REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 84 OF 2005

BETWEEN

ARON TORRES

Appellant

AND

POINT LISAS INDUSTRIAL PORT DEVELOPMENT CORPORATION LIMITED

Respondent

PANEL: Warner, J.A.
Mendonca, J.A.
Weekes, J.A.

APPEARANCES:

Mr. Neebar for the Appellant

Mr. P Deonarine for the Respondent,

Date of delivery: 10th May 2007

1. This is an appeal against the decision of Benjamin J. of the 1st June, 2005 in which he adjudged the appellant Aron Torres to have been constructively dismissed from his employment as an estate constable with the respondent, Point Lisas Industrial Port Development Corporation Ltd. (PLIPDECO), a state enterprise.

2. The trial judge refused however to grant to the appellant a declaration that the dismissal amounted to unlawful and/or wrongful dismissal. Further, he refused to allow the appellant to amend his claim to include a claim for exemplary damages. The application to amend was made after the appellant's case was closed. Instead, the trial judge awarded the appellant damages equivalent to one week's salary and also, costs on the petty civil court scale.

3. The appellant has appealed the judge's decision to refuse to allow the amendment and ultimately to refuse to grant exemplary damages; to refuse to grant the declaration and his failure to award costs on the High Court scale.

Background Facts

4. The appellant had been employed with the respondent as an estate constable from the year 1993 at a weekly wage of $540.00. The employment contract, dated 14th June, 1995, was renewable annually and provided for termination by not less than one week's notice to the other party. According to the particulars of claim, the respondent had accused the appellant of theft from the respondent's warehouse and threatened him with arrest and search if he failed to tender his resignation immediately.

5. The respondent in its defence denied any threat of arrest or search and contended that the appellant voluntarily signed the letter of resignation. Further, and in the alternative the respondent maintained that it had grounds for criminal prosecution and any threat in relation to lawful arrest did not amount to duress. Although the facts of the case are not complicated, the issue of law raised, that is whether the award of exemplary damages is appropriate for breach of contract, (in this case by way of wrongful dismissal) is not a simple one.

6. I do not think however that this court can take refuge in the decision of **Addis v Gramophone Co. 1909 AC 488** which was decided almost one hundred years ago and subsequent authorities which restricted the award of exemplary damages (also called punitive damages) with the effect that they are still not available in England in cases of breach of contract. I refer to the cases of **Rookes v Barnard 1964 A.C. 1029** and **Cassell & Co v Broome 1971 A.C. 1027**. Although in the present case the question has arisen as a result of an application to amend to claim them, the problem must be faced squarely in the light of the developing jurisprudence in the Commonwealth and the recent decisions of the House of Lords in **Kuddus v Chief Constable of Leicestershire (2002) 2 A.C. 122** and **Attorney General v Blake 2004 All ER 122.**

7. In **Kuddus**, the House of Lords held that punitive damages should not be limited solely to cases in which the cause of action was one in which exemplary damages were permitted prior to 1964. In **Blake**, the House of Lords held that

there was no reason in principle to rule out an account of profits as a remedy for breach of contract in exceptional circumstance, and it so ordered.

8. Although not precisely on point, the Privy Council has recently upheld the majority decision of this Court in **Attorney General v Ramanoop Privy Council Appeal No. 12 of 2004** to award additional damages in a case of constitutional breach to reflect the sense of public outrage and to deter future breaches. Their Lordships did however state that the expression "punitive or exemplary" were better avoided and that the damages were not necessarily to be of a substantial size.

The evidence

9. The appellant had been summoned by the respondent to a meeting at which another employee who had also been accused of theft was present, together with a Mr. Downes, representative of the Estate Police Association, and two officers of the respondent company's security personnel, namely Officers Lezama and Connor.

10. The trial judge accepted the appellant's version of the facts to the effect that the respondent had accused him and the other employee of stealing electronic items from the warehouse. Further, Officer Lezama informed him that he and Connor had secured and would execute a search warrant to search the appellant's premises and would arrest him if he did not sign a letter of resignation.

11. The appellant claimed that at that meeting, the representative of his Association, Downes, said that he was not prepared to look into matters involving

liars and thieves and he left the meeting. The appellant stated that it was in those circumstances that he complied with the demand to sign the letter of resignation. The letter which the appellant signed read thus:

> *"Sir,*
>
> *I have to report for your information effective immediately, due to unforeseen circumstances beyond (sic) my control it was nice working with the corporation for a short while and I wish the department success."*

Finally, Officer Connor told him that he could go for his "bush lawyer" if he wished, to represent him. He [the appellant] was then escorted to the locker room to retrieve his personal items.

12. The most important aspect of the evidence was that Officer Lezama accepted that when he told the appellant and the other employee that he was in possession of a search warrant and an arrest warrant to search their premises and to arrest them, that statement was not true. No such warrants had ever been obtained. This, in essence, was the evidence upon which the appellant relied in support of his application for leave to amend, to claim exemplary damages.

13. The trial judge held that the threat was not lawful and amounted to a breach of contract of employment and that the threat extinguished any voluntary element in the resignation — it was demanded then and there and was given.

The application to amend

14. The principles regarding the grant of leave to amend are well known and there is no need to rehearse them in detail. I do not think that the respondent can validly claim that it would have been prejudiced by the amendment because

the relevant evidence had already been led. A successful application in this court to permit the appellant to amend his claim to include exemplary damages will depend, ultimately, on whether this court is prepared to take the robust step of sanctioning an award of exemplary damages in a case founded on breach of contract.

Exemplary damages — origin

15. A series of eighteenth century English Cases demonstrates that exemplary damages were awarded to deter heavy-handed action by the government.

16. In **Wilkes v Wood 98 E.R. 489**, the plaintiff challenged the search of his home on the basis of a general warrant. He asked for "large and exemplary damages" and was awarded damages in the sum of £1000.

Pratt C.J held that: -

> "***damages are designed not only as a satisfaction for the injured person but likewise as a punishment for the guilty to deter from any such proceeding for the future and as proof of the detestation of the jury to the action itself."***

17. In **Huckle v Money (1763) 2 Wils. 205,** a printer who had been taken into custody during a raid on the offices of a newspaper was awarded £300 in damages. Lord Camden accepted that the plaintiff had not suffered serious injury but stated that the jury had been correct in awarding exemplary damages.

18. The question was however reconsidered in **Rookes v Barnard.** The House of Lords significantly restricted the award of exemplary damages to actions in tort and in only three categories of cases:

i. Oppressive arbitrary or unconstitutional action by servants of the government;

ii. Wrongful conduct which has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the plaintiff; and

iii. Where such an award is expressly authorised by statute.

19. The second and third categories are not relevant to the present case.

20. In **Cassell v Broome 1972 A.C. 1027.** the House of Lords refused to depart from this decision despite the Court's of Appeal's attempt to question it.

21. In 1993 the Court of Appeal in **AB v South West Water Services Ltd.** a nuisance case, further restricted the availability of the award when it held that in order to fall within the first two categories, the tort must have been one in which an award of punitive damages was made prior to 1964. It therefore limited the first category in **Rookes v Barnard.** to the torts of malicious prosecution, false imprisonment, assault and battery and in the second category, to torts of defamation, trespass to land and tortuous interference with business. That "category approach" was not accepted in Canada, Australia or New Zealand.

22. In 2001, in **Kuddus v Chief Constable of Leicestershire Constabulary 2002 AC 122**, the House of Lords soundly rejected that limitation holding that the focus should not be on the cause of action but on the features of the defendant's unacceptable behaviour. In this case a police constable forged the plaintiff's signature on a statement which purported to be a withdrawal by the plaintiff of his complaint. It was held that exemplary damages could be awarded on the ground

of oppressive arbitrary or unconstitutional action by a public officer. Neither party however chose to present arguments on whether the award of exemplary damages should continue.

Breach of Contract

23. The law has always set its face against the award of exemplary damages for breach of contract. In the case of **Addis** it was held that exemplary damages could not be awarded for wrongful dismissal. A servant who was wrongfully dismissed could not include compensation for injured feelings. (See also **Perera v Vandiyar [1953], 1 WLR 672** and **Kenny v Preen (1963) I Q.B 499.** Both were claims by a lessee for damages for the breach of the implied covenant for quiet enjoyment.) It is still the law in England that in exemplary damages are not awarded in actions for breach of contract.

24. The current position is stated in Treitel on the Law of Contract, 11th Edition (2003) at 935:

> ***"As a general rule punitive damages cannot be awarded in a purely contractual action, since the object of such an action is not to punish the defendant but to compensate the claimant. Punitive damages are not available even though the breach was committed deliberately and with a view to profit. If the court is particularly outraged by the defendant's conduct, it can sometimes achieve much the same result by awarding damages for injury to the claimant's feelings. In theory such damages are meant to compensate the claimant for mental suffering, rather than to punish the defendant. But in practice the distinction is often hard to draw and--from the defendant's point of view--to perceive. However, where the claimant has a cause of action both in tort and for breach of contract, he may be able to recover punitive damages by framing the claim in tort. For example, a landlord who unlawfully evicts his tenant is guilty both of a breach of contract and***

of a trespass; and punitive damages have been awarded in such a case."

The Law Commission in its report on Aggravated, Exemplary and Restitutionary Damage, Law Com No 247 of 1997 recommended that exemplary damages be retained but extended on a "principled basis".

I propose to review the law in other parts of the Commonwealth.

The Australian Jurisdiction

25. In Australia in **Uren v John Fairfax and Sons Property Ltd. (1966) 117 CLR** the Court of Appeal, in a wide ranging examination of the judicial principles, declined to follow **Rookes v Barnard** and awarded exemplary damages in a defamation action where the defendant's conduct exhibited contumelious disregard of the plaintiff's rights. It is of interest that at the beginning of the trial the defendant abandoned all pleas of denial and made an apology. The only issue left was the quantum of damages. The refusal to adopt the English approach was upheld on appeal to the Privy Council on the ground that it was for Australia to decide whether to change its settled judicial policy in an area of domestic law.(See **Australian Consolidated Press v Uren [1969] 1 AC 590**.)

26. The Australian court recognised that the principal purpose of the civil court was to compensate not to punish. The court however held that in certain situations it was proper to punish for conduct which was particularly outrageous.

27. In that judgment Windeyer J. said at page 154:

"There must be evidence on which the jury could find that there was at least, "a conscious wrong doing in contumelious disregard of another's rights." **(a phrase used in Salmond on Torts)**

28. Menzies J. related the award to a situation where the defendant had acted arrogantly, mindful of his own interests; Mc Tiernan spoke of "wanton conduct", in contumelious disregard of the plaintiff's right to a good name. Taylor J. at page 138 said:

> ***"I am quite unable to see why the law should look with less favour on wrongs committed with a profit-making motive than upon wrongs committed with the utmost degree of malice or vindictively arrogant or high-handedly with contumelious disregard for the plaintiff's rights."***

Finally Owen J. summed it up thus at page 160:

> "***I can see no good reason why we should now place such narrow limits upon the right of a jury to award punitive damages in appropriate cases … The very fact that the right exists has provided in the past and will no doubt provide in future a useful protection against abuse of power and malicious high-handed action by persons of the rights of others."***

29. Punitive damages are not however awarded in breach of contract cases. The Australian position is clearly stated in a decision of the Federal Court of Australia in **Hospitality Group Pty Ltd. –v- Australian Rugby Union Ltd. (2001) 110 FCR 157**. The case concerned the marketing of "hospitality packages" at rugby matches. The Rugby Union through special retailers sold tickets to test matches. It was a condition of sale that tickets should not be resold. One of its agents sold the tickets to another entity and the tickets were subsequently utilised by a Hospitality Group who sold them as part of a hospitality package.

30. The Rugby Union obtained injunctive relief and was awarded exemplary damages to "bolster the deterrent effect of the injunctive relief". On appeal however, the court cited the **Addis** case and set aside the award of exemplary damages. The court observed that the award of exemplary damages was an extraordinary remedy — a defendant must be guilty of something bordering on "the malicious" — and the appellant had not behaved in a manner that warranted the award.

The New Zealand Jurisdiction

31. In New Zealand the courts affirmed the judicial power to mark high-handed and heinous conduct in contumelious disregard of another's rights through the award of the punitive damages without limitation to **Rooke's** narrow categories (See **Donselaar v. Donselaar [1982] 1 N.Z.L.R. 97** (New Zealand C.A.); and **Daniels v. Thompson [1998] 3 N.Z.L.R. 22** (New Zealand C.A.)

32. Punitive damages awards are a "serious and exceptional remedy" (**Donselaar**, *supra* at page 107). They are reserved for truly outrageous conduct where the other remedies that the defendant must bear will fall short of an adequate punishment (**Dunlea v. Attorney General [2000] 3 N.Z.L.R 136)**. The marking out and punishment of outrageous conduct can be achieved by a relatively modest penalty that is fairly and reasonable commensurate with the gravity of the conduct being condemned. (**Ellison v L 1998 1 NZLR 416**) In New Zealand the "category approach" is also rejected.

33. Exemplary damages for breach of contract are however not recoverable. The state of uncertainty which may have existed was quite recently settled in a

decision of the Court of Appeal in **Paper Reclaim Ltd. v Aotearoa International Ltd.[2006] NZCA 14 March 2006.** The Court had this to say:

> ***'The clear trend of overseas Authority is against the possibility that exemplary damages should be available in breach of contract cases. We are of the view that the position in New Zealand should conform with that trend. We are particularly influenced by the detailed reports undertaken by the law commissions in the United Kingdom and Ireland. Those reports were formulated following extensive consultation. We find their reasoning compelling and adopt it.***
>
> ***It is easy for a court to hedge and say that exemplary damages should not be possible save "in very rare cases" or "in exceptional circumstances". But the downside of "leaving an out" is that any plaintiff can blithely plead a claim for exemplary damages, asserting that his or her case is in the "exceptional" category. The defendant will never be successful in having the claim struck out, as the court will not be able to assess at a strike-out stage whether the case factually comes within the exceptional category where exemplary damages might lie…***
>
> ***There is certainly no need for exemplary damages to fill any hole in the range of compensatory damages in the contract field. Contractual remedies now available in appropriate cases include expectation damages, reliance damages and damages for non-pecuniary loss, mental distress, disappointment and loss of amenity. It has even been suggested that a court could order an account of profits as a contractual remedy: Attorney General v Blake [2001] 1 Ac 268*** **(HL). In addition, in appropriate cases, indemnity costs may be available for improper conduct in the course of litigation. And, of course, also within the court's armoury are the non-monetary remedies of injunction and specific performance. There is no reason in principle to add yet another remedy to the above list that would give a contracting party a windfall profit over and above that he bargained for.'**

34. I respectfully express the view, however, that I do not regard the inability to strike out at an early stage as providing any basis for denying the claim.

Moreover, as will be demonstrated, the **Blake** case has made a radical change to the law.

Ireland

35. In Ireland, exemplary damages are not available for breach of contract. The Irish Law Commission in its report dated 1st August 2000 recommended that it should not be extended to breach of contract since that would be at odds with the traditional concept of contract law as having an exclusively private character. Exemplary damages are however awarded for breach of constitutional rights in appropriate cases. (See **Conway v Irish National Teachers Organisation 1991 2 IR 305)**

The Canadian jurisdiction

36. The chronological development of the jurisprudence is reflected in the following four cases:

(i) **Vorvis v Insurance Corp of British Columbia 1989 1 SCR 1085**;

(ii) **Hill v Scientology of Toronto [1995] 2 SCR 1130**

(iii) **Royal Bank of Canada v W. Got Associates Electric 1994 Can L11 714 (S.C.C.)**

(iv) **Whiten v Pilot Insurance Co.[2002] 1 S C R 595;**

37. **Vorvis** was a wrongful dismissal case in which a plaintiff was dismissed prior to the vesting of pension benefits although no complaint had been made about the quality of his work. It was not in dispute that the employer's conduct was worthy of condemnation. The court held that punitive damages may be

awarded in a case where the defendant's conduct had been harsh, vindictive, reprehensible or malicious provided the defendant's conduct that is said to give rise to the claim was an actionable wrong. Mc Intyre J. speaking for the majority said:

> ***"Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach was also a tort for which punitive damages are recoverable."***

However, the employee's conduct was not considered sufficiently offensive, standing alone. Punitive damages were not awarded. Wilson J. and L'Heureux Dubé dissenting, in part, were of the view that punitive damages should be part of the judicial arsenal in contract cases — that it made no sense however to treat one contract breach different from another merely because one violated tort principles while the other did not. Wilson J said:

> ***"I do not share my colleague's view that punitive damages can only be awarded when the misconduct is in itself an 'actionable wrong'. In my view, the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature. Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not."***

38. In **Hill**, a defamation action, the court emphasised that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence. In that case an award of general aggravated

damages of $800,000, though on its face excessive, was held not to be, where the publication was repeated on the day following the verdict.

39. Canadian courts do not debar the award of punitive damages if there has been punishment under the criminal law, although it is a factor to be taken into account. (See **Buxbaum v Buxbaum 1997 Can LII 480**)

40. In **Got**, a unanimous court awarded punitive damages for breach of contract in a case in which the Bank, which had been negotiating with its debtor **Got,** for repayment of monies, failed to give the debtor notice of a demand in breach of contractual notice requirements, and obtained the appointment of a receiver through misconduct though not on the level of fraud. The court, in awarding punitive damages, held that the facts were exceptional and that punitive damages should only be awarded in commercial disputes where other remedies were not available.

41. In the case of **Whiten** an insurer denied an insured's claim on the ground of arson, despite evidence to the contrary. The court carried out a helpful comparative analysis after which it concluded as follows:

i. The court re-affirmed the rejection of the **Rookes v Barnard** category approach;
ii. The general objectives are punishment (in the sense of retribution) deterrence and denunciation;
iii. Punitive damages should only be resorted to in exceptional cases and with restraint;

iv. A less exhortatory approach is necessary, that is to say the use of pejoratives is not helpful;

v. The court should ask itself what is the lowest award that would serve the purpose;

vi. It is rational to use punitive damages to relieve a wrong-doer of profits;

vii. The proper focus is not on the plaintiff's loss but on the defendant's misconduct;

viii. Proportionality is the governing rule for assessing quantum;

ix. Juries should more receive more guidance about the function of punitive damages;

x. Punitive damages are not at large and an appellate court is entitled to intervene if the award exceeds the outer boundaries of a rational and measured response to the facts of the case.

42. The substantial approach of the Canadian Courts is to punish, deter and to show the courts disapproval. (See **Hill** at page 1208.) I should mention however that legal commentators in Canada have criticised the Supreme Court's position in **Whiten** as failing to supply a convincing reason for extending the scope beyond cases of breach of contract that constitute a tort.

Post Kuddus and Blake

43. The recent decisions of the House of Lords in **Kuddus** and **Blake** have had a salutary and liberating effect on the jurisprudence.

44. In **Kuddus**, the House of Lords held that punitive damages should not be limited solely to cases in which the cause of action has permitted the award prior

to 1964. In **Blake** the House of Lords held that there was no reason in principle to rule out an account of profits as a remedy for breach of contract in exceptional circumstance, and it so ordered.

Lord Nicholls said:

> ***"…The availability of exemplary damages has played a significant role in buttressing civil liberties, in claims for false imprisonment and wrongful arrest. From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant's conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what otherwise would be a regrettable lacuna."***

Emphasis Added

The Blake Case

45. George Blake was a member of the British Intelligence Service between 1944 and 1961. He signed an undertaking under the Official Secrets Act 1911. In 1960 he became a Soviet Agent. In 1961 he was arrested, pleaded guilty and was sentenced to 42 years imprisonment. He escaped from prison and went to Berlin and then to Moscow where he now lives. In May 1989 he signed a contract with a publisher in the United Kingdom to publish his story. He was paid an advance on royalties. The Attorney General issued a writ in 1991 seeking any financial benefit due and any future royalties. The Crown did not succeed at first instance and in the Court of Appeal to hold him accountable as a fiduciary. The Court however invited submissions on the issue of whether the Crown might

have a private law claim to restitutionary damages in breach of contract. The Crown declined but did make certain pronouncements on the issue.

46. The matter was eventually considered by the House of Lords. Lord Nicholls delivered the main judgment with which Lord Geoff and Browne Wilkonson concurred. Lord Steyn delivered a separate judgment and Lord Hobhouse dissented.

47. The opening sentence of Lord Nicholls judgment to the effect that Blake was "a notorious self-confessed traitor" and indeed the opinion spoke in clear terms about the heinous nature of Blake's misdeeds and treachery.

48. Lord Steyn was of the opinion that the law should be developed on a principled basis —in a way which covers that case and other cases sharing material facts.

49. While recognising the general principle that damages are compensatory for loss or injury at page 397 Lord Nicholls said:

> ***"This state of the authorities encourages me to reach this conclusion, rather than the reverse. The law recognises that damages are not always a sufficient remedy for breach of contract. This is the foundation of the court's jurisdiction to grant the remedies of specific performance and injunction. Even when awarding damages, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require damages are measured by reference to the benefit obtained by the wrongdoer. This applies to interference with property rights. Recently, the like approach has been adopted to breach of contract. Further, in certain circumstances an account of profits is ordered in preference to an award of damages. Sometimes the injured party is given the choice: either compensatory damages or an account of the wrongdoer's profits. Breach of confidence is an instance of this. If confidential information is wrongly divulged in breach of***

> ***a non-disclosure agreement it would be nothing short of sophistry to say that an account of profits may be ordered in respect of the equitable wrong but not in respect of the breach of contract which governs the relationship between the parties. With the established authorities going thus far, I consider it would be only a modest step for the law to recognise openly that, exceptionally, an account of profits may be the most appropriate remedy for breach of contract. It is not as though this step would contradict some recognised principle applied consistently throughout the law to the grant or withholding of the remedy of an account of profits. No such principle is discernible. An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will only be in exceptional cases, where those remedies are inadequate that any question of accounting for profits will arise."***

Prior to **Blake** the English courts had consistently held that an award of damages for breach of contract was not to punish a wrongdoer.

50. I mention the case of **Mahmud v Bank of Credential Commerce International SA 1998 AC 20**, which has made serious inroads on the **Addis** case. The argument focused more narrowly on the implied term of the obligation of trust and confidence. The claimants were two long serving employees of the Bank where massive fraud had been perpetrated by those controlling the bank. The claimants found it difficult to get employment because of their association with the Bank. The House of Lords held that damages for such loss was recoverable if it was reasonably foreseeable that conduct in breach of the trust and confidence term, would prejudicially affect employees' future prospects.

51. Professor Lawson in his work "Remedies of English Law" first written in 1972 at pgs 170-171, did foresee the development of the law in that direction

when he said, "… the rule that exemplary damages cannot be awarded for breach of contract must not be allowed to prevent the award of damages to compensate for non-pecuniary damages such as a loss of publicity, commercial credit or even general reputation. "

52. Legal commentators in England have regarded this dynamic shift in **Blake** as foreshadowing the next step, which must be, to confront the issue of whether exemplary damages are allowable in contract, as well as in tort. (See Mc Gregor on Damages 17th Edition at para 11-016)

53. In my view, the desire to restrict the award of exemplary damages is no longer as compelling in the light of the development of the law and the advice of the Privy Council in **Ramanoop**. In that case, additional damages were awarded albeit for a constitutional violation, but "to reflect the sense of public outrage". The traditional concept of civil law damages is that they are purely compensatory. The decision in **Ramanoop** goes beyond that boundary. Having heard full argument on the question, I am of the view that it is within the competence of this court to develop the law to permit the award of exemplary damages where the defendant's conduct has been reprehensible.

The Test

54. I think that the proper approach would be to focus on the conduct of the defendant as a whole: Do the facts disclose reprehensible conduct tending to take advantage of every chance of success to the plaintiff's disadvantage? Was it outrageous, highhanded and egregious? Was the misconduct planned and deliberate? Did the defendant try to conceal the misconduct? If the breach was

committed in such a manner in disregard of the plaintiff's rights, then an award of exemplary damages would be appropriate. It follows from what has been expressed above, however, that the award of exemplary damages in breach of contract cases ought to be rare.

55. The award however ought to be proportionate to a defendant's conduct. If therefore a defendant misuses his ascendancy or trust against another in vulnerable position then an award to express public outrage and to deter further breaches ought to be made. If a defendant has already been punished or is likely to face punishment then that factor ought to go towards reducing the amount. The award ought not be extortionate. The defendant must therefore not be unfairly prejudiced.

56. Having considered the matter fully, I would therefore allow the appellant's application to amend the claim to include exemplary damages.

57. I turn now to the facts of this case. There can be no doubt that the respondent's behaviour was oppressive, highhanded and reprehensible. The respondent was a state enterprise which was pitted against a lowly employee, who in the circumstances of this case was extremely vulnerable to being overborne.

58. This respondent's misconduct was deliberate, and it entailed the concurrence and complicity of employees of superior rank. The motive of the respondent was to deny the appellant of his legal rights and to remove him from the company's premises with utmost speed. More than that, by its plea of denial the respondent attempted to conceal its misconduct. Although it does not appear

that there was any breach of the criminal law, a high degree of bad faith was clearly demonstrated.

59. In addition to the sum awarded by the trial judge, I would order that the appellant be paid the sum of $5000.00 as exemplary damages. The appellant will be entitled to be paid costs on the High Court scale, having regard to the novel point of law which was argued. I agree with Mendonca J.A. that there are no exceptional circumstances to warrant the grant of a declaration.

60. The respondent will pay the appellant's costs of the appeal.

Warner J.A

Justice of Appeal

I agree with the judgments of Warner J.A. and Mendonca J.A and I have nothing to add.

Weekes J.A

Justice of Appeal