THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P012/2014
Claim No. CV2011-03332

IN THE MATTER OF TRINIDAD AND TOBAGO NATIONAL PETROLEUM MARKETING COMPANY LIMITED

AND

IN THE MATTER OF SECTION 242 OF THE COMPANIES ACT

BETWEEN

RICHARD CALLENDER

Appellant

AND

TRINIDAD AND TOBAGO NATIONAL PETROLEUM MARKETING COMPANY LIMITED

Respondent

PANEL:
Allan Mendonca, J.A.
Prakash Moosai, J.A.
André des Vignes, J.A.

APPEARANCES:
Mr. Douglas Mendes, SC and Mr. Elton Prescott, SC instructed by Ms. Shelly-Ann Daniel for the Appellant
Mr. Seenath Jairam, SC and Mr. Kelvin Ramkissoon instructed by Mrs. Shobna Persad for the Respondent

Date delivered: 25th May, 2017

JUDGMENT

1. The Appellant was employed by the Respondent (NP) as its the Chief Executive Officer. He was dismissed by NP on April 15 2011. The Appellant commenced these proceedings for damages for wrongful dismissal and breach of contract. He also claimed compensation for oppression under section 242 of the Companies Act. The trial judge dismissed the Appellant's claim. She found that the claim for oppression was not supported on the evidence and that there was reasonable and probable cause for the dismissal of the appellant. The trial judge therefore dismissed the Appellant's claim. The Appellant has appealed.

2. In this appeal the Appellant has not challenged the Judge's finding on the claim for oppression but he contends that the finding of reasonable and probable cause for his dismissal was erroneous having regard to the evidence.

3. The issues raised in this appeal primarily challenge the findings of fact made by the trial judge. The approach of the court of appeal to a challenge on findings of fact by the trial judge has been well rehearsed in numerous authorities, some of which have been referred to in NP's written submissions. The essence of them is that the appellate court will not lightly interfere with the trial judge's findings of fact. It will not substitute its own finding simply because that it would have come to that finding on the evidence. Rather, it will substitute its own findings only where it can properly be said that the judge was plainly wrong. As the Privy Council noted in **Beacon Insurance Co. Ltd v. Maharaj Bookstore Ltd**[1], this phrase (plainly wrong) does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts. Rather it directs the appellate court to consider whether it was permissible for the trial judge to make the findings of fact which she did in the face of the evidence as a whole. The appellate court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine her conclusions.

4. The Appellant made the following concessions in his written submissions filed on 5th April, 2017:

[1] [2014] UKPC 21 at para. 12

i. In deciding to extend 7 days credit to Trebro in October 2009, the procedure for the granting of credit under the Credit Policy was not followed;

ii. The use of the direct billing system, which effectively granted credit to Trebro and circumvented the system of checks and balances, was not authorised (but the Appellant denied that he authorised direct billing)

iii. The Appellant, along with the Divisional Manager Finance issued the override in October 2010.

5. The Appellant complained about the following findings of fact by the Judge:

i. The debt was not repaid by Trebro and therefore the Appellant had caused significant loss to the Respondent. There was no evidence before the court as to whether the Respondent had been repaid or not.

There was no evidence given by any of the Defendant's witnesses that NP did not recover the outstanding amount from Trebro. It was suggested by Mr. Jairam in his cross-examination of Mr. Callender that Trebro had gone out of business but NP's witnesses did not say that.

ii. The Appellant and Dupres concocted the memo dated 12th March 2010 to support the Appellant's case. The Appellant complains that this finding is unsupported by any evidence and was made in breach of the principles of fundamental justice since no one gave evidence to suggest the memo was contrived or produced retrospectively. Also this was never suggested to either the Appellant or Dupres in cross-examination. The Appellant and Dupres were denied the right to defend themselves. Further, Senior Counsel for the Respondent did not submit that the memo was a contrivance. The Judge appears to have gone off on a frolic of her own.

At paragraph 52 of her judgment, the Judge stated as follows:

"*In further support of his case, the claimant produced a memo LD (5), a memo from Mr. Dupres to himself which is dated 12th March 2010. It was proof of the Board approval, he claimed. I attach little weight to this document. One day after the Board meeting, the despatching of personal memo by the Chairman detailing*

the history of Trebro's relationship and reiterating a Board decision, seems to be somewhat unusual. I regret that I have found it to be contrived. Its purpose, even from the narrative style is, in my assessment, a somewhat transparent attempt to support the claimant's case retrospectively, and I have grave doubt as to the genuineness of this document….. I have come to the view that 'memo' was produced solely to back up the claimant's case."

Upon a review of the evidence of the Appellant and Mr. Dupres, there was no cross-examination by Mr. Jairam and no questions put by the Judge to challenge this memo or to suggest that it was contrived or that it was produced retrospectively to "back up" the claimant's case.

Accordingly, the Judge's finding that this memo was contrived is not supported by the evidence. Indeed, as is apparent from (iii) below, there was evidence to support the genuineness of the memo.

iii. The Judge wrongly rejected the Appellant's evidence that he met with Mr. Oliveire on 12th March 2010, the day after the Board meeting. Neither the Appellant nor Dupres were challenged in cross-examination about this meeting.

At paragraph 53 of her judgment, the Judge rejected the evidence of Mr. Dupres that he met with Mr. Oliveire on 12th March 2010. She stated that there could be no purpose for such a meeting following the decisions recorded at the Board meeting the day before and no decision was taken that the Chairman would meet with Oliveire nor was any indication given that such a meeting was to take place. She also stated that "*the production of the memo amounted to overkill and served only to undermine the credibility of the claimant as well as Mr. Dupres."*

However, there were no questions or suggestions from Mr. Jairam to the Appellant or Mr. Dupres that the meeting was not held on 12th March 2011. Therefore, the rejection of this evidence is unsupported by the evidence.

Further, given the decision of the Board on 11th March 2010, (See RC 5, p. 48 of Vol. II) it is not inconceivable or illogical that the Appellant and the Chairman would meet with Mr. Oliveire on 12th March 2010 to communicate to him verbally the decisions of the Board: (a) to offer Trebro the station at Royal Road to commence on or before 15th April 2010 and (b) to defer Trebro's debt and to negotiate soft terms of repayment. The fact that there is no mention in the Board minutes (incomplete as they are) of a decision that the Chairman would meet with Trebro or that such a meeting was to take place should not be interpreted to mean that no such meeting took place. Further, the Judge failed to take into account the contemporaneous email from the Appellant to Glenn Roberts, Chester Beeput and Claude Job dated Monday 15th March 2010 in which he referred to the meeting between the Chairman and himself and the dealer. (See p. 327 of Vol. II)

iv. The Judge was wrong to find that the Appellant attempted to conceal the true nature of his relationship with Oliveire.

The Appellant was cross-examined about his relationship with Mr. Oliveire as well as the email from Mr. Oliveire to the Appellant in which he referred to the Appellant as "Uncle Richard". (TB 3 and TB 4 annexed to witness statement of Terrence Browne, p. 321 of Vol. II). The cross-examination with respect to these emails starts at p. 66 of the Notes of Evidence)

The Appellant admitted receipt of the email from Mr. Oliveire which addressed him as "Uncle Richard" and admitted that he had altered the salutation to "Mr. Callendar". He explained that he did so because "*It wasn't appropriate."* He also pointed out that he had no problem sending the email to all the persons who were copied on his email and also to the Chairman, Mr. Dupres. (TB 6)

TB 6 demonstrates that the Appellant forwarded the "Uncle Richard" email on the same day at 3.59 p.m. to the following persons: Carline Ramgoolam, Wendy Dwarika, Lawford Dupres, Glenn Roberts and Kathryna Baptiste.

At paragraphs 64 and 65 of her judgment, (p. 18-19 of Vol. 1), the trial Judge stated as follows:

"64. The emails which are in evidence indicate that Mr. Oliveire had access to the CEO by telephone outside of business hours on a Sunday night. That suggested a level of contact which went beyond a purely business relationship. More damagingly, Mr. Oliveire in an email addressed the claimant as "Uncle Richard". The claimant sought to explain this away as not unusual. In our culture referring to elders as "uncle" or "auntie" even when there is no blood relationship is not uncommon. But it does suggest some level of familiarity.

65. But the very same email was resent, addressed to "Mr. Callender", and that raised a question as to whether there was an attempt to conceal the true nature of the relationship between the parties. On a balance of probabilities I find that there was indeed such an attempt. Whether there is an actual blood relationship matters not. I find that whatever its nature, it was sufficiently close to influence the CEO's decision to grant preferential treatment to Trebro to the detriment of the defendant. NP was left with a debt of $1.6M which it still has not recovered."

The Appellant admitted that he altered the email and it may be said the trial Judge was entitled to consider that the Appellant's credibility was adversely affected by this admission. However, the Appellant forwarded the unaltered email to his colleagues on the same day. Therefore, the Appellant's alteration of the email does not appear to support the Judge's conclusion that he attempted to conceal the true nature of his relationship with Mr. Oliveire.

v. The Appellant did not have Board approval for his instruction to increase Trebro's credit from 2 days to 7 days and that his reliance on the Minutes of Board Meeting held on 11th March 2010 was misplaced. The Respondent did not adduce evidence from any Board members that no such approval was given at any time.

The first thing to note is that by Notice of evidential objections filed on 8th April 2013, (Tab 2 of Volume II) the Respondent objected to several paragraphs of the witness statements of the Appellant and his witnesses, Lawford Dupres and

Wendy Dwarika. In particular, the Respondent objected to the following words in paragraph 12 of the Appellant's witness statement:

> "*….NP's Board approved an extension of Trebro's credit limit from 2 to 7 days with an outline for soft terms of repayment and directed that an offer be made to Trebro to operate the Station at Royal Road, San Fernando, which was a Company-owned Station. This was a modernised station with a large storage and a convenience store"*

It appears that the Judge struck out these words. (See Notes of evidence, p. 9, left side page, from lines 25-27).

Therefore, the effect of these words being struck out is that the Appellant did not give any evidence of Board approval being given for the increase in the credit limit from 2 to 7 days prior to his memo dated 26th October 2009. (RC 6, p. 54 of Vol. II)

The Appellant also said in paragraph 12 that "*The Board's decision was based on the policy to retain large DODOS. This would have meant greater revenue to NP. This was later reconfirmed in a meeting of the Board of Directors on Thursday 11th March 2010."*

Insofar as the Appellant gave this evidence, these minutes (RC 5, p. 48 of Vol. II) do not reconfirm an earlier decision to increase the credit limit to Trebro from 2 to 7 days and there is no mention therein of that increase in credit limit.

Mr. Dupres gave evidence (at paragraph 10 et seq. of his Witness statement, p. 84 of Vol. II) that by letter dated 2nd September 2009, Trebro sought the consent of the Respondent to be relieved of its contractual obligations in order to purse a contractual relationship with UNIPET. He then said that the Board reacted to this development by agreeing to extend further credit to Trebro to allow for payment for supply to be made to the Respondent within 7 days instead of 2 days. It is not clear from his evidence when the Board agreed to the measures specified in paragraph 11. However, in the memo dated 12th March 2010 from Mr. Dupres to the Appellant, (LD 5, p. 99 of Vol. II) he refers (at paragraph 4) to Mr. Oliveire's

complaint about NP's verbal proposal to give him the station at Royal Road not being implemented "*even after a period of over five months".* Since this memo is dated March 2010, it relates back to October 2009 which is the month in which the Appellant sent out his memo about extending the credit limit. (RC 6") and provides some evidence that there was agreement by the Board, as contended by the Appellant, to extend further credit to Trebro.

The Judge rejected entirely the contention of the Appellant that he acted with the approval of the Board and found that his reliance on the Minutes of the meeting held on 11th March 2010 was misplaced. (paras. 40 et seq. of Judgment, p. 14 of Vol. I) At paragraph 46 of her judgment (p. 15 of Vol. 1), the Judge pointed out that the minute spoke of NP's intention to offer certain credit terms to Trebro which did not reflect the true picture that significant credit had already been extended to Trebro through the Appellant's intervention.

However, in the witness statement of Wendy Dwarika, *(p. 108m, left side, Vol. II)* she stated as follows:

> *"18……The memo did not establish a dollar limit so we did not adjust the computerised accounting system (for billing customers) in relations to Trebro.*
>
> *20. Since the CEO's memo advising on the 7-day credit arrangement did not authorise any change to be made to the dollar value on the system, the Finance Division did not effect any adjustment or change on the system. Even if the system was adjusted to reflect the seven (7) days, Trebro would still have been subject to a credit limit of $200,000.00 as the system continued to recognise $200,000.00 in credit limit. If the station exceeded its credit limit an invoice could not have been generated using the normal billing system."*

It does not appear that the Judge took this evidence into account in coming to the conclusion that significant credit had been extended to Trebro by the implementation of the 7-day credit limit. Further, as pointed out by Counsel for the Appellant, the Accounts Receivable and the Listing of Major Customers

exceeding credit limits (WD 2, p. 113-170) show that the total credit limit for Trebro was $200,000 and not $700,000 over the period December 2009 to August 2010.

Accordingly, although the Appellant did not produce a Board minute approving the increase in the credit limit from 2 to 7 days, it does not appear that the Appellant's memo of 26th October 2009, even though apparently sacnctioned by the Board, brought about the increase in credit granted to Trebro from November 2009 and that there was some other explanation for the increase in credit enjoyed by Trebro.

vi. The Appellant had authorised or 'effectively authorised" the direct billing which was used to circumvent the credit system, despite the Appellant's repeated statements under cross-examination that he did not authorise the direct billing. Further, the Respondent did not adduce any direct evidence that the Appellant had authorised direct billing. The Appellant's unchallenged denial ought to have been accepted by the Judge since the onus lay on the Respondent to prove that the Appellant authorised the direct billing.

It is not in dispute that under cross-examination, the Appellant repeatedly denied that he authorised direct billing of Trebro.

In her witness statement, Wendy Dwarika (p. 108, left side, Vol. II) purported at paragraph 21 to give evidence about what was told to the Production and Distribution Department. However, the following words were struck out from paragraph 21:

> *"At around October 2009 also, I am advised that the Production and Distribution Division, which was responsible to distribution of fuel and for invoicing the customer, was told to ensure that there were no stock outs."*

She continued as follows:

> *"21. ...Following upon the Memo and in order to allow Trebro the facility and avoid stock outs, a direct billing system (not the authorised*

system) appeared to have been used by the Production and Distribution Division in order to "get around" the authorised system. By direct billing one could therefore override credit limits and generate an invoice. That step was not told/known to my Division at that time. Production & Distribution Division was therefore able to deliver fuel and, allowing for a 7-day day lag in payment. Trebro was benefiting from increased credit.

22. To the best of my knowledge, Credit Section, which is within Treasury and Management Accounting Department, would normally be alerted to a delinquency in payment for fuel by the third day after delivery. The use of the direct billing system would leave Credit Section unaware of the reasons for the mounting debt….."

In his witness statement, Mr. Ross, at paragraphs 35 and 37 (P. 338 of Vol. II), stated that he conducted interviews with the Divisional Manager Production and Distribution and the Distribution Manager and they indicated that they received instructions from the Appellant to override the system and continue to make deliveries to Trebro in spite of outstanding balances. He also referred to a memorandum dated 24th January 2011 from the Divisional Manager, Production and Distribution, Mr. Glenn Roberts (JR 8, p. 373-374). He concluded that "*the Chief Executive Officer appeared to have acted outside of his authority in authorising an increase in Trebro's … credit limits to $1,651,712.*" However, Mr. Roberts and the Distribution Manager were not called as witnesses at the trial.

In the circumstances, the Respondent did not adduce any direct evidence from anyone to say that the Appellant authorised direct billing or instructed anyone to continue to provide fuel to Trebro by direct billing. There was therefore no evidence to contradict the Appellan's denial that he had authorised direct billing to Trebro.

In the circumstances, the Judge, at paragraphs 38, 48 and 61 appeared to conflate the extension of the credit limit from 2 days to 7 days with direct billing and the credit override effected on 7th October 2010. The Appellant admitted that he issued the memo on 26th October, 2009 for the increase in the credit limit from 2

days to 7 days but as earlier stated, this was not put into effect. He also admitted that he and Ms. Dwarika signed the Override Request Form dated 7th October 2010. However, the increase in Trebro's indebtedness arose not from the increase of the credit limit to 7 days but from direct billing. The Credit Override on 7th October 2010 came into existence after Trebro's cheques were dishonoured in August 2010 and the Management Team decided in October 2010 to place a freeze on the indebtedness of Trebro and to stop the practice of direct billing. According to Ms. Dwarika, the Override Request Form was prepared in order to facilitate Trebro getting fuel to the maximum of $200,000 with its debt frozen at $1.4 million. (See paras. 26-31 of her Witness Statement, p. 109 of Vol. II)

Accordingly, it appears that evidence was not given by the Respondent or by the Appellant or any of his witnesses to support the Judge's conclusions that the Appellant authorised or effectively authorised direct billing.

vii. The Appellant issued the credit override in October 2010 without an application by Trebro. There is nothing in the Credit Policy which says that an override can only be granted on application by the beneficiary. There were exceptional circumstances which justified the override and the Appellant was acting in accordance with the credit policy.

At paragraph 37 of her judgment, the trial Judge found that the debt was allowed to accrue through direct billings and a "*credit override which was granted without an application by Trebro, with no justification and despite such an override being available for specific transactions under the rules.*"

The Credit Policy is to be found at "JR 1" annexed to the Witness Statement of Joseph Ross at p. 341 of Vol. II. Credit Overrides is dealt with at p. 347 and provides as follows:

> *"**Credit Overrides***
>
> ***This the authority to override the credit terms & limits set by the Credit Committee.***

An override is ONLY allowable in exceptional circumstance. The Chief Executive Officer and the Divisional Manager, Finance will approve all overrides (See Appendix V)

Credit Department will implement the override only for the specific transaction approved.

All instances of credit overrides in excess of $50,000 shall be reported to the Credit Committee monthly and a summary to the Audit and Finance Committee of the Board of Directors quarterly."

It is clear from the language of this part of the Credit Policy that it does not specify that an application for a credit override ought to be made by Trebro.

At paragraph 31 of her Witness Statement, (p. 109, Vol. II) Wendy Dwarika set out the circumstances in which the Credit Override was implemented:

"An Override Request Form was therefore prepared on October 7, 2010 in order to facilitate the billing, which would allow Trebro to get fuel to the maximum of $200,000.00 with its debt frozen at 1.4 million dollars. This was a management tool which was implemented to deal with the exceptional circumstances which had been brought about mainly by Trebro's issuing of dishonoured cheques. The Form was signed by the CEO and by me, consistent with the Credit Policy. The said Override Request Form and the handwritten notes on the form all indicate that the arrears situation was being addressed. A true copy of the Override Request Form dated October 7, 2010 is hereto annexed and marked "WD 7". (p. 188, Vol. II)

Cross-examination of Ms. Dwarika with respect to this evidence is to be found from pg. 187-190 of the Notes of Evidence. Ms. Dwarika insisted that there were exceptional circumstances in relation to Trebro because of the issue of three dishonoured cheques and the increase in the debt to $1.4M. It was not suggested to her by Mr. Jairam that the credit override policy required an application by Trebro.

In the circumstances, the trial Judge's criticism of the credit override is unsupported by the express terms of the Credit Policy or by the evidence of Ms. Dwarika.

viii. The Appellant gave Trebro preferential treatment as a result of 'some kind of relationship between the parties.' Although it is clear that Trebro was accorded different, favourable treatment, it could not be said that this treatment was preferential.

At paragraph 63 of her judgment (p. 18, Vol. I), the trial Judge accepted Mr. Ross' findings that Trebro received preferential treatment and found that there was some kind of relationship between the parties which influenced the CEO's preferential treatment of Trebro.

Mr. Ross gave evidence that, based on the evidence gathered from the Company's records and from interviews conducted, he concluded that (i) Trebro Holdings received abnormally favourable credit treatment by NP; (ii) Management generally, and the Chief Executive Officer in particular, failed to take timely and decisive action to address the Trebro Holdings issue; and (iii) the zero stock out objective of the Company took precedence over all other objectives, including timely collection of sales revenue. From his audit examination, he also concluded that the Appellant gave favourable treatment to Trebro. (See paras. 41 and 42 of Witness Statement of Joseph Ross, p. 39, Vol. II)

However, the Appellant and Mr. Dupres gave evidence that there was a decision taken by the Respondent to offer credit terms to Trebro as a strategy to stave off the threat of competition from Unipet.

In the Minutes of the Board meeting held on 11th March 2010, (RC 5, p. 48-49, Vol. II) it is recorded that the Board directed Management to "*make an offer in writing to Trebro Holdings for the operation of the service station at Royal Road, San Fernando, to commence on or before 2010 April 15. Further, Management to offer Trebro Holdings a deferral of its debt to NP, outlining soft terms of repayment.*"

In his Memo dated 12th March 2010, (LD 5, p. 98-101 of Vol. II), Mr. Dupres listed actions to be taken to address the complaints of Trebro, including the assignment to Trebro on an interim basis of the NP Service Station at Royal Road to be put into effect no later than 9th April 2010 and arrangements to be put in place to ensure that there were no stockouts at the Lady Hailes Station before its refurbishment "*or at other Dealer owned stations now suffering similar problems*." He concluded by stating: "*As you have indicated to me, you will personally follow the progress of the effort to regain Mr. Oliveire's confidence in NP's ability to deliver on its commitments. Success in this is critical in improving our relationships with Owner Dealers and in retaining our market share of the fuel distribution business, without which NP's viability will be severely compromised."*

This Memo is consistent with the directions given by the Board on the previous day.

Therefore, there was evidence before the trial Judge that, in compliance with the direction of the Board, the Respondent permitted Trebro to enjoy credit facilities which it was repaying on a monthly basis up to July 2010. And this was informed by a business decision of the Board to try and keep Trebro as a customer and prevent its desertion to Unipet. After Trebro issued dishonoured cheques in August 2010, Trebro's indebtedness to NP escalated rapidly and steps were taken in October 2010 to freeze the debt at the level of $1.4M and to make arrangements for Trebro to repay this debt at the rate of $100,000.00 per month and to continue to be supplied with fuel with the usual credit limit of $200,000.

In the light of this evidence, the trial Judge appears to have given undue weight to the evidence of Mr. Ross in arriving at her finding that there was preferential treatment afforded to Trebro as a result of "*some kind of relationship between the parties*" This may be explained by (a) the Judge's entire rejection of the evidence of the Appellant that he acted with Board approval; (b) her finding that the evidence of Mr. Dupres was tailored to assist the Appellant to which she attached

little weight; and (c) her finding that the Memo dated 12th March 2010 from Mr. Dupres to the Appellant was contrived.

However, if the Judge is found to have fallen into error in her rejection of that evidence, which as appears from the above, we are of the opinion that she has, then there is a cogent and reasonable explanation provided by the Appellant and his witnesses for the credit facility afforded to Trebro, which does not support the Judge's conclusion that there was preferential treatment afforded to Trebro as a result of some kind of relationship between the Appellant and Mr. Oliveire.

6. The Appellant also complained about the following issues of law:

i. The Judge failed to apply the legal test for determining whether a dismissal was justified at common law: Briscoe v. Lumbrizol Limited [2002] EWCA Civ. 508 "*The question is whether the Appellant's conduct so undermined the trust and confidence which is inherent in his contract of employment? Did his conduct demonstrate that he was repudiating his contract or one of its essential terms, that he was deliberately flouting its essential terms."*

ii. The Judge failed to place the burden of proof of breach of the contract of employment and/or of the Respondent's Credit Policy and/or any misconduct on the Respondent and/or wrongly placed on the Appellant the burden of proving that his dismissal was wrongful or in breach of contract.

The question to be answered here is whether the Appellant's conduct was such that he should be found to have repudiated his contract of employment? Did he so conduct himself that he undermined the trust and confidence which NP reposed in him as the Chief Executive Officer and was inherent in his contract of employment?

In addition to our earlier analysis of the Judge's findings, we note that the Judge also made the following findings which impacted adversely on her assessment of the Appellant:

a) She found that the Appellant's reliance on the Board Minute dated 11th March 2010 was misplaced and expressed the view that the Minute raised

the question whether the Appellant made full disclosure to the Board or withheld information that might have misled the Board, She pointed out that the Minute made no reference to the extent of Trebro's debt and that it was mounting as at the date of the Board meeting and expressed her view that the Appellant must have been aware of the position and must have been duty-bound to bring the situation to the attention of the Board; (paras. 43-44)

b) She attributed to the Appellant, and not the Board, the offer to Trebro of another service station at Royal Road along with credit terms in order to retain its business; (para. 47)

c) She found that the Appellant promoted the offer of another service station to Trebro in circumstances where there was exposure to further financial loss and expressed her view that this defied logic and business sense; (para. 48)

d) She found that the Appellant continued to accommodate Trebro without any full investigation or verification of Mr. Job's report and, in so doing, appeared to prefer to continue to give Trebro the benefit of the doubt. She expressed the opinion that "*such an investigation may very well have demonstrated that the claim about stockouts was just an excuse for the continued credit arrangement, which in any case seemed an over generous and unreasonable response."(*para. 50*)*

In our opinion, these findings cannot be supported for the following reasons:

a) There was no evidence given by the Respondent's witnesses that the Appellant withheld information from the Board or misled the Board as to the financial status of Trebro as at the date of the Board meeting on 11th March 2010. On the contrary, Ms. Dwarika gave evidence that "*the Audit and Finance Committee of the Board would meet once every six (6) weeks, approximately one week before a Board meeting in order to approve financial reports and documents, whether it was an extension of credit, monthly financial statements or any other report that would have to be*

submitted to the Board." Further, the Treasury and Management Accounting Department generated the Accounts Receivable Report of credit customers once per month and this Report was submitted to the Credit Committee and then the Audit and Finance Committee whose Chairman sat on the Board and reported to the Board on significant matters. A reasonable inference to be drawn from this evidence is that at its meeting on 11th March 2010, the Board had before it the requisite financial reports and documentation, including the Accounts Receivable Report which would have shown the financial status of Trebro and that the Appellant did not withhold information from or provide misleading information to the Board. It is also reasonable to infer that the Board would have been aware of Trebro operating outside of its standard credit policy and, not unexpectedly, took no action to countermand it;

b) The Minutes of the Board meeting (p. 48-49 of Vol. II) reveal that, after in-depth discussion, the Board directed Management to offer the station at Royal Road to Trebro and to offer Trebro a deferral of its debt, outlining soft terms of repayment. Therefore, the decision was made by the Board and not by the Appellant;

c) The Minutes of the Board meeting reveal that the Appellant put forward for the Board's consideration a proposal that an offer be made to Trebro of credit terms and the operation of the station at Royal Road. After in-depth discussion, the Board accepted this proposal and gave directions to Management. From that point onwards, this was a decision of the Board and the Judge was not entitled to second-guess the wisdom of the Board's decision and to attribute blame to the Appellant for the Board's decision;

d) The email from Mr. Job dated 15th March 2010 (p. 328 of Vol. II) raised a concern about the honesty of Mr. Oliveire's claim that he was out of stock. On the same day, the Appellant communicated with Mr. Oliveire at 4.19 p.m. pointing out that his information was different from the information provided by Mr. Oliveire and seeking verification. This email was copied

> to Glenn Roberts, Wendy Dwarika and Lawford Dupres. Under cross-examination, the Appellant indicated that Mr. Job's email did not really raise alarm bells about what Trebro was doing and that, by his email to Mr. Oliveire, he was forwarding the information he had received from Ms. Dwarika (as to the balance of $846,343.86 outstanding from Trebro as at 15th March 2010) and not the email from Mr. Job. (p. 76 of Notes of Evidence) However, it was not suggested to the Appellant that he ought to have investigated the matters raised by Mr. Job or that such an investigation may very well have demonstrated that the claim of Trebro about stockouts was just an excuse for the continued credit arrangement, In the circumstances, the Judge's finding that the Appellant continued to accommodate Trebro without any full investigation or verification of Mr. Job's report and her opinion that "*such an investigation may very well have demonstrated that the claim about stockouts was just an excuse for the continued credit arrangement, which in any case seemed an over generous and unreasonable response"* is not supported by the evidence. Further, it is not in dispute that the Board had made its decision just four (4) days before and therefore, the continued accommodation granted to Trebro was granted with the approval of the Board.

Accordingly, the Appellant's role in the implementation of the Board's decisions should not have been construed as a repudiation of his contract of employment but as a demonstration of his efforts to ensure that the Board's decisions were complied with. We think that the trial judge was plainly wrong to find otherwise. This would account for the further credit extended to Trebro and the continuation of the supply of fuel to Trebro between March 2010 and July 2010. After Trebro issued dishonoured cheques, the Appellant took action, in accordance with the Credit Policy, to request a credit override to freeze the indebtedness of Trebro at $1.4 million and to make arrangements for the repayment of this amount at the rate of $100,000.00 per month. Again, such action ought not to be construed as a repudiation of his contract of employment.

Accordingly, applying the test in **Briscoe v. Lumbrizol Limited, we** are of the opinion that the dismissal of the Appellant was not justified.

iii. The Judge was wrong to find that the Appellant had given no consideration for the alteration of his contract and that it was null and void and of no effect in law.

The trial Judge dealt with this issue at paragraphs 21 to 26 of her judgment. (p. 11 of Vol. I). She accepted the submission of the Respondent that the variation was not binding because there was no consideration provided by the Appellant and found that the variation was null and void and of no effect in law.

In his submissions, Counsel for the Appellant relied on Claude Albert v. Alstons Building Enterprises Limited (CA 37 of 2000)

In our opinion, that case is distinguishable on its facts. In that case, the employer had unilaterally altered the employee's contract of employment by including in the Company Manual a term which provided that the employee was entitled to severance benefits upon termination. Upon termination, the employer sought to avoid paying severance benefits to the employee. The Court of Appeal found that the employees, by continuing in their employment with the Group, indicated their acceptance of the offer of the benefits and provided consideration that made the promise of them enforceable as a contractual obligation of the employer.

In this case, the Appellant's contract of employment is annexed as RC 1 (pp. 12-16 of Vol. II). This document reveals that the Board of Directors offered the Appellant a contract of employment for a period of three years form 1st February 2009 to 31st January 2012. The covering letter dated 9th February 2009 from the Permanent Secretary, Ministry of Energy and Energy Industries indicates that the Minister agreed to the renewal of the Appellant's contract of employment.

The Appellant's evidence with respect to the variation is contained at paragraphs 15-18 of his Witness Statement. It should be noted, however, that certain words from these paragraphs were struck out:

The following words were struck out from paragraph 16:

"*I viewed the extension of my contract in 2009 for 3 years as an expression of the Board's confidence in me further to my last Performance Appraisal.* The following words were struck out from paragraph 17:

"*I expected that, in a matter of this nature, the Chairman would hold discussions with the Human Resources Manager and it would be agreed at a Board meeting."*

The following words were struck out from paragraph 18:

"The now retired Divisional Manager, Human Resources, NP, confirmed to me that a signed copy of the Contract Variation was given to her for filing. The Executive Assistant to the Chairman/CEO also confirmed to me that he Chairman gave her the original signed document and she was instructed to put it on the CEO's file, which is part of her responsibilities to maintain.

Therefore, the essence of the Appellant's evidence is that he raised with Mr. Dupres his concerns about being terminated after the elections in 2010 and suggested that his contract be changed to allow him to give notice of termination and to be dismissed and/or removed for only for cause. According to him, Mr. Dupres took the variation of his contract to the Board and the Board accepted the change at a meeting held on 22nd April 2010. He produced a letter of variation dated 4th May 2010 signed by Mr. Dupres. (RC 7, pp. 56-57 of Vol. II)

However, the Appellant failed to produce any minutes of a Board meeting held on 22nd April 2010. Further, Mr. Dupres failed to give any evidence in his Witness Statement that he sought and obtained the approval of the Board of Directors for a variation of the terms of the Appellant's contract of employment.

The facts in this case are therefore different in the following respects:

a) There was no evidence before the trial Judge that the Board approved the variation of the Appellant's contract. At best, therefore, there was an agreement made between the Appellant and Mr. Dupres to vary the termination clause but this cannot bind the Respondent without proof of Board approval;

b) The Appellant suggested the variation of his contract and Mr. Dupres signed the variation letter. There was no promise or offer by the Respondent of a benefit to

the Appellant with an apparent intention of being bound by it. It cannot therefore be implied that by the Appellant continuing in his employment that he accepted the offer or that he provided consideration for it.

Accordingly, we are of the opinion that the trial Judge was correct in her finding that there was no consideration for the variation and that the variation was null and void and of no effect in law

iv. The Judge found that if the contract did not provide for notice, reasonable notice would have been three months. A period of 9 months was reasonable in the circumstances.

Clause 7 of the Appellant's contract of employment provided for the termination of his contract in two ways:

a) By either party giving to the other not less than three (3) months' notice in writing or payment in lieu thereof; or

b) By the Company without prior notice at any time for unsatisfactory performance, gross default or misconduct or breach or non-observance of the terms and conditions stipulated herein.

We have already examined the issue of whether or not the Respondent was entitled to terminate the Appellant for cause and expressed the opinion that it was not entitled to do so. In **Mc Gregor on Damages (19th Edition)**[2] the authors state that the measure of damages for wrongful dismissal is prima facie the amount that the claimant would have earned had the employment continued according to contract, subject to a deduction in respect of any amount accruing from any other employment which the claimant, in minimising damages, either had obtained or should reasonably have obtained. However, when the defendant has a right to terminate the contract before the end of the term, damages should only be awarded to the end of the earliest period at which the defendant could have so terminated the contract: **Marsh v. National Autistic Society [1994] ICR 453**[3]

[2] Para. 31-005;
[3] At 31-013

At the hearing of this appeal, Counsel for the Appellant accepted that if the variation was not effective, the Respondent was entitled to terminate the Appellant's contract by three months' notice and that would be the measure of damages to which he would be entitled for his wrongful dismissal. Therefore, we are of the opinion that the Respondent is liable to pay the Appellant three months' pay in lieu of notice.

v. The Judge was wrong to find that the Respondent had conducted a fair hearing into the allegations made against him of breach of his contract of employment and breach of the obligation of trust and confidence.

In the light of our earlier analysis of the trial Judge's findings and conclusions, we are of the view that it is not necessary to consider this issue since we are of the opinion that the Appellant was wrongly dismissed by the Respondent and that he is entitled to three months' pay in lieu of notice.

Order

7. Accordingly, the Appeal is allowed and the Order of the trial Judge is hereby set aside.
8. In light of the findings above, we now invite Counsel to address us on the issues of the quantum of damages, interest and costs.

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Allan Mendonca
Justice of Appeal

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Prakash Moosai
Justice of Appeal

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Andre des Vignes
Justice of Appeal