IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2002/B-132

BETWEEN	AUDREY BASANTA-HENRY	1ST PLAINTIFF
AND	JOSEPH SHOUCAIR	2ND PLAINTIFF
AND	HERMA McRAE	3RD PLAINTIFF
AND	SHEILA GREEN	4TH PLAINTIFF
AND	IAN WATSON	5TH PLAINTIFF
AND	NORIENE SPENCE	6TH PLAINTIFF
AND	SHEILA SHERIFF	7TH PLAINTIFF
AND	ANDRAL SHERLEY	8TH PLAINTIFF
AND	THEODORE GOLDING	9TH PLAINTIFF
AND	NORMAN MARSH	10TH PLAINTIFF
AND	NATIONAL COMMERICAL BANK JAMAICA LIMITED	DEFENDANT

Lord Anthony Gifford Q.C. and Ms. S. Kong Quee, instructed by Gifford, Thompson & Bright for the Claimants and Emil George, Q.C., Conrad George, Esq. and Alayne Bennett, instructed by Hart, Muirhead, Fatta for the Defendant.

Heard on March 8-11; August 11, 17th and December 20, 2004

ANDERSON, J:

This action arises out of a dispute between the Claimants who were at all material times members of a group referred to as the "Senior Managers Group" (the "Group" or "SMG") within the defendant company, on the one hand, and the company ("NCB"), on the other. According to the witness statement of the 9th Claimant, Theodore Golding, these members of the Group, all senior employees of the defendant bank at the material time, occupied senior positions in the Bank classified as E3, E4, SM1 and SM2 in descending order of seniority. There are no material differences in the facts alleged by the claimants and the defendant and the essential issue to be determined in the case is one of law. That issue is whether in the factual circumstances largely agreed between the parties, there had arisen on or about 17th September, 2001, a binding and enforceable agreement pursuant to

which the claimants became entitled to receive, and the defendant liable to pay, certain sums to each claimant as set out in the claimants' statement of claim.

In the 1990's, NCB was one of the largest commercial banks operating in Jamaica and like other banks and financial institutions, it was then (as now) subject to the control and regulation of the Bank of Jamaica (B.O.J). Like many other financial institutions at that time, it suffered from the crisis which, it is widely now acknowledged, afflicted the financial sector in the mid to late 1990's, leading to what is often referred to, as the financial sector "collapse". On May 10, 1999, the then Chairman of the defendant bank, the Hon. Oliver F. Clarke O.J., wrote to the Governor of the Bank of Jamaica, the letter which stands at the centre of this matter. In that letter, the bank purported to give certain "undertakings" to the B.O.J. For the purposes of this action, the relevant undertaking was contained in paragraph 6 and is in the following terms:

> "Subject to 13 below, the bank will not re-negotiate upward or otherwise increase any salary or emolument package of any director and/or senior manager of the bank of the rank of senior branch manager or upwards. Furthermore, the bank will not enter into any contract or agreement or revise upwards any existing contract or agreement for the payment of any service rendered by any director and/or party connected to the bank except where such services are rendered in a professional capacity at arms length and at competitive and fair rates."

For completeness, I also set out paragraph 13, which was referenced in paragraph 6, below.

> The Bank undertakes to strengthen its team of management personnel by the enlisting of persons with appropriate expertise covering the areas of credit, finance, information technology and internal auditing.
>
> We bring to the BOJ's attention, the fact that NCB operates a staff training facility, which places emphasis on all aspects of credit. Based on our current programme, all Lending Managers will have received instruction in the Financial Analysis Management Authoring System (FAMAS) Course by 1999 June. Additionally, the Staff Training Centre will continue to run specialized credit courses utilizing the services of overseas instructors, including Mr. Keith Chetley (formerly of the Manchester Business School, now a consultant at the Chartered Institute of Bankers (UK)) and Robert Morris Associates. The latter are well known in the American banking fraternity for their Uniform Credit Analysis Programme

The issues to be determined require the court to provide answers to the following questions:

1) Was there at any time a concluded valid and enforceable agreement between the Defendant Bank and the Claimants?
2) If there was such, was there any factor that vitiated that agreement?
3) If the answer to the first question is positive, and to the second question negative, when did such agreement arise and when did it take effect?
4) Was there any action by the claimants or any of them which was in breach of any fiduciary duty owed to the defendant, and which breach gave to the defendant a right to recover damages?

First, however, it is necessary to review what was the evidence presented to the Court.

The Evidence

Much of the history of the events which form the backdrop to this action is recounted in the witness statement of the 9th Claimant, Theodore Golding, a retired Senior General Manager of the defendant company. According to that witness statement, Mr. Golding served the bank for forty (40) years, many of those in senior positions, until his retirement in March 2002. It would not be unreasonable to infer that this experience gave him a unique perspective on matters related to the bank's processes and activities. He asserts that the Senior Managers' Group ("the Group") comprised about 22 senior managers and he served as a member of the "Emoluments Review Committee" ("ERC") of the group prior to 1996, at which time that group became dormant for about 4 years. He was the Chairman of the ERC from its revival around January 2000 until the time of his retirement in March 2002. He avers further that while up to the bank's financial year ending 30th September 1996, the group benefited from increases in salaries and other benefits which were negotiated by the ERC, for the year ending September 30, 1997 all categories of staff of the bank agreed, in the words of the statement, "to forego salary increases owing to the adverse financial position of the bank".

The ERC was revived after a meeting on January 2, 2000, between members of the Group and Dunbar McFarlane, then Deputy Chairman of the Bank and Group Managing

Director, at which the Group members protested the lack of any salary increases from the financial year ended September 30, 1997. Other categories of staff represented by the Staff Association had continued to benefit from salary increases in each year. The salaries of members of the Senior Manager's Group remained frozen for the years 1997 – 98 and 1998-99. Following up on the suggestion purportedly made by Mr. McFarlane, the group submitted a claim by way of a memorandum to the Bank on January 12, 2000. No immediate response was forthcoming from the Bank. A meeting was held with the Chairman, Mr. Clarke and Mr. McFarlane on March 27th at which the Chairman allegedly advised that he could not support the claim which had been submitted. A further meeting was held on April 3, 2000 at which the chairman expressed concern at Mrs. Henry (Claimant #1) being a negotiator for the Senior Managers' Group in talks with the bank while also representing the bank in talks with the Bank of Jamaica, concerning a Performance Incentive/Variable Pay Scheme for senior employees. According to the agreed documents the Chairman at that meeting, indicated that "some consideration would be given to increasing basic pay".

According to Mr. Golding's evidence, in June 2000, members of the group became members of the Bustamante Industrial Trade Union. The defendant challenged the right of some members of the group to become members of the union. When the matter was referred to the Industrial Dispute Tribunal (IDT) the IDT ruled against the defendant that all employees in the relevant categories should be included on the list for purposes of carrying out a representational rights poll. The defendant then sought an Order for Certiorari to quash the IDT award. However, the group mindful of the need to avoid litigation and in the interests of settling the dispute, held discussions with the Bank and on the 21st June 2001 arrived at certain understandings.

As a consequence of these understandings, the defendant agreed not to pursue its action for Certiorari; the Group decided not to pursue its attempts as being represented by the BITU, and the BITU for its part, agreed not to pursue claims on behalf of the Managers in respect of emoluments for the period October 1999 to September 2001. The meeting of June 21, 2001 also agreed that the defendant would re-instate the Salaries Committee

of the Board "with a view to expediting a review of the emoluments of the Group". Mr. Golding's witness statement, interestingly, has this to say, and for reasons to which I will advert later, I consider it to be important. "Mr. McFarlane stipulated that the BITU should confirm that it would not pursue further claims pending this review, and this was done". In apparent fulfillment of its part of the understandings, the BITU sent a letter to the defendant, at the request of Mr. McFarlane, in the following terms:

> "The Bustamante Industrial Trade Union is advised by its members in the Senior Management Category comprising SM1, SM2, E3 and E4 employees, that discussions were taking place between themselves and your bank in respect of their outstanding emoluments.
>
> We are further informed that these discussions will be speedily concluded and that the BITU will be advised of the results of the talks".

In September 2001, the Group prepared and on September 14, 2001, presented to the Bank through its managing director, Mr. McFarlane, a proposal document entitled "New Scale for Executives and Senior Managers for the year 2001-2002", which, according to Mr. Golding, included a summary for the years 1999-2002: "This document sets out the proposals for increases to pay and emoluments for the years 1999 –2000, 2000-2001 and 2001-2002 which we believe would be acceptable to both sides". Mr. McFarlane advised the Group, and there seems no reason to doubt this, that the Executive Committee of the Board had been mandated to deal with the issue. The Executive Committee met on September 17, 2001 and, again according to the 9th Claimant's witness statement, after the meeting Mr. McFarlane advised him at a meeting in his office, that the Executive Committee had approved the proposed salary increases "subject to the approval of the Bank of Jamaica". This statement is confirmed by the Minutes of the Meeting of the Executive committee of Monday September 17, 2001, document 202 of the Agreed Bundle of Documents. I shall set out in some detail the relevant paragraphs of those minutes. After listing the names of those present at the meeting the minutes are headed "Review of Emoluments - Senior Managers/ Executives". They contain the following.

> "The Committee discussed Management's recommendations for a review of the emoluments of the Senior Management. These recommendations were made against the background of the agreement reached with the managers and endorsed by the Bustamante Industrial Trade Union to negotiate settlement without the

involvement of the union for the period up to September 30, 2001. It was hoped that agreement would be reached to extend the latter date to September 30, 2002.

The committee approved the following, subject to the approval of the Bank of Jamaica. Salaries of SM2, SM1, E4 and E3 to be increased as follows":

Year commencing October 1, 1999	10% p.a.
Year commencing October 1, 2000	10% p.a.
Year commencing October 1, 2001	10% p.a. (average)

Plus one-off merit awards for existing E 4 and E 3 Managers in the aggregate (i.e. not each) of $1.5M (total cost). It was noted that SM2 and SM1 Managers had received merit awards up to year 2000.

Exclusive Share Incentive Scheme

The Committee agreed that this benefit which was last paid in year 2000, be rolled into the salaries with effect from 2000 October 1, at an annual cost to the Bank of $10M. This sum is to be apportioned and applied to the salaries of the Senior Managers, (including the Deputy Chairman) on 2001 October 1, after the salary adjustments for the 2001/2002 year in the case of incumbents, but paid in a lump sum to the managers who left the employment during the 2000/2001 year".

Between September 2001 and January 2002 further discussions took place between the Group on the one hand, and the Bank, on the other, represented variously by the Deputy Chairman, Mr. McFarlane, the Chairman, Mr. Clarke and later, Acting Chairman, Hon. Noel Hylton, O. J. In a meeting on January 22, 2002, Mr. McFarlane had advised the participants that the defendant had sought the approval of the Bank of Jamaica for the increases which had been agreed subject to its approval. The matter had been 'referred by the Bank of Jamaica to the Minister of Finance and Planning'. The Minister, for his part, had indicated that he could not support a 10% increase as proposed but would support a 4% increase. I should note, en passant, that there is no evidence to indicate that the matter had been referred to the Minister pursuant to any statutory or regulatory obligation to do so. Rather, there was some evidence that the bank was, and continued to be, considerably dependent upon the support of the Financial Sector Adjustment Company Limited (FINSAC), the agency which government had set up to assist in the rescue of troubled financial sector companies, and ultimately, such support was in effect borne by Jamaican taxpayers. The Acting Chairman, Mr. Hylton, had continued to make further

representations to the Minister on behalf of the Group. It is at this point in his witness statement that Mr. Golding mentions: "Mr. McFarlane also said there was a possibility that the Bank would be released from its undertaking, and the Bank was awaiting the outcome of discussions between the Chairman and the Minister of Finance or the lifting of the undertaking, whichever came first".

The Final Chapter? The Release from the Undertaking

It is a matter of record that on March 22, 2002, the Bank of Jamaica purported to release the defendant from its undertaking. The claimants contend that the release of this undertaking *fulfilled the condition precedent* for the coming into effect of an agreement with the defendant, in that the need for approval now lapsed. A point that should also be noted is that the only evidence in this case came from the witness statements of the claimants, as the defendant called no witnesses.

Submissions for Claimants

Lord Gifford, Q.C., claimants' counsel, submits that agreement had been arrived at by virtue of the offer from the Group to the bank, that being contained in the proposal submitted by the Group to Mr. McFarlane on behalf of the Executive Committee on the 14th September 2001. It is contended that the offer was accepted by the Executive Committee as confirmed by the minutes of the meeting of that committee and conveyed to the Group through its representatives, Golding and Smith-Sears. It was further submitted that consideration was provided by the mutual promises of the bank and the Group respectively, not to pursue the action for certiorari and not to pursue the right to membership of the B.I.T.U.

Leaving aside the issue of intention to create legal relations, asserted by claimants' counsel and denied by counsel for the defendant, the issue to be decided was what was the effect of the phrase, "subject to the approval of the Bank of Jamaica". With regard to this term, Lord Gifford in his closing submissions has this to say:

> It is common for binding contracts to be made, the *performance of which* is subject to the occurrence of some event. In particular, as here, contracts are often made which are subject to some outside party's approval. Such contracts are binding when made, but the parties are not bound to perform them unless and until the condition is fulfilled or the need for it lapses". (My emphasis)

Counsel cited **Halsbury's Laws of England, 4th Edition Reissue, Volume 9(1) paragraph 670** as support for the Claimants' case that:

1. There was a legally binding agreement subject to a condition precedent for BOJ approval;
2. There was an implied term that the condition would lapse if the undertaking lapsed.

In these circumstances he asserted, the agreement became effective when the undertaking lapsed on 22nd March 2002, so that performance by the defendant was required. The relevant section of Halsbury's is in the following terms.

> Whether a condition is precedent to contract or to performance is essentially a question of whether the parties have or have not completed the process of reaching agreement. Thus, the fact that the parties contemplate the execution of a formal contract is some evidence that they do not intend to be bound by it until it is signed, but there is nothing to prevent them from indicating that they intend to enter into a binding provisional contract.

I note with interest that Ken Lewison, Q.C. in his book 'The Interpretation of Contracts" (Sweet & Maxwell, 2004), {for bringing this book to my attention, I am indebted to my brother Bryan Sykes J. (Ag)} expresses much the same thought as that in Halsbury's cited above, in the following way.

> "In modern law, the expression "condition precedent" should be restricted to cases where non-fulfillment of the condition prevents the formation of a binding contract *or* suspends its operation".

Counsel submitted that the parties had clearly "completed the process of reaching agreement". Further, he claimed, it was an implied term of the agreement so purportedly arrived at, that if the undertaking lapsed or the bank was discharged from obligations thereunder, the need for approval of the BOJ would also lapse. Claimants' counsel purports to find support for his submission that such a condition was to be "logically implied", in the minutes of the board meeting of December 20, 2001, in which it was noted "that if the BOJ undertaking had been released, there would have been no need to refer the matter to the BOJ", as well as Mr. McFarlane's statement that they were

awaiting the outcome of discussions being undertaken by the Chairman with the Minister of Finance or the lifting of the voluntary undertaking by the BOJ, whichever came first".

Submissions for Defendant

On the other hand, counsel for the defendant, Emil George, Q.C., submitted that in light of the voluntary undertaking given by the bank to the Bank of Jamaica, it was impossible either to enter into negotiations, which could lead to the increase of salaries of the Senior Managers group or, *a fortiori*, to agree to increases. It was submitted that the parties did not arrive at a consensus ad idem; that there was no consideration and therefore no contract capable of enforcement. Alternatively, it was submitted that even if there was an agreement as suggested by the minutes of the meeting of September 17, 2001 that agreement came to an end when the Minister of Finance communicated his "decision not to approve" the proposed 10% per annum increase and suggested instead that he would be supportive of an increase not exceeding 4% per annum. Counsel for the defence goes on to allege that the claimants rejected this offer from the Minister, although it is not clear from the only evidence available that any such rejection took place.

Defendant's counsel also pointed to the letter dated September 17, 2001 from Chairman Clarke to the BOJ in which he denies that the bank had either "sought or obtained the approval of the claimants". Defendant's counsel's submission protests that claimants' counsel has unfairly accused the chairman of lying when he said this. There is no evidence, he says, that the chairman was aware of any basis for assuming that the senior managers were amenable to any proposals. However, there is considerable evidence that the Executive Committee was the actual or ostensible agent of the Board and that committee acted through Dunbar McFarlane. According to the evidence, Mr. McFarlane knew and therefore the chairman, as a member of the committee, ought to be taken to have known of what was taking place between the claimants and the bank. Counsel for the defendant proffered that, although the claimants suggested that Mr. McFarlane as the agent for the defendant entered into a binding agreement with them, the fact that Mr. McFarlane did not himself give evidence, any assumption as to his state of mind must necessarily be conjecture. It was undoubtedly open to the defendant to call Mr.

McFarlane as a witness to deny the claimants' suggestion. But in the absence of his testimony, it is clearly open to the court to make what use it can of any evidence it can, which supports a particular interpretation of what he may have said.

I note in particular the submission by counsel for the defendant, in light of the terms of the aforementioned letter sent by the bank's Chairman to the BOJ, that it categorically refutes the existence of legal relations between the parties. The letter should be taken as evidence of the lack of any such intention. With respect, I decline the view that determination of this issue is assisted by the opinion of the chairman of the bank. Rather, it is peculiarly an issue which this Court must decide. It will be recalled that September 17, 2001 was the day on which, at the meeting between the Senior Manager's Group and Mr. McFarlane acting on behalf of Executive Committee of the board, McFarlane conveyed the information of the agreement of the Executive Committee subject only to the approval of the Bank of Jamaica. The chairman's letter in its' penultimate paragraph states:

> "We have not yet sought or received any indication of the acceptance of the managers concerned but this will be pursued diligently on receipt of your approval".

Of considerable interest is the fact that it set out in paragraph 1, 2 & 3 precisely the terms which had purportedly been agreed to according to the information conveyed to the September 17, meeting by Mr. McFarlane. There was also evidence that the chairman himself was willing to support an 8% increase. (*See Price Waterhouse letter referred to below*) Defendant's counsel's written submissions also say that there was no basis upon which Mr. Clarke could have assumed that the claimants were "bound to accept /approve the proposals and it would have been grossly wrong for him to do so". This submission also seems to be at variance with the evidence, since the only "proposal" was that presented to the Executive Committee by and on behalf of the Claimants.

Additional Defence Submissions

I might mention here two other submissions made by the defendant's counsel. Firstly, there is a submission that the ERC of the Senior Manager's Group "had no legal basis on

which to negotiate on behalf of the members of the Group", as they did not constitute a bargaining unit. Secondly, that in any event, "even collective agreements lawfully entered into and properly signed by the parties are merely binding in honour only". It would seem to me that the defendant is denying the possible applicability of the law of agency in matters of contract negotiations and at the same time, calling in aid the principle of collective agreements being binding in honour only. In this regard, I accept the uncontroverted evidence of Mr. Golding that the bank at all material times treated with him and the other managers as being the representatives negotiating for the Group, both before the crisis of the 1990s and after the revival of the ERC in 2000. Indeed, that was part of the complaint of the Chairman in relation to Mrs. Henry. She was on the bank's team in talks with the Bank of Jamaica and also party to the Group's negotiations with the bank. I have already expressed my opinion on the Executive Committee of the Board being either the actual or the ostensible agent of the defendant.

The Effect of the Minister's "Decision".

It is necessary to refer to one other submission by defendant's counsel to the effect that the defendant treated the Minister's "decision" as "disentitling them from making an offer of a 10% increase in salary per annum to the claimants". But there is a total absence of any evidence of any statutory authority on the part of the Minister to give instructions to a publicly owned company, (the bank) in relation to any commercial/industrial relations matter, one not determined to be of a regulatory nature. This seems to give rise to two consequences: first, it would appear that the Minister has no *locus standi* in the issue. Secondly, it would mean that if indeed there were a contract, it would not be vitiated by illegality as suggested by the defendant. There was another intriguing but perhaps equally indefensible submission from defendant's counsel. It was suggested that "The Ministers *proposal* had the effect of relaxing the undertaking. Any attempt to resurrect the contract cannot *bring back the contract like Lazarus*". (My emphasis) This seems on the surface to concede the existence of a prior contract. If so, I merely restate my views as to the role, if any, that the Minister had in all of this. It will also be apparent that I reject the suggestion in the submission inherent in the statement – "If a matter is subject to someone's approval, if the person who is to approve it says "No", it is

submitted that that is the end of the contract", since no contract was ever subject to the Minister's approval, nor was there one in which he had any *locus standi.*

It should be noted that while the Bank of Jamaica Act in Part VA dealing with "Supervision and Examination of Banks and Specified Financial Institutions" gives the Minister the right to make regulations, there is nothing there which gives to the Minister the right to independently exercise any of the regulatory or supervisory functions given to the BOJ under the Act. Nor is the Minister empowered to give specific directions to the BOJ in matters relating to its supervisory role. Indeed, section 41 of the Act is in the following terms.

> The Minister may from time to time after consultation with the Governor give to the Bank in writing *such directions of a general nature* as appear to the Minister to be necessary in the public interest including without prejudice to the generality of the foregoing provisions directions to review the state of credit in any sector of the economy and either to make recommendations for improving the supply of credit or to take steps to foster the provision of credit to that sector of the economy. (My emphasis).

In **JAMAICA ASSOCIATION OF LOCAL GOVERNMENT OFFICERS & NATIONAL WORKERS' UNION v THE ATTORNEY GENERAL OF JAMAICA**, Suit No: 33 and 56 of 1994 (Consolidated) the Full Court (Cooke J, as he then was) held that where an agency, in that case the Industrial Disputes Tribunal, (IDT) was to arrive at a decision by the exercise its own discretion, it could not defer to the decision even of the Cabinet. Thus, in that case, where the IDT had concluded that "Cabinet's final approval constituted a policy decision which is not subject to modification by the Tribunal", it erred in law. By parity of reasoning, it seems to me that it was not open to the BOJ, either to delegate to the Minister its right to approve an agreement between the defendant and the claimants, or to accept that the Minister had the right to determine the level of increases which could be allowed by the BOJ.

What, if anything, is the effect of the Undertaking?

Defendant's counsel submitted forcefully that the bank could not have intended to enter into legal relations in light of the undertaking given to the Bank of Jamaica. From the

tenor of the agreed documents, it appears that it was common ground among all parties that the undertaking to the Bank of Jamaica was a "voluntary undertaking". Thus, it should be noted that the defendant itself frequently referred to the undertaking as being voluntary. For example, Mr. Clarke's letter of September 17, 2001, the letter from Christopher Lowe by then Managing Director of the defendant dated November 29, 2001; the minute of a meeting between Senior Manager and Executives held on January 22, 2002 all referred to the undertaking as voluntary. It would seem to be inconsistent to argue that the undertaking was voluntary and at the same time conclude that any agreement was void for illegality because of it, an alternative submission by defendant's counsel.

In their written submissions, Counsel for the bank, although also characterizing it as "voluntary" in the submissions, nevertheless stated that the undertaking was given "in response to a requirement from the Supervisor of Banks pursuant to section 25 (1) (a) of the Banking Act". The terms of the relevant section are set out below:

> "Where the supervisor believes that any of the conditions specified in paragraph 1, 2, 3 and 4 of Part A of the Second Schedule exists in relation to a bank, the supervisor may unless directed otherwise by the Minister
>
> a) require the bank to give an undertaking signed by the majority of the members of the Banks' board to take such corrective actions as my be agreed between the bank and the Supervisor."

Having carefully reviewed it, I have formed the view that there is nothing in the undertaking, which requires a conclusion that it was other than a voluntary undertaking. There is also no evidence that it was signed by a majority as the regulator could demand under the statute. Nor, indeed, is there evidence that any other members of the board apart from the Chairman did sign. Thirdly, any undertaking pursuant to the sub-section under reference would specifically require the bank to take positive "corrective actions". This undertaking, in its relevant part, merely required the defendant to refrain from taking certain action. Claimants' counsel, in response to the defendant's counsel's submission as to the prohibitory effect to be given to the undertaking makes the observations that I adverted to above, and concluded with the following:

> "The penultimate paragraph of the letter acknowledges that the undertaking will immediately determine '*in the* event *that the Minister and/or the Supervisor should issue written directions to the Bank or take*

> *any similar action under the Banking Act.* ' In other words, if there were to be any formal action under the Banking Act, the letter of undertaking would be superseded".

While the last sentence of the submission is an interesting suggestion, it is not at all clear to me that such formal action would have led to the undertaking being "superseded", nor is there any logical reason why this should be so.

Was the Bank of Jamaica aware of the negotiations?

Claimants urge the court to the view, not only that there were negotiations between the parties, but that even the BOJ knew of them. There is considerable evidence that all parties, including the supervisor, were aware of discussions taking place between the bank and Senior Managers group on the issue of salaries. In this regard I find it highly instructive that when the Bank of Jamaica's approval was sought to the level of increases purportedly agreed by September 2001, there was not even a hint of objection that "no negotiations ought to have taken place". Rather, it suggested that BOJ would defer to the Minister in relation to that level of increase. But it is not clear what the legal basis for that deference was. I have come to the view therefore, that the voluntary undertaking given by the Bank could not by its terms change what might otherwise be a valid and enforceable agreement into one, which is void for illegality.. The letter of June 30, 2000 from the Bank of Jamaica to the defendant is in my view clear evidence that the Bank of Jamaica was aware that negotiations were taking place between the bank and the Senior Managers; but even more telling perhaps is the fact that Mr. Clarke, in a meeting held on the 3rd day of April, 2000, clearly expressed his discomfort at Mrs. Henry being a negotiator for the Senior Managers' group in talks with the bank while, at the same time, also representing the bank in its talk with the Bank of Jamaica concerning a performance incentive/variable pay scheme for Senior employees.

What is more is that at that very meeting the minutes state that the chairman himself had indicated that some consideration would be given to "increasing basic pay". It is difficult to contemplate how the level of increase would have been determined without some negotiation. There is also evidence in a letter from Price Waterhouse Coopers dated May 2, 2000 and addressed to Denise Price-Hoo, Director Financial Institutions, Supervisory

Division, concerning the proposed performance incentive scheme for Managers of National Commercial Bank. That letter made the observation that for the year 1999/2000,

> "Pensionable salaries to be adjusted as at October 1, 1999 by a percentage which is to be agreed by negotiation. The chairman is of the view that the banks offer should be around 8% for the year."

It is difficult in these circumstances, to escape the conclusion that negotiations, of which all parties were aware, were taking place with a view to increasing salaries. It is equally clear that no objection to those negotiations was ever raised by the Chairman or the BOJ and therefore it cannot now be said that the undertaking prohibited not only the entry into an agreement, but even the negotiations taking place. I would add further, by way of concluding, that it would be difficult to understand what the BOJ was to approve if there had been no negotiations between the parties at the time the approval was sought. Put another way: If the BOJ had said: "We approve", wouldn't that have been the end of the matter and the new scale would have been what was set out in the proposal?

One of the submissions forcibly made by the defendant's counsel, and the pleadings were amended to reflect this, is that there was a total absence of consideration. It is averred that the defendant received no benefit from the alleged promise to pay increased salaries, nor did the claimants suffer any detriment in the present case. It is also said that the claimants merely continued to do what they had to do by virtue of their existing contracts and therefore any promise in these circumstances produced no consideration. The defendant's counsel cited the seminal case of **STILK v MYRICK 1809 2 CAMP 317** as authority for the proposition that without consideration there can be no agreement. In that well known case, two (2) sailors had deserted the ship and the master offered to increase the wages of the remaining sailors for the remainder of the journey.
Lord Ellenborough ruled in that case that the plaintiff, one of the sailors to whom the increase had been promised, was not entitled to recover any such increase. It was his view that the contract between the sailor and the owners of the vessel required that the sailor do all the work that the situation required him to do. Defendant also sought to call in aid, the cases **FRAZER v HATTON AND ANOR. 2 C.B. (N.S.) 516,** and **PRICE v RHONDDA URBAN DISTRICT COUNCIL (1923) 2 CH 372**, but I don't believe that these cases take the

submission on consideration any further. Counsel posited that Stilk v Myrick had been held to still be good law as recently as in 1978 in the case **NORTH OCEAN SHIPPING CO. LTD. v HYUNDAI CONSTRUCTION CO. LTD. [1978] 3 All E.R. 1170**, and continues to be good law in Jamaica. Claimants' counsel rejects this submission and points to the well-known principle that "forbearance" can provide consideration.

Defendant's counsel acknowledges that forbearance may provide consideration. However, with respect to the claimants' submission that such consideration was supplied by the claimants' forbearing to pursue membership of the BITU, in order to allow the union to act as their representative, it was the view of the defence counsel that such forbearance was not that of the claimants but of the BITU itself. Hence, it could not provide claimants' consideration. I believe on a proper reading of the circumstances, the forbearance was in fact that of the claimants. It is they who had a right to be represented by the union of their choice. It is not the union which has the right to represent a group of workers, at least not until they have secured bargaining rights in a poll. Essentially, what the claimants were saying is this. 'We will not pursue that right, (a right you will need to fight to overturn in the courts), if you will negotiate directly with us'. What the defendant said was: 'We want the union to commit that it joins you in your stated decision to forswear that right'. In fact it may be possible to argue that what we have here is a contract by virtue of mutual exchange of promises. The bank is saying: "If you give us your promise that you will refrain from pursuing membership of the union *so that we do not have to seek legal redress,* then we will negotiate on your claim directly with you". I had said earlier in this judgment that I would advert to this exchange between the bank and the union, because I believe that it was important.

It will be recalled that the union's letter in response to the request was in the following terms:

> "The Bustamante Industrial Trade Union is advised by its members in the Senior Management Category comprising SM1, SM2, E3 and E4 employees, that discussions were taking place between themselves and your bank in respect of their outstanding emoluments.

> We are further informed that these discussions will be speedily concluded and that the BITU will be advised of the results of the talks".

On a plain reading, the letter makes *no claim in respect of its own position*. It merely acknowledges that it has been advised of "discussions" by its members and said it expected to be advised "of the results". I take the view that in the instant circumstances, there is consideration. Note also that it is settled law that forbearance will provide good consideration even where the forbearance is founded upon some invalid reasoning. Claimant, in this regard cites Halsbury's 4th Edition Reissue in paragraph 740 of Volume 9(1).

> "Where a party agrees to forbear from suing on a good claim, that may be valuable consideration for a promise whether he agrees to forbear absolutely or for a certain time or for no specified time at all. Moreover, even when the promise to forbear is for some reason invalid, the actual forbearance may be valuable consideration".

Thus, even if it is merely a "postponement of right", as suggested by the defendant's counsel's written submissions, it could still amount to forbearance, although to be fair to those submissions, they attributed it to the BITU and not the claimants. I believe that to suggest that what took place between the claimants, the defendant and the BITU was not forbearance on the part of the claimants from insisting upon their rights to union membership is incorrect. Accordingly I do not accept the pleading introduced by a late amendment to the defence, that there was no consideration for the agreement. Nor can it be argued at this stage of our Jurisprudence and this juncture in our industrial relations history that an agreement between management and workers by virtue of which retroactive increases are payable, could then be denied on the basis that the work of the employees for which these increases were to be paid had already been performed and amounted to past consideration and therefore was not valuable consideration.

Was there a completed Agreement?

I am prepared to hold that the proposal which was submitted by the Senior Manager's group for consideration by the Executive Committee of the board was an "offer" within the meaning of that term as it applies to contract law. It would also appear that the Executive Committee's decision, as recorded in the minutes of its meeting of September

17, 2001, accepted and approved that proposal, although its approval was conditioned upon the approval of the Bank of Jamaica. In particular, the minutes clearly indicate 10% annual increases for the years commencing October 1, 1999, October 1, 2000 and October 1, 2001. Also approved, subject to the approval of the Bank of Jamaica, were merit awards for the existing E4 & E3 managers in the total of One Million, Five Hundred Thousand Dollars ($1.5m). In light of my views on the nature of the undertaking, I also hold that there was a clear intention to create legal relations. The fact however, is that the contract was subject to a condition precedent, namely, the approval of the BOJ. It will also be recalled that the position of the claimants was that the need for the approval lapsed by virtue of an implied term when the undertaking lapsed. On the other hand, the defendant says there was no approval. The condition, precedent or subsequent, was never satisfied and therefore the contract, if indeed it were such, never came into existence. Nor do they accept that any term can be implied. It is accordingly necessary to deal with two subtle but important legal issues and I now proceed to do that. These issues are:-

1) The true nature and meaning of the condition precedent; and
2) The issue of whether a term may be implied by the Court in a set of contractual arrangements agreed upon by contracting parties.

In relation to the first issue, the Court must determine, assuming (as I have found here) the validity of the offer, the acceptance, the consideration and the intention to create legal relations, how it is to characterize the requirement for the approval of the agreement by the Bank of Jamaica.

The Nature and Meaning of the condition Precedent

Lewison (above) in a section dealing with conditions precedent, has the following to say:

> "A condition precedent is a condition which must be fulfilled before any binding contract is concluded at all. The expression is also used to describe a condition which does not prevent the existence of a binding contract but which suspends performance of it until fulfillment of the condition"

In **TRANS TRUST S.P.R.L. V DANUBIAN TRADING COMPANY LIMITED (1952) 2 Q.B. 97**, a contract for the sale of goods provided that payment was to be by cash against shipping

documents from a confirmed credit. The question arose what was the nature of the buyer's obligation to procure the provision of a confirmed credit. Denning L.J. (as he then was) had this to say:

> "Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit' is rather like a stipulation "subject to contract'. If no credit is provided there is no contract between the parties. In other cases the contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit."

Lewison says that Denning's analysis divides conditions precedent into two groups, viz, those where the non-fulfillment of the condition prevents the existence of any binding agreement, and the other, where non-fulfillment of the condition has the same effect as a breach of contract which goes to the root of the contract. He was of the view, however, that there was an intermediate position. This will be where the condition maybe such as not to prevent a binding contract coming into existence but to suspend immediate performance of the obligations it creates until fulfillment of the condition. Hence, his own formulation set out above. Thus, in **MARTEN v WHALE, [1917] 2 K.B. 418,** A agreed to sell land to B "subject to purchaser's solicitors' approval of title and restrictions", and at the same time and in consideration of the sale of the land, B agreed to sell A a motor car. B allowed A to have the car on loan and A sold the car to C. Subsequently, B's solicitors refused to approve the title. The question was whether A had "agreed to buy" the car, for if he had he was empowered to pass good title to C. The Court of Appeal held that the arrangements amounted to a conditional contract and consequently title passed to C. It is this latter interpretation that the claimants would have the Court put upon the circumstances of the condition of the instant case.

Similarly, in **SMALLMAN v SMALLMAN [1972] Fam. 25**, Lord Denning M.R. in analyzing the effect of an agreement for divorce settlement which was stated to be "subject to the approval of the Court" had this to say.

> "In my opinion, if the parties have reached an agreement on all essential matters, then the clause 'subject to the approval of the court' does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves it, it is binding on the parties. If the court does not approve, it is not binding. *But, pending the application to the court, it remains a binding agreement which neither party can disavow.*" (My emphasis)

Lord Gifford also cited in support of his submission, the case of **MICHAEL RICHARDS PROPERTIES v ST. SAVIOURS [1975] 3 ALL E.R. 416** in which case, the wardens of a charity had agreed to sell property subject to the approval of the charities Commissioners. The Charities Act of 1960 provided in the relevant section that no charitable properties "shall without an order of the Court of the Charity Commission be sold, leased or otherwise disposed of". It was argued there that in light of that condition, the parties could not have intended to make a contract to sell property, because such would have been unlawful. Goff J. apparently disposed of that point easily. He said:

> "In **MILNER v STAFFORDSHIRE CONGREGATIONAL UNION (INCORPORATED) [1956] CH. 275**, Danckwerts J. held that an absolute and unqualified contract so made was bad, but he left open the question how it would be if. as here, the contract, though preceding the consent, were conditional on it being obtained. It seems to me, however, that it must be good. Such a condition is precedent and therefore either the consent is not forthcoming when cadit quaestio, or if it be, the contract becomes effective only when the consent is given. It is therefore not made without consent and does not offend against s.29 (1) of the Charities Act 1960".

Lord Gifford also submitted that the Court should be mindful of the distinction between so called "contingent conditions" and "promissory conditions", discussed fully in **Chitty on Contracts**. This distinction was much canvassed in **TOTAL GAS MARKETING LTD., v ARCO BRITISH LTD, 1998 2 LLOYD'S REPORT 209**, a fairly recent case which I found most useful. There, Lord Slynne of Hadley adverted to the submissions made by counsel in urging the court to a view that the condition therein was promissory and not contingent. He said.

> "In this context Your Lordships have been referred to the discussion in ***Chitty on Contracts*, 27 ed., (1994) chapter 12,** pp. 570-573 as to the difference between promissory conditions and contingent conditions. Mr. Pollock Q.C. relies in particular on the passage in paragraphs to 12-025

> where breach of a promissory condition by one party, which gives the other party the opportunity to treat himself as discharged from further performance of the contract:
>
> > 'must be carefully distinguished from that of a 'contingent' condition, i.e. a provision that on the happening of some uncertain event an obligation shall come into force, or that an obligation shall not come into force until such an event happens. In this latter case, the non-fulfilment of the condition gives no right of action for breach; it simply suspends the obligations of one or both parties'."

In **Total**, the House of Lords had to determine whether a condition precedent, viz., that a contract was to become effective upon the signing of an agreement by a particular date, ("The First Delivery Date") was a contingent condition, that is one that was necessary to bring the contract into existence, or a promissory condition, that is, one that did not prevent the contract coming into existence but required fulfillment for implementation. Lord Slynne of Hadley, who gave the main opinion of their Lordships, formulated the issue thus:

> "On this appeal the issue before Your Lordships was agreed by the parties to be as follows:
>
> > 'Whether a condition to which a contract for the sale and purchase of North Sea Gas was expressed to be subject, but for whose fulfilment no time was fixed, had necessarily to be fulfilled before the date fixed for the first delivery of gas so that the agreement automatically terminated if not fulfilled'".

He also went on to characterize what came before the learned trial judge at first instance as follows:

> The sole issue was simply expressed--did the non-fulfilment of the condition that ARCO enter into the Allocation Agreement, (which was admitted), mean that on 31 October 1996 the Agreement terminated or that further performance of the Agreement was merely suspended, and if so for how long.

Lord Steyn, for his part, made the following observations which are useful in the instant matter.

> My Lords, the central question is whether on a correct construction of a long- term contract for the sale of gas it was discharged by reason of the non-occurrence of a condition. It is a contract of a type which is sometimes called a relational contract. But there are no special rules of interpretation applicable to such contracts: see McKendrick, The Regulation of Long Term Contracts in English law, essay in Good Faith and Fault in Contract Law, ed. Beatson and Friedman, 1995, 305. That is not to say that in an appropriate case a court may not take into account that, by reason of the changing conditions affecting such a contract, a flexible approach may best match the reasonable expectations of the parties. *But, as in the case of all contracts, loyalty to the contractual text viewed against its relevant contextual background is the first principle of construction.* (Emphasis mine)

Both Lords Slynne and Steyn accepted that there could be no hard and fast conceptual separation of contingent and promissory conditions. Each case had to be looked at on its own merits. At the same time, there is interesting dicta in Lord Slynne's opinion which may be recalled here. In discussing the nice distinction between the two concepts and the need to look at each case on its merits, he noted that counsel's submission stressed that "this being a commercial contract, the desirability of upholding rather than defeating the purpose of the contract between the parties". I agree with that reasoning.

The court must look closely at the words as well as any implied terms, in order to properly characterize a condition and determine its implications. In light of **Total** and independent of any contrary authority whether binding or persuasive, in the instant case, I am content to adopt the reasoning of the Learned Master of the Rolls in **SMALLMAN** above, particularly in relation to the question as to whether and when the agreement becomes binding. I accordingly hold that a binding agreement was arrived at in September 2001, but that implementation was postponed, pending the approval of the BOJ.

May a Term be implied that if the undertaking was discharged, need for approval would lapse?

Claimants counsel cannot contest the fact that no approval was ever given by the BOJ and therefore pleads that there was an implied term that if the undertaking was discharged, the need for approval would necessarily lapse. He submitted accordingly, and

to support this submission he cited **CHITTY ON CONTRACTS 26th Edition Vol I,** Paragraph 903:

> The implication of a term is a matter of law for the Court (See **O'Brien v Associated Fire Alarms Limited 1968 1 W.L.R. 1916**) and whether or not a term is implied is usually said to depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances.

Lord Gifford posited that if an "officious bystander" had asked the parties on 17th September 2001 what would happen if the BOJ discharged the defendant from its undertaking, the parties would have said there would then be no need for approval. It ought therefore to be "logically implied". In **REIGATE V UNION MANUFACTURING (RAMSBOTTOM) LTD. (1918) 1.K.B. 592**, Scrutton LJ characterized the officious bystander test in the following way: 'if it can be confidently said that at the time of contracting someone had said to the parties 'what will happen in such a case' they would have replied 'of course, so and so will happen' we did not trouble to say because it is clear'. Lord Gifford suggests that this was implicitly the basis upon which the parties proceeded.

Counsel also suggests that the defendant itself seemed to accept this view. He points to the Board Minutes of December 20, 2001 in which it was stated that "if the BOJ undertaking had been released, there would have been no need to refer the matter to the BOJ". Further according to the minutes of 22nd January 2002, Mr. McFarlane stated that the defendant was "awaiting the outcome of discussions being undertaken by the Chairman with the Minister of Finance/ lifting of the voluntary undertaking by the BOJ, whichever came first". Counsel refers to the pleadings and seeks to make a point of the fact that since the defence did not specifically challenge the implied term which was pleaded, it was not "denying the reasonableness of the implied term". It is true that the defendant in its pleadings did not dwell on the pleading of the implied term, since its main submission was that there was no contract and therefore nothing into which a term could have been implied. But, in any event, and as we shall see, while it is true that where a term is to be implied it ought to be a reasonable one, a term will not be implied merely because it is reasonable so to do. Implication of a term into an agreement is NOT a matter

of "reasonableness" but necessity. As was said in **LIVERPOOL CITY COUNCIL v IRWIN [1977] A.C. 239**, "The touchstone is always *necessity* and not merely *reasonableness*"[1].

It is trite, that at common law a term may be implied in order to give effect to the *presumed intention of the parties* where the contract does not deal with the matter expressly. It is clear that a court may not create a *new contract* on behalf of parties by the implication of a term. A court should only imply a term where it passes what my learned brother Sykes J (Ag) in a case[2] decided recently called, "the very stringent test of necessity" which have been laid down by the authorities have been met. This has been characterized by Halsbury's as necessary to give "efficacy" to the contract. But what does this term mean?

According to **Chitty**: "The general principle of law was stated by Bowen L.J. in ***THE MOORCOCK [1889] 14 P.D.64, 68***:

> Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the intention of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have".

In ***DAVY OFFSHORE v EMERALD FIELD*** **CONTRACTING 1991 55 BLR 1** His Honour Judge Thayne Forbes Q.C. having reviewed the authorities concluded that five factors must be present for a term to be implied:

1. It must be reasonable and equitable;
2. It must be necessary to give business efficacy to contract, so no term will be implied if the contract is effective without it;
3. It must be so obvious that 'it goes without saying';

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[1] Per Lord Edmund Davies

[2] S & T Distributors and Anor. v CIBC Jamaica Ltd And Anor, Suit # C.L. 222 of 1999

4. It must be capable of clear expression;

5. It must not contradict any express term of the contract.

In **TROLLOPE & COLLS v NORTH WEST METROPOLITAN REGIONAL HOSPITAL BOARD [1973] 1 W.L.R.601**. Lord Pearson said that a term should be implied "if and only if, the court finds that the parties must have intended that term to form part of the contract". And in the Jamaican case of **NCB v. GUYANA REFRIGERATOR'S LIMITED (1996 53 W.I.R P 229)** the Judicial Committee of the Privy Counsel refused to allow a term to be implied into a contract as to the means of payment merely because it would be "reasonable and sensible" so to do. It affirmed that the criterion is strict necessity, judged objectively.

I also find help in considering this issue of the implied term in paragraph 13-008 of the Twenty-Eighth Edition of **Chitty's,** where it deals with "Incomplete Contract".

> There is yet another situation where a term may be implied. This is where the court is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. "In this sense the court is searching for what must be implied". In **LIVERPOOL CITY COUNCIL v IRWIN [1977] A.C. 239** the contract by which dwelling units in a Council block were let to tenants consisted of "conditions of tenancy" which imposed obligations upon the tenants but which were silent as to the contractual obligations of the landlord. The House of Lords implied an obligation on the part of the landlord to take reasonable care to keep the essential means of access and other communal facilities in reasonable repair.

Thus, the Isle of Jersey Court of Appeal (Le Quesne, Fennell and Collins, JJ.A.), in **SELVEY (Nee PAVEY) v BERRY (Nee DU FEU)** decided on July 7th, 1987, (Unreported) in holding that where a loan contract required that repayment was to be effected on the happening of a specific event, it was unable to imply a term that the loan would also be payable on reasonable notice to the debtor. It held in applying the dictum of Lord Wilberforce in Liverpool, that one of the circumstances in which a term may properly be implied is where the parties to the contract have not fully stated its terms, the court having established them may complete the agreement

Not without some difficulty, I have formed the view that this is a proper contract into which one should imply a term that if the undertaking lapsed, the approval would be un-necessary, and I so hold. I am fortified in this view by what appears to have been the

common view of the parties themselves as reflected in the minutes referred to above. In answer to the second and third questions which I had posited above, I hold that the answers are as follows: Question 2, "No" and question 3, on or about the 17th September, 2001 and it took effect according to its terms on October 1, 1999.

The Counterclaim by the Defendant.

The fourth of the questions which I had identified above was whether there was any actionable wrong on the part of the claimants which gave rise to a right to damages in favour of the defendant. The defendant has filed a counterclaim in which it seeks damages for breach of fiduciary duty on the part of the claimants. Defendant asserts, and this is not disputed, that the claimants were aware of the undertaking given to the BOJ. It is submitted that it is trite law that an employee owes a duty of good faith to his employer during the course of his employment. Counsel submits that this duty militated against any act on the part of the employee which could place the employer in the position of breaching its undertaking. It is further submitted that, as a matter of law, "The mere attempt to negotiate with the Defendant, unsuccessful as it was, constituted a breach of this duty entitling the Defendant to treat the contracts of employment of each of the Claimants as discharged, with effect from such attempt, thereby disentitling them to claim any benefit under the contract so discharged". **BOSTON DEEP SEA FISHING & ICE CO. v ANSELL (1888) 39 CH.D. 339**, in which an employee is forced to account for and disgorge secret profits, is cited as authority for this proposition. With respect, that case in which the employee negotiated with a third party on behalf of the employer but received secret profits (commissions) on his own account from that third party, is unhelpful and easily distinguishable. Those circumstances do not appear to arise here.

As I understand the submission of the defendant's counsel, since the claimants knew of the undertaking, negotiating with the defendant, or even attempting to do so, breached the fiduciary duty which an employee has to his employer, in this case because it encouraged the defendant to breach its undertaking with the BOJ. However, there is no evidence either that merely breaching the voluntary undertaking would have been an illegal act, or that there would be any sanctions therefor. And if the breach of the voluntary undertaking was not itself an illegal or wrongful act, how would it be possible to create an "inchoate

offence" from merely attempting to negotiate. One should bear in mind. as well, that one aspect of the defendant's defence is that it was not "negotiating" with the claimants, as that would have breached the undertaking. In any event, what damages has the defendant suffered in respect of which, it is to be made whole by this counterclaim? I accordingly find for the claimants on the counterclaim

IMPLICATIONS FOR THE CLAIMS OF THE RESPECTIVE CLAIMANTS

It is necessary to refer specifically to the pleadings in both the statement of claim and the defence as amended for these purposes. It will be recalled, and I find this quite curious, that the defendant called no witnesses. In many aspects of the claim the only evidence which was led before me is that of the claimants. I accept the evidence that was presented in relation to the bank's practice with respect to payment of retroactive increases to persons who were eligible at the time those increases took effect, even where they may have left the institution prior to the increases being agreed. The evidence of the 1st Claimant, Mrs. Audrey Basanta-Henry, a former Assistant General Manager for Human Resources in the Bank, in her witness statement was to the effect that, "In cases where employees resigned voluntarily, were made redundant or retired prior to the conclusion of wages and fringe benefits negotiations, the Bank's practice was to give such employees any retrospective salary increases that related to the period during which they were employed, once the negotiations had concluded". This evidence is uncontroverted.

I also accept and consider it logical that in the cases where retroactive increases of salaries were paid, there would be consequential adjustments of other relevant entitlements including, where applicable, redundancy payments. Indeed, the memo from the bank's Personnel Manager to Mr. McFarlane, the then Managing Director of the Group at page 142 of the bundle, confirms that this was the practice. Claimants' counsel also points to the several letters from Mr. McFarlane to various claimants which indicate a clear acknowledgement that in the event of increases, redundancy and/or pension entitlements would be re-calculated. I hold that there is more than adequate credible evidence that this was an invariable practice of the bank, and a term may thus be implied into the terms of the contracts with the managers, including those who had left the bank,

that they were entitled to increases which were effected in relation to any period during which they were employed by the bank. {**SPURLING v BRADSHAW [1956] 2 All E.R. 12**).

The defendant pleads in its defence that 3rd and 4th claimants (McRae and Green)had both entered into agreements (I shall refer to them as the "termination agreements") with the bank which now preclude their being able to rely upon the purported agreement which is the subject of this action. The wording of the termination agreements dated October 17 2000, is in substantially the same terms and provides in material part as follows:

1. The contract of employment between (SG/HM) and the company shall be terminated effective November 30, 2000{on or before December 31, 2000} and HM's/SG's employment to the company shall immediately cease and determine on that date.
2. The company will pay to HM/SG the sum of --------- dollars which was arrived at in accordance with the particulars set out in the Schedule hereto.
3. The payment of the said sum of -------- dollars referred to in clause 2 above is paid in full and final settlement of *all claims, entitlements and/or other rights whatsoever* which, but for this agreement may or could have been asserted by HM/SG in consequence of the termination of her contract herein, and without prejudice to the generality of the foregoing, the said sum of ----- dollars shall be deemed to include the statutory entitlements of HM/SG if any under the Employment (Termination and Redundancy Payments) Act, so that the payment of the aforesaid sum of --------dollars shall constitute an absolute discharge of any and all obligations and liabilities of the company under the said Act. (My emphasis)

This agreement was entered into on October 17, 2000, almost one year before the conclusion of the agreement (as I have found), between the Senior Managers' Group and the defendant. Claimants' counsel suggests that the rights given up "in consequence of the termination of her contract" were those which they may have had in connection with "wrongful dismissal". It is not at all clear to me why the agreement should be interpreted in this way. The words of the termination agreement are clear: "*all claims, entitlements and/or other rights whatsoever which, but for this agreement, may or could have been asserted by (SG/HM)*". At the time when the termination agreement was entered into, the 3rd and 4th claimants had a right, albeit inchoate, to participate in all the fruits of any negotiations which on the evidence, to their knowledge, were being carried out on their

behalf. It seems to me that that "right" must, or at least ought to have been in their contemplation when they agreed to the termination agreement in the terms they did, and "*all rights*" have been specifically surrendered in consideration of the payment set out therein. Claimants' counsel submits that these claimants sought and were given assurances that the documents were not intended to avoid the obligation to pay retrospective increases. But the defendant may feel more than justified in adopting one of claimants' counsel's earlier submissions, to the effect that such assurances arising from someone's interpretation of the agreement can be of no assistance to the court here, as was said in relation to the defence seeking to elicit from Mr. Golding, his interpretation as to the legal effect of an agreement. I also have considerable difficulty with the submission that the claimants are "not claiming statutory entitlements but *contractual* entitlements". The fact is that the termination agreement deems the payment to cover "*any and all obligations and liabilities*" of the company under the Act. It should be noted that since it is not possible to contract out of the provisions of the Act, the terms of the Act are implied into any contract. Obligations under the Act are therefore both statutory and contractual. What the Act does is to give the employee the right to enforce in contract, the statutory entitlements implied into his contract. It seems to me that HM and SG have by the termination agreement estopped themselves from asserting by leading any evidence that they did not receive all the Act gave them. They had ceased by virtue of the terms of the termination agreements to be a part of the SMG by the time that contract was concluded, and one of the things they had surrendered was the right to potentially benefit from that latter agreement. In other words, the effect of the termination agreements was to say: "Give us a certain dollar amount now, and we will forego any other claims we may or could assert against you".

In light of the foregoing, I hold that the claim on behalf of the 3rd and 4th Claimants must fail in all respects, and I find for the defendant in respect of these claimants.

With respect to the 8th claimant, the defendant purports to resist his claim on the basis of a letter written to him by the defendant and dated December 13, 2000. That letter specifically agreed that Mr. Shirley would be entitled to, and the bank would honour "any

amounts payable under the E.S.I.S.; Long Service Award and Salary award if allocated by the I.D.T.". Just for the record, it is worth pointing out that counsel for the claimants seeks to suggest that the 8th claimant accepted an offer for early retirement when he did not have to do so". For the purposes of accuracy, the letter clearly indicates that the defendant was responding to a "request for early retirement". There is no reason here to gild the lily. It will be apparent from the statement of claim that the heads of claim for this claimant does fall within the matters which the bank said it would honour. In that regard, I accept the evidence of Mr. Golding and Mr. Watson as to the sums which were to be made available for profit share among the Senior Managers' Group as there has been no evidence to contradict those statements.

The defendant submits that with respect to claimants 1, 2 and 10, they had agreed to accept sums of money by way of redundancy and are now precluded from asserting any claim since legal relations had come to an end. None of the letters which have been exhibited in respect of the admitted redundancy of the persons in question provides any basis for saying that their entitlements should not now be re-calculated based upon the finding of a contract, as I have now found. Indeed, as stated above, it is not possible for an employee to contract out of the entitlements payable under the Employment (Termination and Redundancy Payments) Act and the Orders made thereunder. Having found that the contract gave rise to increased emoluments, the redundancy payments must be recalculated and I reject the submission on behalf of the defendant that they are not so entitled as "legal relations had come to an end".

With respect to claimants 5 and 6, the submission that the clear words in the redundancy letters to those claimants that, "if there are any increases granted in respect of any period relating to your employment, the redundancy package will be re-calculated and the difference paid to you", is "too vague to be enforceable" is rejected. It is difficult to see what more definitive words could have been used to acknowledge the obligation should it eventuate. In any event, as claimants' counsel submitted, those figures had been the subject of specific calculation in the proposal submitted to the BOJ for approval.

Merit Awards

I am a little leery about the evidence of the 9th claimant as it relates to this head of claim as it is largely hearsay, even double hearsay, and also self-serving. While no objection was made to that evidence nor was any contradiction offered, I have to consider whether this evidence as set out in Mr. Golding's witness statement should be accepted. I have, with some hesitation, agreed that I will allow the claim for the one-off merit increase, claimed in respect of the 6th and 9th Claimants because there is also corroboration in the minutes of the September 17, 2001 meeting which is in evidence before me. It seems clear that this was the treatment which the bank was accustomed to accord the senior managers. In this regard, I wish to make the observation that in this era of witness statements standing as the evidence-in-chief of the witness, there is a need for vigilance on the part of both the parties and the bench that witness statements do not consist of hearsay. I have had occasion in two previous trials in these courts to hear applications that portions of witness statements be excluded on the basis that they represent hearsay. On both occasions, there was need to remove portions of the witness statements so that the statement could stand as the evidence of the witness. It is clear that this will become an important of counsel's duty in litigation in the future.

Insofar as the claim by Ian Watson for Merit Award is concerned, I hold that this has been made out in view of Mr. Watson's uncontroverted evidence and the letter from Christopher Lowe dated April 30, 2002 confirming that Mr. Watson was so entitled.

The ESIS Buy-Out

Let me deal briefly with the Executive Incentive Share Scheme. It is clear from Mr. McFarlane's letter of May 25, 2000, to Audrey Anderson, Deputy Governor of the BOJ, that the defendant was of the view that ESIS was an entitlement which was not affected by the undertaking, whatever else may have been so affected. There is no evidence to the contrary and I accept that this is how that issue is to be treated. I accept the evidence of Mr. Golding as to the amounts which became payable to the various claimants under the ESIS, and that evidence has not been contradicted.

Profit Share

Part of the claim as set out in the Statement of Claim is in relation to Profit Share. I accept that this was part of the contractual emoluments of members of the SMG and the

figures which have been presented as to the amount of the entitlement have not been controverted in any way. In particular, I hold that the claim for payment of ten (10) weeks salary as profit share has been made out. I accept that the managers did in fact receive a payment amounting to four (4) weeks' salary and they are accordingly entitled to a further payment of six (6) weeks salary although this payment would be based upon the increased salaries under the agreement.

Terminal Gratuity for 9th Claimant

There is evidence that there was a custom in the bank for employees who retired at retirement age after twenty (20) years service to be paid a terminal gratuity amounting to six (6) months salary. The question may well be asked whether a "gratuity" by definition can be an entitlement. Where, however, a practice or custom has become so established as to give rise to what one may call a "legitimate expectation' on the part of the employee that it is done as a matter of course, it seems to me that there is clear authority for holding that such is part of the employment contract. That this was the practice was confirmed by some of the documents and these were not contradicted by any evidence.

Finally, I should note that the only evidence offered in relation to claims in respect of notice pay and payment for vacation leave came from the claimants. Nor were any of the calculations disputed by evidence from the defendant. I have therefore to accept that as it is the only evidence before me.

Awards

In light of the findings above, including my conclusions with respect to the 3rd and 4th Claimants, I make the following awards:

1. Ordered that the Defendant do notify the Managers of the NCB Limited Staff Pension Fund (1975) that the salaries of the 1st, 2nd, 5th, 6th, 8th, 9th and 10th Claimants at the date of the respective termination of their employments with the defendant were salaries in the amounts claimed by the said claimants herein.
2. Ordered that the defendant pay into the aforesaid Pension Scheme on behalf of the aforesaid claimants in 1 above, such sums representing 5% of the increase representing the difference between the sums at which they were paid at the relevant time and the sums as should have been paid pursuant to the finding of

this court that there was an agreement to pay such increased salaries with effect from October 1, 1999.

3. Judgment for the 1st Claimant in the sum of $2,698,235.61
4. Judgment for the 2nd Claimant in the sum of $2,135,912.75
5. Judgment for the 5th Claimant in the sum of $4,535,854.07
6. Judgment for the 6th Claimant in the sum of $6,285,707.06
7. Judgment for the 7th Claimant in the sum of $736,153.19
8. Judgment for the 8th Claimant in the sum of $808,893.59
9. Judgment for the 9th Claimant in the sum of $6,935,205.91
10. Judgment for the 10th Claimant in the sum of $592,497.91.
11. Interest is to be paid on the above sums at the rate of 12% from the date of the service of the writ upon the defendant.
12. Costs to the above successful 1st, 2nd, 5th, 6th, 7th, 8th, 9th and 10th claimants on the claim, such costs to be agreed or taxed.
13. Judgment for the defendant on the claim against the 3rd and 4th claimants, with costs to the defendant against the said 3rd and 4th defendants to be agreed or taxed.
14. Judgment for the claimants on the counterclaim

Stay of Execution Granted for six (6) weeks.