COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

BETWEEN

2016/COM/lab/0064

DONNELL FERGUSON

Plaintiff

AND

WEST BAY MANAGEMENT LIMITED

(t/a Sandals Royal Bahamian Spa Resort and Offshore Island)

Defendant

AND BETWEEN

2016/COM/lab/0065

SHARON HENFIELD

Plaintiff

AND

WEST BAY MANAGEMENT LIMITED

(t/a Sandals Royal Bahamian Spa Resort and Offshore Island)

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Obie Ferguson Jr. for the Plaintiffs

Dwight Glinton for the Defendant

23 January 2018, 16 and 20 March 2018

JUDGMENT

WINDER, J.

These are separate but related employment disputes brought by the respective plaintiffs claiming unfair dismissal against the defendant, their employer.

1. The claims were each brought by separate specially indorsed Writs of Summons on 7 September 2016. Paragraphs 14-16 of the statement of claim in each case provided as follows:

> 14. The Defendant breached the contract of employment between it and the Plaintiff.
>
> **PARTICULARS OF BREACH**
>
> The Defendant failed to give the Plaintiff proper notice of the closure of the establishment in accordance with section 20 of the Agreement.
>
> 15. The Defendant's dismissal of the Plaintiff was unfair pursuant to sections 34 and 36(1)(a) and (b) of the Employment Act on the basis that the Plaintiff was dismissed because of the Plaintiff's membership in an independent trade union and participation in activities of a trade union.
>
> **PARTICULARS OF UNFAIR DISMISSAL**
>
> The Plaintiff was dismissed in, and as a result of, the following circumstances:
>
> a. On 4 July, 2006 the Maintenance Union applied to the Defendant for recognition as bargaining agent for its non-managerial workers;
>
> b. The Defendant refused to recognize the Maintenance Union as the bargaining agent for the non-managerial employees of the Defendant's Resort;
>
> c. The Union thereafter petitioned the Minister of Labour and Social Development for recognition. The Minister and not the Defendant recognized the Maintenance Union as bargaining agent on 17 August, 2009;
>
> d. This notwithstanding, since 17th August 2009 the Defendant failed and/or refused re-negotiate with the Maintenance Union, the terms of the Agreement, in contravention of section 41(3) of the Employment Act;
>
> e. As a result of the Defendant's refusal and/or failure, the Plaintiff, along with other non-managerial employees of the Defendant's Resort and members of the Union, made criminal complaints against the Defendant;

f. The date of the first hearing in the criminal proceedings was 2 days before the date of the Plaintiff's dismissal;

g. All members of the Maintenance Union were dismissed after the hearing of the criminal proceedings;

h. The Defendant alleged that the grounds for the dismissal was redundancy although it knew or ought to have known the same to be untrue, particularly because:

   i. The Defendant closed the Resort for the purposes of effecting renovations to improve its product offering to the public at large;

   ii. The Defendant intends to reopen the Resort to provide the same services to the public in October, 2016.

   iii. The Defendant does not intend to cease to carry on the business of the Resort;

   iv. Further, about 8 days after the Defendant dismissed the Plaintiff and its other non-managerial employees, the Defendant hosted a job fair to interview prospective employees to fill the vacancies in the positions that were previously held by the Plaintiff and the other dismissed non-managerial employees at the Defendant's Resort.

   v. The job fair was advertised to the public at large including the dismissed employees.

   vi. The Defendant has also indicated in public statements that dismissed employees (which includes the Plaintiff) may not be rehired to work at the Resort when it reopens in October, 2016.

16. In light of the foregoing, the Plaintiff seeks an Order for reinstatement pursuant to section 43 of the Employment Act.

2. The defendant denies the claim in each case and says that:
   (1) The plaintiffs were not made redundant but terminated without cause.
   (2) It was not subject to the industrial agreement because it already expired at the time of termination of each employee.
   (3) The plaintiffs were not terminated as a result of their membership or participation in the Union because at the time their employment was terminated, Sandals was closed for renovations and all non-managerial staff, many of whom were not unionized, were terminated and given severance pay in accordance with the law.

3. At trial, each plaintiff gave evidence in their respective cases whilst Gary Williams gave evidence for the defendant in each case.

Donnell Ferguson

4. The facts relied upon by Donnell Ferguson (Sharon Henfiled), in her case, taken from her filed statement of facts and issues, were as follows:

> 2. The plaintiff commenced employment with the Defendant sometime on or about May 18, 2003 as a Cook. Sometime on or about February 6, 2005 the Defendant confirmed the plaintiff position at Sandals Royal Bahamian Hotel as a cook/chef de' parte in the kitchen department with effect from the 6 February, 2005.
> 3. The plaintiff was employed with the Defendant until her termination on August 15, 2016 at a salary of $560.00 per week including gratuity.
> 4. The plaintiff was at all material time a member of the Bahamas Hotel Maintenance & Allied Workers Union (Maintenance Union). She became an officer of the union in 2013. The maintenance union was registered on or about November 22, 2001 and issued a Certificate of Recognition as the bargaining agent for non-managerial employees at Sandals Royal Bahamian Resort, Cable Beach, Nassau, Bahamas on the 17th day of August, 2009. See tab 4 of the agreed bundle of documents.
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> ...
>
> 6. Sometime on or about April, 2009 the Maintenance Union replaced the Bahamas Hotel Catering and Allied Workers Union (Catering Union) as the bargaining agent for the three hundred (300) plus non-managerial employees of the defendant's resort.
>
> ...
>
> 8. Sometime on or about April 18, 2012 the defendant as a member of the Bahamas Hotel Employer's Association agreed with the union that save for certain provisions (which are not material to this action) its employment contract with the union members would be governed by and or incorporate the terms and conditions embodied in the agreement dated January 7, 2008 between the Association and the catering Union (the agreement).
> 9. On August 15, 2016 the defendant terminated the plaintiff's contract of employment on the ground of redundancy without reference to the procedures laid down by section 20.1.2 of the agreement.
>
> ...
>
> 11, That the termination of the plaintiff's contract of employment in the circumstances is in breach of section 45(1) of the Industrial Relations Act, having regard to the fact that at the time of the termination of the plaintiff's contract of employment she was President of the Bahamas Hotel Maintenance and Allied Workers Union (Maintenance Union) having been duly elected to the post on June 17, 2015.
>
> ...
>
> 13. That at the time of termination the plaintiff was off from work suffering from an industrial injury which took place on the 12th February, 2016 while in the course of her employment and carrying out her job duties in the vicinity of Spices Restaurant she was involved in an accident when a fire extinguisher exploded causing her to inhale toxic

chemicals, fumes and powder resulting in the plaintiff sustaining severe personal injuries, pain and suffering.

14. That the said accident was caused and or contributed by the negligence of the defendant, its servants or agents.

...

17. That the defendant held a job fair between August 22 and 25, 2016 at Christ the King Anglican Church, Ridgeland Park West in the city of Nassau, at which fair the defendant advertised vacancies for and interviewed applicants for the plaintiff's position having only days earlier declared the post redundant.
18. On August 22, 2016 Mr. Jeremy Jones, Director of Corporate Services at Sandals Resorts International said that the resort decided not to consult with the employees about what was possible with respect to their employment situation in the context of the need to close the resort for urgent repairs, "because of the urgency of the situation" and he defended the decision not to lay off but to make them **redundant**.

...

21. That at termination the defendant offered the plaintiff termination pay in the sum of $24,093.24 which include vacation pay and gratuities and made it mandatory that in order for her to receive the payment she was required to sign a deed of release contrary to law and the industrial agreement at the time.
22. The amount offered in the release is insufficient and is less favourable than what the plaintiff would be entitled to by way of damages for breach of contract and unfair dismissal.

Sharon Henfield

5. The facts relied upon by Sharon Henfield (Donnell Ferguson) in her case, taken from her filed statement of facts and issues, were as follows:

2. That the plaintiff commenced her employment with the Defendant sometime on or about November 7, 2012 as a dishwasher in the Stewarding Department. Sometime on or about 2014 she was transferred to the Kitchen as a cook with a weekly salary of $486.00 plus gratuity.
3. The plaintiff was at all material time a member of the Bahamas Hotel Maintenance & Allied Workers Union (Maintenance Union).
4. That on August 15, 2016 the defendant terminated the plaintiff contract of employment on the ground of redundancy without reference to the procedures laid down by section 20.1.2 of the agreement between the Maintenance Union and Sandals by denying the union to meet on the plaintiff's behalf. Further, the defendant breached section107 (c) of the code of the Industrial Relations Act, Chapter 321 Statute Laws of the Commonwealth of the Bahamas.

...

8. That the defendant maintained its position that the plaintiff's dismissal and the other dismissed employees were not due to redundancy in

spite of the fact that section 27 of the Employment Act and section 21.1.2 of the agreement defines the meaning of redundancy.

...

11. The defendant avers that a verbal agreement between the parties made on or around 8 February, 2012 the Hotel Employers' Association and the Maintenance Union will be governed by the Catering Union agreement. This agreement was honoured up to the date of the redundancy save for the non-compliance with the section 21.1.2 of the agreement and Part III of the IRA that deal with redundancy.

...

15. That at termination of the Plaintiff's contract of employment in the circumstances is in breach of section 45(1) of the Industrial Relations Act.
16. The defendant is in breach of Part III Section 31 and 32 of the Employment Policies of the Third Section (section 40) of the Code of Industrial Relations Practice.
17. That at termination the defendant offered the plaintiff's termination pay in the sum of $3,684.62 which include vacation pay and gratuities, and made it mandatory that in order for her to receive the payment, she was required to sign a deed of release contrary to law and the industrial agreement at the time.
18. The amount offered in the release is insufficient and less favourable than what the plaintiff would be entitled to by way of damages for breach of contract and unfair dismissal.

6. The evidence of Gary Williams provided in part as follows:

26. In early 2016 Sandals was in a poor state of repair and it was in urgent need of renovations. It was realised that the extensive repair and renovation could not be safely carried out in the presence of guests and its staff so the decision was made to close the Resort whilst work was being carried out. The renovation work was projected by contractors to last for approximately 14 weeks. However, Sandals insisted that it last for only 8 weeks. The total cost of repairs and renovations are estimated at 4 million dollars.
27. Sandals rebooked all guests and, as far as possible, attempted to send them to Sandals Emerald Bay so that they could stay in The Bahamas. Sandals issued an Official Statement dated the 2nd August 2016 to travel agents indicating that it would close on the 15th August 2016.
28. Sandals considered how to deal with employment contracts and found that the terms of the expired Catering Union Industrial Agreement, which contained redundancy and layoff provisions, no longer applied. The decision was made to let go non-managerial staff as it was felt by the management of the Resort that it would be better for financial, commercial, technical and organisational reasons to terminate the employment of all the non-managerial staff instead of temporarily ceasing their engagement.
29. On the 15th August 2015 Sandals held a meeting with all non-managerial staff to discuss the closure of the hotel. In accordance

with the provisions of the Employment Act and the employees' contracts of employment, Sandals terminated the employment of its 592 line staff with full payment of notice, termination pay, vacation due and other benefits. This included 309 employees who were members of the Maintenance Union and 283 employees who were not unionised. No redundancies took place.

30. The local media extensively covered the closure of Sandals and the renovations that were taking place. There were several articles on the scale of the repair work and the consequential positive impact on the economy.
31. On the 5th September 2016, Sandals issued a notice in the media including local newspapers addressing the closure of the Resort for refurbishment and the termination of non-managerial staff. The notice itemised the payments the employees received upon termination and made no mention of the non-managerial staff being made redundant.

...

33. In preparation for the reopening, Sandals advertised its job fair in local newspapers that was held between the 22nd and the 25th August 2016.
34. Sandals voluntarily invited all employees to reapply and interview for their previous jobs. At the job fair, 379 of the 592 former Sandals employees attended and a total of 890 candidates were interviewed for various positions.
35. Sandals reopen for business on the 14th October 2016 at which time 592 Bahamians were employed. This was in addition to the approximately 40 Bahamian managerial employees who were not terminated as a result of the renovations. Members of the Maintenance Union were among the employees who were reengaged.

...

In relation to Henfield's case, Williams stated that:

37. By letter dated the 19th November 2014 from Mrs. Cathy-Ann Cromarty-Johnson, the Human Resources Manager at Sandals, Ms. Henfield was promoted to the position of Cook which she held for the remainder of her employment.
38. On 15th August, 2016, Ms. Henfield's contract of employment was terminated by notice pursuant to her contract terms and in accordance with s 29 of the Employment Act. She was fully compensated based on her years of employment at Sandals. Moreover, any allegation that Sandals unfairly dismissed Ms. Henfield and the other non-managerial employees due to the employees being members of the Maintenance Union is unfounded.
39. On the day of her termination, Ms. Henfield received cheque number 045031 in the sum of $3,684.62.
40. The cheque was accompanied by an Earnings Statement that itemised the said sum she received.
41. Upon receiving the cheque, Ms. Henfield was presented with a Release (hereinafter "the Release") by which she covenanted not to commence legal proceedings against Sandals. Specifically, the Release stated:

"Also in consideration of the aforesaid payment, I, the undersigned, hereby covenant with the said West Bay Management Ltd, T/A, Sandals Royal Bahamian Spa Resort & Offshore Island not to take any further action against it in respect of any matter arising out of or connected with my said employment or the termination thereof by way of company, charge, action or suit of any kind or nature whatsoever and whether civil or criminal or otherwise it being the intent of my execution and delivery of these presents that all these matters be at an end."

Ms. Henfield waived any right that may arise from her employment and termination by signing the Release and accepting the termination pay as full and final settlement of the amount she was entitled to receive.

...

43. Ms. Henfield did not attend the said job fair that took place for 4 days nor did she reapply for employment at Sandals as did the majority of employees who were terminated because of the renovations.
44. Ms. Henfield subsequently cashed her cheque on 29th August, 2016 as is reflected in the Sandals' Scotiabank Account Activity report which shows the cheque was negotiated that day.

7. In relation to Ferguson's case, Williams stated that:

36. By contract of employment dated the 6th February 2005 Ms. Ferguson commenced employment as a cook in the Kitchen Department at Sandals.
37. On 15th August, 2016, Ms. Ferguson's contract of employment was terminated by notice pursuant to her contract terms and in accordance with s 29 of the Employment Act. She was fully compensated based on her years of employment at Sandals. Moreover, any allegation that Sandals unfairly dismissed Ms. Ferguson and the other non-managerial employees due to the employees being members of the Maintenance Union is unfounded.
38. On the day of her termination, Ms. Ferguson received cheque number 044599 in the sum of $23,847.62.
39. The cheque was accompanied by an Earnings Statement that itemised the said sum she received.
40. Upon receiving the cheque, Ms. Ferguson was presented with a Release (hereinafter "the Release") by which she covenanted not to commence legal proceedings against Sandals. Specifically, the Release stated:

    "Also in consideration of the aforesaid payment, I, the undersigned, hereby covenant with the said West Bay Management Ltd, T/A, Sandals Royal Bahamian Spa Resort & Offshore Island not to take any further action against it in respect of any matter arising out of or connected with my said employment or the termination thereof by way of company, charge, action or suit of any kind or nature whatsoever and whether civil or criminal or otherwise it being the intent of my

execution and delivery of these presents that all these matters be at an end."

Ms. Ferguson waived any right that may arise from her employment and termination by signing the Release and accepting the termination pay as full and final settlement of the amount she was entitled to receive.

41. Further, the last paragraph of the Release states:

"I, (singed), the undersigned, have read and understand the contents herein and rely solely upon my own judgment and without influence by anyone in making this settlement, and I fully understand and voluntarily accept the terms of this Release."

I am informed by the Sandals representatives who issued the cheques and Releases to non-managerial employees on the 15th August 2016 that all employees accepted their cheques and signed the Releases without any force or coercion.

42. Ms. Ferguson did not attend the said job fair that took place for 4 days nor did she reapply for employment at Sandals as did the majority of employees who were terminated because of the renovations.

43. Ms. Ferguson subsequently cashed her cheque on 29th August, 2016 as is reflected in the Sandals' Scotiabank Account Activity report which showed the cheque was negotiated that day.

44. I only became aware of this claim when Sandals was served with the Writ of Summons.

8. The issues for determination in these cases are:
   (1) Whether the employees were made redundant or terminated in the ordinary course.
   (2) The effect of the expired agreement.
   (3) Whether the defendants were unfairly terminated.

9. The plaintiffs pleaded case rests on two prongs:
   (a) The defendant failed to give her proper notice of the closure of the establishment in accordance with section 20 of the Agreement.
   (b) The defendant's dismissal of her was unfair pursuant to sections 34 and 36(1)(a) and (b) of the Employment Act on the basis that the Plaintiff was dismissed because of the Plaintiffs' membership and participation in an independent trade union and participation in activities of a trade union.

Notice pursuant to Section 20 of the Industrial Agreement

10. It is not disputed that the agreement has expired. Section 20 of the Industrial Agreement provided a mechanism for the giving of notice and other procedures when the employer seeks to make an employee redundant. The notice is to be

given to the union. The plaintiffs claim that the defendant breached it obligations under terms of the agreement.

11. I am not satisfied on the evidence before me that there has been any such breach as I am not satisfied that there is any evidence of the incorporation of this term (Section 20) into the individual contract(s) of employment. According to ***Jones J*** in ***The Bahamas Hotel Catering & Allied Workers Union V Cable Beach Resort Limited And New Continent Ventures Inc D/B/A Melia Beach Resort*** at paragraph75.

> [75] Where a valid registered Industrial Agreement has expired, the employment of the worker is covered by individual contracts of employment. The terms of an expired registered Industrial agreement may be incorporated into the individual's contract of employment, either expressly or by implication, but must be done during the currency of the Industrial Agreement. Authority for this proposition is found in The Bahamas Court of Appeal case of Hutchinson Lucaya Limited v Commonwealth Union of Hotel Services and Allied Workers et al SCCivApp No. 61 of 2014.

This statement as to the law was later approved on appeal by the Court of Appeal.

12. On the evidence before me there is no direct or indirect evidence, which I accept, that Section 20 of the Agreement was incorporated. At best the parties may be said to have implicitly accepted the disciplinary procedures under the agreement but nothing as to the question of redundancy. Further, in relation to Henfield, she joined the employment of the defendant in November 2012 when the agreement would have already expired and therefore no such incorporation was possible in relation to her as the agreement was no longer current.

In any event I am not satisfied that the plaintiffs were dismissed for redundancy. Dismissal for redundancy is defined in section 27 of the Employment Act as follows:

> 27. For the purposes of this Part, an employee shall be deemed to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to —
>
> (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or

(b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish: Meaning of redundancy.

Provided that an employee shall not be deemed to be dismissed because of redundancy where such employee is required to carry out work for a fixed term of less than two years in respect of a specific construction project and such term has come to an end.

13. Where an employee is made redundant he is liable to payment under the provisions of Section 26 of the EA. The terms of those payment mirror the terms of section 29 of the EA relative to termination upon notice for someone employed for more than 12 months. The plaintiffs received payments in the terms of section 29 which mirrors the payments which would otherwise have been due under section 27 had the plaintiffs been made redundant.

14. In any event, I am satisfied, as was ***Barnett CJ*** in the case of ***Smith and ors v FirstCaribbean International Bank*** **[2012] 1 BHS J. No 28**, that a breach of the provisions of section 20 of the Agreement, does not give rise to a claim by the plaintiffs. The sections, if operative, required notice to be given to the union and could not be the subject of any damages claim by either of the plaintiffs and no loss could be assessed thereon.

Unfair Dismissal

15. Section 34 of the EA provides that employees have a right not to be unfairly dismissed. The plaintiffs allege that they have been unfairly dismissed on the following grounds:
    (a) The participation of the plaintiffs in the union;
    (b) the defendant claiming to have made the plaintiffs redundant when the facts suggest that there was no redundancy since:
        (i) 8 days after the Defendant dismissed the Plaintiff and its other non-managerial employees, the Defendant hosted a job fair to interview prospective employees to fill the vacancies in the positions that were previously held by the Plaintiff and the other dismissed non-managerial employees at the Defendant's Resort.
        (ii) The job fair was advertised to the public at large including the dismissed employees.
        (iii) The Defendant has also indicated in public statements that dismissed employees (which includes the Plaintiff) may not be rehired to work at the Resort when it reopens in October, 2016.

(c) The plaintiffs were dismissed as a result of the criminal complaints filed by the union in the Magistrates Court alleging that the defendant's failure to recognize the Union as the bargaining agent for the non-managerial employees amounted to a criminal offence.

16. The plaintiffs say that they are entitled to compensation in accordance with Sections 41 and 42 of the EA.

17. The defendants say at paragraph 74 of its submission that "the Court cannot rightfully make an order pursuant to [section 41 and 42] on unfair dismissal as the provision expressly empowers the Industrial Tribunal to make such orders". The Court of Appeal in the recent decision of ***Bahamasair v Omar Ferguson*** has stated unequivocally that the Supreme Court is empowered to make awards for unfair dismissal in accordance with the provisions of the EA.

18. Unfair dismissal, relative to union participation and redundancy, is found at Section 36 and 37 of the EA which provides:

> 36. (1) For the purposes of this Part, the dismissal of an employee by an employer shall be regarded as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee —
> (a) was, or proposed to become, a member of an independent trade union;
> (b) had taken, or proposed to take, part at any appropriate time in the activities of an independent trade union; or
> (c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused or proposed to refuse to become or remain a member.
>
> (2) Any reason by virtue of which a dismissal is to be regarded as unfair in consequence of subsection (1) is in this Part referred to as an "inadmissible reason".
>
> (3) In subsection (1) "appropriate time" in relation to an employee taking part in the activities of a trade union, means time which either —
> (a) is outside his working hours; or
> (b) is a time within his working hours at which, in accordance with prior arrangements agreed with or consent given by his employer, it is permissible for him to take part in those activities, and in this subsection "working hours", in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work. Right of employee.
>
> (4) In this section, unless the context otherwise requires, references to a trade union include references to a branch or section of a trade union.

37. Where the reason or principal reason for the dismissal of an employee was redundancy but it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by him and who have not been dismissed by the employer and either —

(a) that the reason (or, if more than one, the principal reason) for which he was selected for dismissal was an inadmissible reason; or

(b) that he was selected for dismissal in contravention of a customary arrangement or agreed procedure relating to redundancy and there were no special reasons justifying a departure from that arrangement or procedure in his case,

then for the purposes of this Part the dismissal shall be regarded as unfair.

19. As I had found in relation to the question of redundancy, I do not find that the facts of this case lend to a finding of any infringement of section 36 and 37 as the entirety of the non-managerial staff has been terminated. I am not satisfied that the plaintiffs were made redundant or that their connection with the union was a basis upon which they were terminated.

20. Whilst the conspiracy advanced by the plaintiffs as to retribution by the employer for the drastic step of proffering criminal charges against its executive managers are indeed believable, the evidence does not lead me to find on a balance of probability that the plaintiffs' union affiliations were the cause of the terminations. Where the entirety of the line staff, the entire bargaining unit as well as non-union members, is terminated, it is difficult to assert, without more, that the presidency in the union or indeed the membership in the union is basis for the termination.

21. Further this is not a case where the plaintiffs have been made redundant and others holding positions similar to them continue in the defendants employ, so as to invoke Section 37.

Duress

22. As to the question of signing the documents under duress, I rely of the dicta of ***Osadebay JA*** in ***Bahamas Electricity v Smith*** **[2007] 5 BHS No. 244** at paras

47-52. ***Osadebay JA*** relied on the Privy Council decision in Pao On and ors v Lau Yin Long where Lord Scarman delivering the decision of the Board stated:

> Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J. in *The "Siboen" and the "Sibotre"* [1976] 1 Lloyd's Rep. 293 at p. 336 that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent": *loc. cit.* This conception is in line with what was said in this Board's decision in *Barton v. Armstrong* [1976] AC 104 at p. 121 by Lord Wilberforce and Lord Simon of Glaisdale—observations with which the majority judgment appears to be hi agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v. Homer* [1915] 3 K.B. 106, relevant in determining whether he acted voluntarily or not.

23. I find that there is no evidence from which any conclusion can reasonably be drawn that either of the plaintiffs were coerced into executing the Deed of Release or that duress in any form was exerted on either of them to cause them to execute the deed of release. There was no evidence or outcry as to the requirement to execute the deed either at the time of execution or thereafter. The evidence of Williams, which was not contested, was that the first time the defendant became aware that there was a problem was the receipt of the Writ of Summons commencing this action.

24. In all the circumstances both claims are dismissed with costs to the defendant to be taxed if not agreed.

Dated this 28th day of January 2019

Ian Winder

Justice