

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2016-03761

Between

GARTH MC LEAN

First Claimant

APRIL PETERS

Second Claimant

And

THE NATIONAL LOTTERIES CONTROL BOARD

Defendant

Before The Honorable Justice David C Harris

Appearances:

Mr. Gideon Mc Master instructed by Mr. Joel Roper **for the** Claimants.

Ms. Raisa Caesar instructed by Ms. Manisha Lutchman **for the** Defendant.

JUDGMENT

INTRODUCTION

1. The Claimants bring this action for wrongful dismissal and breach of contract after the Defendant determined that their employment contracts were invalid, unenforceable and unratified and the Defendant subsequently summarily terminated the said employment contracts.

THE CLAIMANTS' CASE¹

2. The First Claimant pleads that on or around 6th July 2015 he was offered and accepted a 2-year contract of employment with the Defendant, by a Director of the Defendant, at the Defendant's offices, to provide Information Technology Management Services. He further pleads that the said contract was signed by himself, the Secretary to the Board of the Defendant, Ms John and witnessed by an employee of the Defendant, at the premises of the Defendant.
3. The Second Claimant pleads that on or around 29th July 2015 she was offered by a Director of the Defendant Ms Forde, and accepted, the 2-year contract of employment, at the Defendant's offices, to perform the duties of Financial Controller within the Defendant. She further states that the said contract was signed by herself, the Secretary to the Board of the Defendant and witnessed by an employee of the Defendant at the Defendant's premises.
4. The Claimants contend that on or round 5th October 2016 the Chairman of the Defendant notified the Claimants, via individual letters, of the decision to terminate their contracts. They further contend that the letters stated, inter alia, that the respective contracts had not been approved nor ratified by the Board and that the power to enter into the said contracts was not delegated expressly or by implication to the Secretary to the Board.
5. The Claimants contend that they were summarily relieved of their duties, without cause, by the Defendant nine months in advance of the contractual duration of 2 years, without prior notice that the issue of revocation or termination of their contracts was under consideration. Further, they contend, the reasons for termination as put forward by the Defendant, were not matters within the knowledge or control of the Claimants when the Defendant issued the contracts. Indeed they were not matters provided for in the said contract itself.
6. The Claimants plead that under their respective contracts, they were each entitled to three months' notice of termination and that such notice was not afforded to them by the Defendant, neither were they paid fully in lieu of such notice as required by the contract.

¹ Substantially re-produced from the Claimants' Statement of Case

DEFENDANTS' CASE²

7. The Defendant contends that at no time did the Board delegate the power to enter into the said contracts to the Secretary or the Director or any other person on behalf of the Defendant. Further, the Defendant contends that the purported contracts held by the Claimants were not approved by the Defendant, nor were they ratified by the Defendant and were not executed pursuant to the statutory formalities and are therefore invalid and unenforceable.
8. The Defendant pleads that an investigation was initiated by the Board into the validity of the contracts held by certain service providers and that prior to this, the Defendant did not realise that the Claimants' contracts were invalid.
9. Throughout the pleadings, the Defendant contends that the contracts were invalid and unenforceable, having not been approved by the Board or ratified and were executed outside of the statutory formalities. As such, the Defendant contends, the Claimants were not summarily dismissed as they were not validly employed with the Defendant at any time. Their employment not being legitimate, the Defendant contends, the Claimants could not be afforded a hearing before the Board made its decision that the Claimants' contracts were unenforceable and that they (the Claimants) should be terminated; neither could they be allowed access to the Defendant's offices, nor be afforded any prior notice of termination.
10. The Defendants contend that no legitimate expectation was created by the Defendant, neither can the Claimants rely on any entitlements under their respective contracts, said contracts being deemed by the Defendant as invalid, unenforceable and executed outside of the statutory formalities.

ISSUES TO BE DETERMINED

11. (i) Whether the proceedings of the First and Second Claimant were properly brought together in one claim;

² Substantially re-produced from the Defendant's defence

(ii) Whether employment contracts are required to be executed by the Board in accordance with s. 12(1) of the National Lotteries Act Chap. 21:04;

(iii) Whether the ostensible authority of persons to execute contracts overrides statutory requirements.

(iv) Whether the claimants were unlawfully dismissed and are entitled to relief.

ASPECTS OF THE LAW

Civil Proceeding Rules 1998 (as amended) - CPR

12. The CPR at Part 26.1(1)(i) gives the court the power to “try two or more cases on the same occasion.”³

Statutory

13. The National Lotteries Act (“the Act”) s. 12(1) states:

“Any document requiring to be executed by the Board shall be deemed to be duly executed—

(a) if signed by the Chairman and the Secretary; or

(b) if signed, whether within or without Trinidad and Tobago, by a person or persons authorised by resolution of the Board so to sign; but such an extract of the resolution certified by the Chairman and the Secretary shall be attached to and form part of the document.”

Apparent or Ostensible Authority

14. *“This doctrine of ‘holding out’ also known as apparent or ostensible authority is based on estoppel.....arises where one person has acted so as to lead another to believe that he has authorised a third person to act on his behalf, and that other in such belief enters into transactions with the third person within the scope of such ostensible authority. In this case the first-mentioned person is estopped from denying the fact of the third person’s agency under the general law of estoppel, and it is immaterial whether the ostensible agent had no authority whatever in fact,*

³ The Defendant neither pleaded a case against the joinder nor did it lead any evidence with respect to the issue. A question of whether the Claimants were properly joined was first introduced in the Defendant’s submissions.

*or merely acted in excess of his authority.....The onus lies upon the person dealing with the agent to prove either real or ostensible authority and it is a matter of fact in each case whether ostensible authority existed for the particular act for which it is sought to make the principal liable. No representation made solely by the agent as to the extent of his authority can amount to a holding out by the principal.”*⁴ [Emphasis added]

Illegality

15. In Treitel, ***The Law Of Contract***, 11th Edit; the authors posit that the law may refuse to give full effect to a contract on the ground of illegality, i.e. because the contract involves the commission of a legal wrong or is in some other way contrary to public policy. The problems with classification of the cases in which contracts are affected by illegality is noted in those works.

16. It is perhaps best set out for our circumstances in the instant case, in the broadest of ways, in the case of ***Soteriou (Claimant) v Ultrachem and others (Defendants)*** [2004] EWHC pp 983 (QB), as being two types of cases where illegality renders a contract unenforceable: (i) a contract entered into with intention of committing an illegal act; (ii) where the contract is expressly or implicitly inhibited by statute. It is the later that the Defendants in the instant case contend is applicable to the Claimants’ contract and dismissal by virtue of section 12 of the Act.

17. A contract may generally be illegal because it is contrary to a statute or is an immoral contract. A contract which is illegal in its purpose, is void regardless of the state of mind of the parties: Halsbury’s Laws of England/Employment Vol. 39 (2014) at para. 18.

Breach of Contract/Wrongful dismissal

18. In ***Johnson v Unisys Ltd.***⁵ at para. 40 Lord Hoffman quoted Lord Reid in ***Malloch v Aberdeen Corporation***⁶. Lord Reid said:

“At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant

⁴ Halsbury’s Laws of England/Agency Vol 1(2017) para. 25. See also ***Australian Bank of Commerce Ltd. v Perel*** [1926] AC 737 PC; ***Pole v Leask*** (1863) 33 LJ Ch 155, HL; ***A-G for Ceylon v Silva*** [1953] 2 WLR 1185 PC.

⁵ [2001] UKHL 13

⁶ [1971] 1 WLR 1578, 1581

has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."

Lord Hoffman concluded at para. 41:

"The action for wrongful dismissal could therefore yield no more than the salary which should have been paid during the contractual period of notice.

19. Halsbury's Laws of England/Employment Vol. 41 (2014) at para. 825:

"A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely:

(1) the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and

(2) his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily.

20. It is further stated in this paragraph that *"...in order to found a claim for wrongful dismissal an employee has to show that he was employed under a contract of employment that was enforceable": Soteriou v Ultrachem Ltd [2004] EWHC 983 (QB)* where contract found to be tainted with illegality; finding of illegality necessarily defeated the claim.

21. Halsbury's Laws of England/Employment Vol. 41(2014) at para. 830:

*In the case of a fixed-term contract, this means that the starting point is the remuneration for the remainder of the fixed term; but **most contracts of employment are terminable by notice so that the employee is entitled to recover only the amount of remuneration during the notice period.** That remuneration includes wages or salary, including a reasonable amount of any variable such as commission, loss of a vehicle and other fringe*

benefits, and any loss of pension rights: Addis v Gramophone Co. Ltd.⁷; Lindsay v Queens Hotel Co. Ltd.⁸; Acklam v Sentinel Insurance Co. Ltd.⁹

EVIDENCE

The Claimants

22. In their respective witness statements/evidence in chief, the Claimants reiterate the circumstances under which they were offered, and accepted the contracts of employment of the Defendant, and the subsequent termination of the said contracts by the Defendant without cause. In cross examination the first claimant testified that Mrs Forde, a Director of the Defendant, was present when he signed the contract. The second claimant went on to testify that it was Ms Forde that offered her the contract. Their testimony on this point was not shaken.
23. The Defendant, through the Chairman by letters on or around 5th October 2016, notified each Claimant that the “contract is unenforceable and therefore invalid because the respective contracts were *“not approved by the Board and the power to enter into the said contract was not delegated expressly or by implication to the Secretary of the Board.”* There is no pleading or evidence from either party of the contract being *illegal in its purpose* or in its performance. The contract was to perform the respective legitimate business of the Defendant.
24. The Claimants also state that under the terms of their respective contracts, each was entitled to a minimum of 3 months’ notice of termination or 3 months’ salary in lieu of notice. The First Claimant states that he was not given notice nor paid any monies in lieu of said notice. The Second Claimant states that she was paid one (1) months’ salary in lieu of notice. The subject contracts provided in the “*Termination*” section for *immediate* termination under specified conditions. The Claimants have proved that none of those four (4) conditions existed (and none were pleaded). The section goes on to provide for the agreement otherwise being terminated by either party giving three months’ notice of termination in writing. It is not disputed that the Claimants were terminated in writing, but without any notice period. The termination was immediate.

⁷ [1909] AC 488, HL

⁸ [1919] 1 KB 212

⁹ [1959] 2 Lloyd’s Rep 683

25. During cross-examination Mr. Mc Lean testified that having been recruited through a recruitment agency hired by the Defendant (see pleadings; statement of agreed facts and the evidence), he attended an interview conducted by a panel of interviewers including 'representatives of the Defendant'. The Defendant neither admitted nor denied this last assertion. It was not successfully challenged nor was an alternative fact pleaded or put forward at trial in relation to the interview and the make-up of the panel. It was put to Mr McClean that he had failed to identify by any person on the interview panel by name. He agreed. The fact that he was interviewed as alleged by persons he alleged, remains substantially unchallenged and in the court's view in all the circumstances, proved. The Claimant testified to meeting with Mrs Forde, a member of the Board of the Defendant. This fact was admitted by the Defendant in para 10 of the Defence. Ms. Forde, a member of the Board of the Defendant, offered him a contract and if it is that she was not a director of the defendant at the time, he was not aware of that. While he was not sure whether any Board resolution was attached to his contract, on being shown the exhibit by defence counsel, he confirmed there was none attached thereto. The First Claimant was referred to clause 8.5 of his contract as evidence of the existence of enforceability of a contract. He acknowledged the existence of the clause.
26. He further stated that he is entitled to the relief sought for wrongful termination of his contract with the Defendant, including loss of salary from October 2016 to June 2017.
27. Ms. Peters, the Second Claimant, testified under cross-examination that she, likewise, was approached and interviewed by HRC Associates Ltd for the job at the Defendant. She later attended a further interview at the Defendant's premises with Mrs. Forde, a Director of the defendant. Mrs. Forde offered her the position which the Claimant accepted. The signatories to the contract are the said Claimant and Mrs. John, the Secretary to the Board of the Defendant of which Mrs. Forde is part¹⁰. Further, the Claimant testified that she became familiar with s. 12 of the Act after the fact and was unaware that a resolution was required because the contract was signed by Ms. John. She also questions how she could have known of that requirement. She testified that neither the legitimacy of her contract nor indeed her performance on the job was questioned during the 14 month period of her employment.

¹⁰ See para 9 of Mr Jogee's witness statement.

The Defendant

28. The witness statement and oral testimony on behalf of the Defendant was given by Mr. Michael Joguee, a Director of the Defendant with effect from February 1, 2017. His utterances therein are based on the NLCB's records as he was not at the NLCB in any capacity at the time the Claimants were contracted and subsequently terminated. His evidence was to the best of his limited capacity but in the end not altogether helpful to the case for the Defendant. At the onset, the court notes his testimony in cross examination whereby he asserts that; *Ms Forde was a director at the material time.*
29. Mr. Joguee's statement, in chief, reiterates the NLCB's findings that the Claimants' contracts were purportedly not executed in accordance with s. 12(1) of the Act and therefore the said contracts were unenforceable and invalid. He noted that the contracts were not signed by the Chairman and further, they were signed by the Secretary to the Board and not the Secretary of the Board as required by s. 12(1) of the Act. He also stated that the said contracts were not ratified by the Board. The defendant tendered no document – letter of appointment for instance – or other evidence such as the testimony of Ms Forde or Ms John herself, to collaborate Mr Joguee's assertion that Ms John did not hold the requisite position in the defendant as contemplated by the Act
30. Under cross-examination, this witness could only testify to the contents of the records of the NLCB, as he was not a Director of the Defendant during the relevant periods of the Claimants' contracts. He did not establish himself as the 'keeper of the records' either. He was directed to copies of 5 contracts of various persons from March 2016 which in some cases terminating on a date well after that which the Claimants were contracted. These contracts were exhibited to the Claimants' reply to the defence. Mr. Joguee acknowledged that all of these contracts, as with those of the Claimants, were signed by the Secretary *to* the Board, Ms. Rosalie John. He testified that, according to the records and as far as he was aware, no contracts other than the Claimants were terminated. The Defendant did not annex to Mr Joguee's witness statement any contracts executed in the manner in which the Defendant says is required by s.12 of the Act. Mr Joguee confirmed that Ms. John and Ms Forde were still employed with the NLCB. They did not give evidence in the matter.

31. The Defendant exhibited several items of correspondence between a Mr. Borde of the Defendant and the Claimants, more particularly the Second Claimant. None of these were exhibited, referred to, or relied upon in the pleadings or the witness statement of the Defendant. The Defendant's case was and still is that the contracts were voided due to its unenforceability for illegality.
32. The Court notes that Ms. John, who may have added some clarity regarding the execution of these 5 contracts and those of the Claimants, was not made available by the Defendant to testify in this matter.

ANALYSIS, FINDINGS AND CONCLUSIONS

33. The Defendant relies on s. 12(1) of the **National Lotteries Act** to support its contention that the contracts were rendered unenforceable. That is the narrow case for the Defendant. The Court notes that the said Act does not expressly identify or definitively define the documents that fall to be executed by the Board. The Defendant has interpreted the section to mean that contracts of employment are such documents to be executed by the Board and therefore must be signed by the Chairman and Secretary in order to be deemed "duly executed," and by extension, valid and enforceable.
34. Having first been interviewed and recruited by a recruitment agency hired by the Defendant for the purpose, and subsequently offered contracts of employment at the Defendant's offices by persons holding themselves out as representatives of the Defendant, and indeed by Mrs. Forde, a Director of the Defendant in person, the Claimants reasonably concluded the offer was a bona fide offer from the Defendant. As the Claimants pleaded and this court concurs, the purported proper execution of the contracts was within the knowledge and control of the Defendant and not that of the Claimants. 'Ignorance of the law' does not defeat the Claimants' rights in these circumstances especially where the conduct of the Defendant may have conducted to the veiling of the true powers and authority (or absence thereof) of Ms Ford and Ms John.
35. Further, the Defendant has not presented any Board decision, rule, regulation or directive of the NLCB which corroborates the Defendant's interpretation that the section 12 words; "*any document requiring to be executed by the Board*", includes and refers to contracts of employment. The absence of such corroborating evidence leaves the door open to a contrary interpretation to

that given by the Defendant; that contracts of employment do not fall within s. 12(1) of the Act. Indeed, it is unclear as to what documents qualify as requiring to be executed by the Board, the import under this section being vague at best. There is bald and repeated reference in the pleading by the Defendant as to the failure of the executed contracts to meet the statutory formalities. However, there is no evidence as to what exactly are these formalities referred to and relied upon by the Defendant, if other than the requirement for the signatures of the persons holding the positions there set out.

36. In evidence, the Claimants presented copies of 5 contracts of employment offered by the Defendant and accepted by various contractors. Even from months after the Claimants' contracts were executed in July 2015, these 5 contracts were signed by the Secretary to the Board and a Director or other staff, on behalf of the Defendant. The testimony given at trial suggests that these contracts were not terminated nor the contractors dismissed, although they were executed in similar manner as the Claimants' contracts. These actions, or omissions as it were, on the part of the Defendant, adds weight to the contrary interpretation of s. 12(1), that employment contracts were not seen or held to be governed by this section at the material time.

37. Indeed, it can be inferred from the evidence that the manner of execution of these 5 contracts and those of the Claimants was the norm at the Defendant; certainly it does not appear on the evidence to be out of the norm for contracts of employment to be so executed, that is, in the absence of the Chairman's signature. Further, there is no evidence presented to this Court to show that s. 12(1)(b) was applied to these 5 contracts or that a resolution certified by the Chairman and Secretary was attached to the contracts, which authorised Ms. John and others to sign these 5 contracts on behalf of the Board. In the Court's view, the absence of this resolution places these contracts in the same basket as it were, with the Claimants' contracts. Mr Jogee in cross examination stated that according to the records, the procedure for the execution of these contracts have been changed and "*we are now doing the right thing*". The court concludes on all the evidence that the "right thing" was not been done at the material time because it was not required by the Board to be done so as to fit it into a requirement of section 12.

38. The absence of evidence from Ms. John or any of the other Directors and staff who signed or witnessed the Claimants' contracts on behalf of the Defendant, has not strengthened the credibility of the Defendant's case in any way. Rather, it has left questions unanswered, as the

Director Mr. Jogee, who testified on behalf of the Defendant, was unable to speak directly to the period in question and in particular, to the Defendant's practice when executing contracts of employment at the material time.

39. In the absence of any Board resolution, regulation, rule or directive from the Defendant that s. 12(1) of the Act applies to contracts of employment, then this unenforceability argument must fail. Further to this, the court is of the view that the import of the section suggested by the Defendant is not an inescapable implication or necessarily a rational, practical or commercially logical conclusion. Even if this section did apply to the contracts, did the Claimants have any responsibility for the purported incorrect execution of the contracts, such responsibility requiring termination of the said contracts? The short answer to this question is 'no'.

40. This court holds that in all the circumstances the relevant authority in the Defendant must have known about the contracts and their form of execution. The Claimants held and performed in high end and critical portfolios. The relevant persons authorized to sign "*any document requiring to be executed*" referred to in the statute, can be fairly held to have known whether or not they executed such a contract with such persons as would have come to be known to them as senior employees. Further still, having regard to the said section 12 upon which the Defendant relies, there is no reason to accept that the Company, coming to the realization that the contracts were not executed in accordance with their interpretation of section 12, could not then give effect to the contracts which they authorized and procured, by ratifying the contracts. Indeed in the absence of ratification, the Defendant has exhibited bad faith and improper motives for the dismissal.

41. The Claimants will not be made to bear the Defendant's responsibility for the purportedly incorrect or invalid execution of the contracts; it was out of the Claimants' control. Responsibility for execution of the contracts in this case rests solely with the Defendant and any errors or omissions were on the part of the Defendant and not the Claimants.

42. It bears repetition, that having discovered the errors/omissions which from all the evidence adduced, were not instigated or caused by the Claimants in anyway, and in the absence of any allegations of fraud or any other form of illegality on the part of the Claimants (none were pleaded by the Defendant), why were these contracts not ratified by the Board? A question that Ms. John

or the Director who was part of the recruitment and procurement process may have been able to answer had they been available to do so before this Court.

43. The quote from Lord Reid in *Malloch*; the conclusion of Lord Hoffman in *Johnson v Unisys* and the excerpts from *Halsbury Laws* are relevant to this matter. *Was there wrongful dismissal and breach of contract on the part of the Defendant? If 'yes' then the remedy is clear; if 'no' then the Claimants' case fails.*

44. The Defendant's reliance on clause 8.5 of the second claimant's contract, in support of the illegality/unenforceability issue is somewhat misconceived in this court's view. Indeed, the court is of the view that the clause reflects the intent of the framers of the contract and the implied intent of the terms and tenor of the contract to avoid as far as possible the unfortunate and objectionable result, of the contract; any part of it; or sufficient of it, that may render and frustrate the larger intention of the parties therein contained. This Court finds that the Defendant has not provided any basis for concluding that s. 12(1) applies to execution of its contracts of employment. That being so, it follows that the Claimants' contracts are enforceable and an action for wrongful dismissal and breach of contract can be validly brought against the Defendant. This is so because the Claimants' contracts have been terminated by the Defendant without cause or notice and indeed without adequate compensation in lieu thereof and to be clear; none has been pleaded. The court is of the view that on the evidence and on the Law, the defendant's signatory to the contract represented the principal, and was the agent of the Defendant.

Ostensible authority

45. The Claimants contend in their written submissions that the Defendant is also bound to honour the contract by virtue of the ostensible/apparent authority of the two parties representing the Defendant. This court agrees. If the court were wrong on Mrs. John and Mrs. Forde having the actual authority to act on behalf of the Defendant, then the following applies: One of the parties/representatives of the Defendant was a Mrs. Forde, a Director on the Board of Directors of the Defendant and the other, a signatory, Ms. Rosaline John, the Secretary to the Board of the Defendant. Further still, it is not disputed (see the agreed facts) that the recruitment agency was hired by the Defendant to source the employees for the requisite positions. If it is in doubt, then this court finds that fact as proved on the preponderance of the evidence. The first line of attack, as it were, from the Claimants, is that the two signatories to the contracts on behalf of the

Defendant were these two highly placed persons meeting with and executing the contracts on the premises of the Defendant, were agents of the principal Defendant and had actual authority to enter into the contracts of employment with the two Claimants and indeed several others both before and after the Claimants were hired. There is nothing in the character and identity of these two persons – Mrs. John and Mrs. Forde - or in the course of conduct between the Defendant, the Claimants or any other persons similarly hired, leading up to the execution of the subject contracts, at, or indeed thereafter, to suggest that the process and/or the identity and status of the Defendant's representatives/agents was inherently flawed, implausible, illogical, irrational or simply inconsistent with commercial reality. The Claimants had every reason to believe they were executing a valid contract and Ms. Forde and Ms. John had the authority to do so.

46. To come to the further point, the Claimants contend that even if the Defendant's agents in Ms. John and Ms. Forde, were not agents with actual authority, they had the ostensible authority to contract on behalf of the Defendant. The Defendant by conduct if not words, represented or permitted it to be represented that these two persons, Ms John and Ms Forde both, were persons who had the authority to act on its behalf. Indeed Mrs Forde appeared to have been a member of the very Board of the company. She was part of the interview panel together with others from the recruitment company and she was the one who made the offer to the Claimants before they signed on the dotted line with the secretary to the Board, Mrs John. These persons not only conducted business and entered into contracts for employment with other persons on their behalf before and during the execution of the contracts with the Claimants, but even well after the Claimants had been hired. The evidence of this hiring process is borne out in the evidence of the other contracts tendered and all but admitted to by Mr. Jogee for the Defendant. This is in the court's view, evidence of a representation made to the Claimants or an apparent permission to the two persons to contract on behalf of the Defendant. It is as loud a representation as one could get.

47. The course of conduct of the Defendant/Board in permitting the hiring process in full view of the Claimants and on the premises of the defendant itself, along with being witnessed by employees of the company, is an act or omission as the case might be, tantamount to representing to the Claimants that Ms. Forde and Ms. John had the authority and permission to contract on its behalf. Put another way, the manner in which the Defendant has so arranged its affairs so as to allow the

hiring process as narrated by the Claimants and accepted by the court, from recruitment to execution of the contract to take place on its premises, it is taken that the defendant intended this outcome and represented it to be so and permitted it to be so. It was entirely reasonable in the circumstances for the Claimants to have concluded that Ms. John and Ms. Forde had the permission from the company to contract with the Claimants and for the Claimants to rely on the representations of the defendant and to contract with the two agents, Ms Forde and Ms John. This court also finds that Ms. Forde's acts of participating in the procurement process and the offer of the contract (with its attendant terms and conditions) to the Claimants cannot reasonably be separated from the acts of Ms John in the execution of the contract. Collectively they represented the hiring of the claimants.

48. Bowstead on Agency 18th Edition at pp 335-336 para 8-013 has been cited in this matter and makes the point that:

“Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no actual authority.”

49. It is of course the legal burden for the Claimants to prove an enforceable contract and not the Defendant to prove an unenforceable contract. As it is with *burdens*, the evidential burden shifts upon a prima facie discharge of the legal burden. As this court has noted above, there is no statutory provision that either expressly or impliedly prohibits the subject contracts and contractors. There is no Board resolution or other documentary evidence of any policy of the Defendant that supports the assertion of a statutory prohibition of the execution of the employment contracts in the instant case in the manner in which they were executed. Further, there was no oral testimony from anyone in support of the allegation of the prohibition during the relevant period. Indeed, it appears that Mr Jogee's evidence was consistent with that of the Claimants claim that at the time there was no such policy, written or otherwise.

50. The Claimants' contracts were terminated without notice, in breach of clause 4.2 of the said contracts. The remedy available to the Claimants is the salary payable during the contractual

period of notice, which is three months' salary. This Court finds no additional benefits mentioned in the contracts of employment. The Second Claimant has acknowledged receipt of one months' salary in lieu of notice. The Defendant has not proffered any pleading or evidence to justify the termination in accordance with clause 4(1) of the contract – termination for cause. The Claimants have proved that there was no cause, under that clause, that existed. Further still, the Claimants have proved that the Defendant did breach clause 4(2) of the contract in failing to give the requisite notice of 3 months. On both bases for termination under the contract, the Defendant was in breach. The Defendant relies entirely on the illegality of the contract on the basis of its interpretation of section 12 of the Act.

51. Further still, the Defendant never afforded the Claimants an opportunity to make representations to the Board with respect to the Board's consideration of the validity of the contract or their termination as a result of their conclusions or other considerations. The Defendant has not put forward any evidence of their receiving legal advice on this question of law. This suggests the board meeting was not anything other than a layman's discussion (albeit no doubt by professional persons) to which the Claimants could have adequately participated and represented their positions on the contractual clauses and the execution of the contracts. On the evidence, the decision appears arbitrary and capricious.

DAMAGES

52. Halsbury Laws of England, cited earlier in this judgment, provides for several conditions to be met before a Claimant can sue for damages for wrongful dismissal; a dismissal in breach of a relevant provision in the contract of employment.

53. The Claimants have met these thresholds in that, based on the findings and conclusions of this court as stated in the preceding paragraphs:

- a) They were engaged by the Defendant for a fixed period;
- b) Termination to be effected by way of notice or, immediately for cause;
- c) They were dismissed without notice and without the stipulated cause(s);
- d) The fixed period had not yet expired;
- e) No sufficient cause for dismissal.

54. Where a dismissed employee is suing for breach of contract, as is the case here, *“the rule is that the wrongfully dismissed employee should, so far as money can do so, be placed in the same position as if the contract had been performed. This is to be done by awarding as damages the amount of remuneration that the employee has been prevented from earning by the wrongful dismissal...In the case of a fixed-term contract, this means that the starting point is the remuneration for the remainder of the fixed term; but most contracts of employment are terminable by notice so that the employee is entitled to recover only the amount of remuneration during the notice period. That remuneration includes wages or salary, including a reasonable amount of any variable such as commission, loss of a vehicle and other fringe benefits, and any loss of pension rights...”*¹¹ (Emphasis added)

55. In **Yorkshire Engineering and Welding Company Limited v Burnham [1973] 3 AER 1176** at page 1179:

*“The essence of the cause of action for wrongful dismissal is that the employee is dismissed prematurely. If it is a fixed term contract, he is dismissed before the end of the term... The damages to which he is entitled consist of the net loss flowing from the premature nature of the dismissal. **Prima facie the measure of damage is what the employee would have earned between the time of dismissal and the earliest moment at which he could properly have had his contract terminated less any benefits which he has received and which he would have received if he had been properly dismissed. ...**”*(Emphasis added)

56. The court having found that the Claimants’ contracts are not tainted with illegality and are enforceable, the earliest time the contract can properly be determined is with 3 months’ notice.

57. The Claimants also sued for aggravated and/or exemplary damages. What is *aggravated damages* and when does it apply?

¹¹ Halsbury’s Laws of England/Employment Volume 41A (2014), paras 1093-1532)/6. Unfair Dismissal and Wrongful Dismissal/(4) Wrongful Dismissal/(ii) Remedies/b. Damages/830. Measure of damages.

58. According to the **Halsbury's Laws of England Vol. 29 (2014)** on Aggravated Damages at [322]:

"The defendant's motives, conduct or manner of inflicting the injury may have aggravated the claimant's damage by injuring his proper feelings of dignity and pride. In tort, the claimant can be awarded additional damages, called 'aggravated damages', to compensate for this...It should be noted that quite apart from this the claimant may be able to point to aspects of the defendant's conduct which have aggravated or increased his actual damage, or caused additional heads of damage such as inconvenience."

59. Further still, in the **The Law of Damages (Common Law Series) Chapter 15**, is provided that:

"Where a wrong for which damages are at large has been deliberately committed in a flagrant, outrageous or high-handed way, the normal measure of compensatory damages may be inflated to take account of the fact. Aggravated damages are compensatory. They exist to make good, albeit in a rough and ready way, the distress and humiliation that the claimant is presumed to have suffered, over and above the other more concrete effects of the wrong."

60. The First Claimant's and Second Claimant's contracts were terminated without cause or notice.

They were required to forthwith hand over certain property of the Defendant and refused entry to the Defendant's property. The First Claimant was not paid any monies for the 3 month contractual notice period and further, to add *pain to injury* to the First Claimant, the Second Claimant was paid at least one (1) of the 3 months of the contractual notice period. The aggravating circumstances for both the Claimants do not stop here; there is no evidence that the other contracts which were entered into in a similar fashion to that of the Claimants were terminated as were the Claimants', or at all. Further still, there is no pleading or evidence from the Defendant that the Claimants had failed to perform on the job or were in breach of any provision of the contract and in the light of this, nor did the Defendant ever seek to ratify the Claimants' contracts once they were of the view that the contracts were void ab initio. There is no legislative provision drawn to the attention of this court that precluded the Defendant at the material time from ratifying a contract entered into as was those of the two Claimants. On the evidence, it appears that the defendant sought to devise or contrive even, a way to dismiss the

Claimants without cause or notice¹². The wrong was firstly, deliberately committed and further, committed in a high-handed way giving rise to the *distress and humiliation that the claimant is presumed to have suffered* along with the calculable and tangible damages – i.e. non-payment of salary for the contractual notice period. The Claimants are entitled to compensatory aggravated damages.

Interest

61. The **Supreme Court of Judicature Act** Chap. 4:01 provides for the award of interest as follows in **s.25** *“In any proceedings tried in any Court of record for recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of **the period between the date when the cause of action arose and the date of the judgment**, but nothing in this section—*
- (a) shall authorise the giving of interest upon interest;*
 - (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or*
 - (c) shall affect the damages recoverable for the dishonour of a bill of exchange”.*
62. In addition to this Act and of relevance to the instant matter is the **Remedies of Creditors Act** Chap.8:09 which provides specified rate of interest at s.13. (1) - *“Every judgment debt entered up carries interest at the rate of five per cent **from the time of entering up the judgment until the same is satisfied**, and the interest may be levied under a writ of execution on the judgment”.*

DISPOSAL

63. As a note to both counsel, I state the obvious, that evidence comes from the witness stand and not the bar table. Several pieces of ‘evidence’ mark the written submissions. They of course have not been considered in the deliberation.

¹² If it had cause to terminate the claimants under the contract it failed to invoke the requisite contractual mechanisms and in any event did not pursue and prove them in this action.

64. For the reasons set out above; **IT IS HEREBY ORDERED AS FOLLOWS:**

- I. The Defendant to pay the sum of \$94,000.00 (\$69,000.00 + Aggravated Damages) for wrongful dismissal and breach of contract against the First Claimant inclusive of aggravated Damages;
- II. Interest to be paid on the said principal amount of \$69,000.00 at the rate of 3% per annum from the 5th October 2016 to the date of this judgment, and Interest at the Statutory rate of interest at 5% per annum from date of Judgment to full satisfaction on the remaining balance of the whole judgment debt¹³;
- III. The Defendant to pay the sum of \$82,000.00 (\$62,000.00 + Aggravated Damages) for wrongful dismissal and breach of contract against the Second Claimant inclusive of aggravated Damages;
- IV. Interest to be paid on the said principal amount of \$62,000.00 at the rate of 3% per annum from the 5th October 2016 to the date of this judgment, and interest at the Statutory rate of 5% per annum from date of Judgment to full satisfaction on the remaining balance of the whole judgment debt;
- V. The Defendant to pay the costs of each of the Claimants on the Prescribed Costs Scale or as otherwise agreed between the parties in writing.

DAVID C HARRIS
HIGH COURT JUDGE
March 11, 2020

¹³ The *whole Judgment debt* is the principal which in relation to this claimant is \$94,000.00 plus the interest up to the date of Judgment. This follows for the Second Claimant - \$82,000.00 plus interest up to the date of Judgment.