragraph a.

[110] I therefore find that the "effective date" of the amended contract employment, being the sole document governing the employment relationship of the Plaintiff and the Defendant

at the material time, was the date of its execution rather than the date from which the gross wages were to be paid.

[111] I further hold that the Plaintiff's term of employment with the Defendant (as expressly provided for in under the rubric *"Term")* was for an initial period of one (1) year commencing on July 1st, 2005. As is clear from the wording of the contract itself, the 1-year term was intended to have been automatically renewed for successive 1-year periods unless either party notified the other of their intention not to renew at least thirty (30) days before the end of the term.

[112] Additionally as is also clear from the contract, where it can be established that before the expiration of the 1-year term on July 1st, 2006, either party gave the other party at least 30-days notice of non-renewal, the 1-year term which commenced on July 1st, 2005 would have expired or terminated on July 1st, 2006.

[113] *Issue No. (ii)- Did the Plaintiff's letter of May 5th, 2006 (accepted by the Defendant on May 10th, 2006) operate as a notice of non-renewal so as to effectively bring the amended employment contract to an end at the expiry date of the first 1-year term?* Having established the commencement and expiry dates of the initial 1-year term under the amended employment contract, the Court must now consider whether the Plaintiff's letter to the Defendant of May 5th, 2006 (which was accepted by the Defendant by letter dated May 10th, 2006) operated as a notice of non-renewal, thereby effectively bringing the amended employment contract to an end on July 1st, 2006 - the expiry date of the first 1-year term.

[114] As appears from the pleadings, the parties both agree that by letter dated May 5th, 2006 the Plaintiff gave notice in accordance with the terms of the amended employment contract dated July 1st, 2005 of his election not to renew the contract at the end of the then current 1-year term which (according to his calculations) would expire in December 2006.

[115] The following extract from the Plaintiff's letter of non-renewal addressed to the Defendant largely speaks for itself:

> *"5th May, 2005*
>
> *Dear Maarten,*
>
> *As you will be aware I have a one year contract with Divi Southwinds that expires December 2006. I intend staying and seeing through this contract.*
>
> *However, I am writing to let you know that I have made a decision to return to either the USA or Canada at that time and will therefore not renew my contract with the company beyond that date unless I am say offered a transfer to NC (which I would obviously welcome).*
>
> *When I originally came back to Barbados I envisaged staying longer but I am afraid that after living abroad for so many years I have realized that I am now really too old to adapt back to an island existence and really consider myself a North American and the fact that my girlfriend also lives in the USA has influenced my decision…."*

[116] It is not in dispute that the amended employment contract is a fixed-term contract which was intended to operate for a specified period of time only. Such contracts determine either (i) on the expiry of the fixed term specified therein; (ii) by mutual agreement; or (iii) by gross misconduct: ***Lyritzis v Inmarsat (unreported) cited in Norman Selwyn,***

Selwyn's Law of Employment (16th Edition) at para 2.123. Unlike contracts of indefinite duration, such contracts can only be terminated by the giving of notice if permitted by its terms: ***Allen v National Australia Group Ltd [2004] IRLR 847 also cited in Selwyn (Ibid).***

[117] The amended employment contract in this case did not specify the form that a notice of non-renewal was to take. Notice could therefore have been verbal or written. It could also have taken the form of a telephone conversation, an email or a letter sent by the Defendant to the Plaintiff or vice versa, although a written notice would undoubtedly provide much stronger evidence.

[118] On receipt of the Plaintiff's non-renewal letter of May 5th, 2005, the Defendant through its General Legal Counsel, Mr. R. Lewis Stanford wrote to the Plaintiff on May 10th, 2006 and purported to accept his election not to renew his contract. The Plaintiff was informed that his reference to the old contract expiry date was inappropriate and that according to the company's records, his contract would expire on July 1, 2006. The following excerpt from the Defendant's letter is self-explanatory:

"May 10, 2006

Dear Geoff,

Maarten has forwarded to me your letter of May 5, 2006 where you notified him of your decision not to extend your contract. In reading the letter and some emails that you've subsequently sent to Ebbie, I understand that you have some issues with respect to the termination date on your contract. To resolve this, Maarten has asked me to review your file. I have attached your contract, along with your previous contract for reference.

Your original contract with Southwinds was executed and commenced in late November 2004. However, this contract was substituted by a replacement contract that was executed in July 2005. The new contract

> *supersedes the old contract-see the first sentence of the "Miscellaneous" section of the new contract. Consequently, your reference to the old contract expiration date is inappropriate.*
>
> *Your original contract provided for renewing 6-month terms, which would expire each late November and late May. The new contract provides for 1-year terms, which would annually expire at the beginning of July. Therefore, your contract expires July 1.*
>
> *Besides the legal issue, I've also advised Maarten that the old contract was executed on your request in order to change the renewing terms from 6 months to 1 year. The company agreed to your request to extend the term but part of this meant the establishment of a new commencement date.*
>
> *Although it is not required that the company accepts your notice not to renew, it has nevertheless done so and you are notified that the contract will expire on July 1, 2006…"*

[119] The Court has already concluded that the amended employment contract governing the professional relationship between the parties entered into force not on January 1st 2005, but on July 1st, 2005. The Court has also found that under its terms and conditions, the Plaintiff's amended contract expressly provided that where either party gave the other notice of their intention not to renew at least 30 days before the expiry date of the 1-year fixed term, the term of engagement would expire or terminate on July 1st, 2006, failing which it would be automatically renewed for successive one year terms.

[120] The Court has accordingly found that the Plaintiff's letter of May 5th, 2006 (given as it was more than thirty (30) days before July 1st, 2006 when the initial 1-year term was due to expire) operated to bring the amended employment contract to an end with effect from July 1, 2006.

[121] Additionally, as the non-renewal letter was not retracted or withdrawn by the Plaintiff before the issuance of the Defendant's letter of May 10th, 2006, the amended employment contract also came to an end by mutual agreement with effect from July 1, 2006.

[122] *Issue No (iii) - What is the effect of the Defendant's letter of May 24, 2006? Did it operate to terminate the Plaintiff's amended employment contract with immediate effect and ahead of the expiry date?* The third issue that arises for consideration is whether the letter from the Defendant to the Plaintiff dated May 24, 2006 operated to terminate the amended contract of employment before its scheduled date of expiry in breach of its terms.

[123] As the Defendant's letter dated May 24, 2006 was sent more than 30 days before the expiry of the fixed term of the amended employment contract and as the letter asserted that by it the Company was *"notifying [the Plaintiff] that it will not renew the contract*", there can be doubt that the said letter could have operated to provide adequate notice of the Defendant's intention not to renew the amended employment contract as was required by its terms and conditions.

[124] Unfortunately, the letter did not simply seek to notify the Plaintiff of the Defendant's intention not to renew upon expiry of the then current term, but also sought to instruct the Plaintiff that: "*[his] services are no longer required and to remove [his] personal effects from the resort by the end of the day*". Given the clear terms and provisions of the amended employment contract which governed the parties' employment relationship, there is no doubt that the Defendant sought to terminate the Plaintiff's contract peremptorily and on the very date on which its letter dated May 24, 2006 was issued, in plain breach of the terms of amended employment contract.

[125] Dismissal in this manner does not appear to be justified in this case on the grounds of gross misconduct. The Plaintiff's evidence is that he carried out his duties competently,

despite an issue that arose with the trade union over the disciplining of a specific member of staff. This fact was not contradicted by the evidence of the Defendant or disproved during cross-examination of the Plaintiff by Counsel for the Defendant.

[126] Although the Defendant sought to use that specific incident arising between the Plaintiff and the trade union to justify its dismissal of him, the Court observes that neither in the letter of May 24th by which the Plaintiff was ultimately dismissed nor in the chain of emails preceding and succeeding that letter was the incident mentioned or doubt otherwise raised about the competence of the Defendant to execute his duties and responsibilities. The Court is therefore satisfied on a balance of probabilities that the Plaintiff had not at any time been so incompetent or inefficient in the performance of his duties as to merit dismissal on the ground of gross misconduct and, more importantly, that the Defendant had not sought to dismiss him on that basis.

[127] The Defendant can also not seek to justify its dismissal of the Plaintiff by the letter of May 24, 2006 by alleging that the Plaintiff had already repudiated the contract by his earlier letter dated May 5, 2006 by which he sought to give notice of his intention not to renew, believing the amended employment contract to be expiring in December 2006. In ***Hackett v Caribbean Examinations Council (1988) 40 WIR 38***, Sir Denys Williams, CJ held that where the Court had to consider whether one party to a contract was set free by the actions of the other, the appropriate test was whether the action or actions of the party in question were such as to lead a reasonable person to conclude that he no longer intends to be bound by the contract.

[128] It is clear from the content of the Plaintiff's letter dated May 5th 2006 and the emails preceding his letter that he was not intending to repudiate the contract or to conclude it prematurely, but was providing more than sufficient notice of his intention not to renew to make it easier for the Defendant to find a replacement for him, although he was misconceived as to the date on which the contract would expire.

[129] The Court accepts his evidence on this point, and therefore finds that it was the Defendant's letter of May 24th that led to his having left his employment ahead of the scheduled expiry date of July 1st, 2006.

[130] *Issue No. (iv) – Can the Plaintiff's claim for damages in the amount of $99,892.86 as set out in his Statement of Claim in respect of the peremptory termination of his contract of employment on May 24th, 2006 ahead of its expiry date be sustained?* The final question that arises for determination is the quantum of damages to which the Plaintiff is entitled by reason of the peremptory termination of his contract of employment ahead of its expiry date. In her submissions on this question, Counsel for the Plaintiff referred the Court to two Barbadian decisions of Sir Denys Williams, CJ in the area of employment law, namely ***Waithe v Caribbean Airlines (supra)*** and ***Hackett v CXC (supra)***.

[131] The Court is satisfied however, that in neither of the cases to which it was directed was the learned Chief Justice required to consider the appropriate quantum of damages to be awarded to a Plaintiff who had been employed under a fixed-term contract. As the contracts by which the Plaintiffs in the cited cases were employed were contracts of indefinite duration that could have been terminated by either party giving the other

reasonable notice, the quantum of damages in each case was formulated by determining what would have been reasonable notice on the facts of the case.

[132] The Court therefore found these cases of limited assistance in determining the damages to be awarded in this case as the amended employment contract was a fixed term contract that did not give either party an option to terminate by giving notice.

[133] The Court has, accordingly, had regard to cases in which the measure of damages available for the wrongful dismissal of fixed-term contracts has been applied including the Australian case of ***Van Efferen v CMA Corporation Limited [2009] FCA 597 at [64] per Tracey J*** and the English case of ***Yorkshire Engineering and Welding Co. Ltd. v. Burnham [1973] 3 All E.R. 1176 at 1179 per Sir John Donaldson.***

[134] Given these cases, the Court is satisfied that it is well-established that where an employer wrongfully terminates a fixed term employment contract, thereby causing loss to an employee, damages are normally calculated on the basis that the employee would have enjoyed the benefits of the contract for the remainder of its term and that he is therefore entitled to the amount he would have earned if his term had continued along its proper course.

[135] The employee is therefore entitled to receive not only his salary, but the value of all benefits, gratuities and emoluments which he would have enjoyed as a result of his contract of employment: ***Waithe v Caribbean Airlines (supra) at 66-68***. Quantifying damages on this basis places the employee in the position he would have been in had the contract not been breached and thus accords with the general principle underlying the award of damages for breach of contract.

[136] It is also well-established that all employees who have been wrongfully dismissed, whether employed under a fixed-term contract or not, are required to mitigate any loss suffered as a result of their wrongful dismissal by seeking alternative employment. However, the onus is on the Defendant to prove that the Plaintiff has failed to comply with his duty to mitigate.

[137] The Court observes that the Defendant in this case quite rightly did not argue or plead that the Plaintiff had failed to mitigate his loss. It is clear from the Plaintiff's oral testimony before the Court that after he had been dismissed by the Defendant he had made all reasonable efforts to mitigate his losses and is therefore entitled to the full amount that he would have earned until the expiry of the amended employment contract.

[138] The Court is therefore satisfied that the sum to which the Plaintiff is entitled includes not only the salary which he would have received but the monetary value of all the benefits and emoluments to which he would have been entitled as part of or in addition to his compensation package under the amended employment contract, had this contract not been prematurely terminated. These benefits include monthly housing, entertainment, travel and food and beverage allowances, as well as insurance contributions and the use of a motor vehicle and cellular phone provided by the Defendant.

[139] As the Court has already found that the amended employment contract was due to expire on July 1st, 2006, but was prematurely and peremptorily terminated by the Defendant on May 24, 2006, the Plaintiff is entitled to his gross salary and the monetary value of his benefits and emoluments up to July 1, 2006. However, as this sum has already been paid by the Defendant and accepted by the Plaintiff and as the Plaintiff is now seeking to

claim that to which he would have been entitled had his contract expired in December 2006, this claim must be dismissed.

[140] ***Disposal***: For the reasons outlined above, the Plaintiff's claim is dismissed with costs to the Defendant, certified fit for one attorney-at-law to be agreed or assessed.

Maureen Crane-Scott
Judge of the High Court