

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMERCIAL DIVISION
2006/COM/lab/FP0005

BETWEEN

DARVIN RUSSELL

Plaintiff

AND

FREEPORT CONCRETE COMPANY LIMITED

Defendant

BEFORE: The Honourable Mrs Justice Estelle Gray Evans (Acting)
APPEARANCES: Mr Harvey O. Tynes, Q.C. along with Miss Ntshonda Tynes
for the Plaintiff
Mr Roy Sweeting for the Defendant
HEARING DATE: 30 June 2008

JUDGMENT

Gray Evans, J. (Ag.)

THE APPLICATION

1. By a specially indorsed writ of summons filed 3 May 2006, the plaintiff claimed against the defendant damages in the sum of \$82,918.02 together with interest and costs as a result of the wrongful determination by the defendant of the plaintiff's employment without cause.
2. The action came on for trial on 30 June 2008.
3. The parties have agreed the following facts and issue as evidenced by the agreed statement thereof filed herein:

Statement of Agreed Facts

- (1)** By an agreement in writing dated 30 December 2004 and made between the plaintiff and the defendant the plaintiff agreed to serve the defendant and the defendant agreed to employ the plaintiff as Chief Financial Officer for a fixed term commencing on 20 April 2004 and ending on 31 December 2005 at an annual salary of \$72,000.00.
- (2)** The Agreement expressly provided that the plaintiff was entitled to a housing allowance of \$1,400.00 per month, an annual bonus of not less than \$5,000.00 per year, medical insurance allowance of \$500.00 per month, the use of a company vehicle and three (3) weeks paid vacation.
- (3)** The Agreement expressly provided that it was "renewable annually."
- (4)** The agreement contained no stipulation as to notice of termination.
- (5)** Following the expiration of the initial fixed period of employment, on or about the 1st January 2006 the defendant continued to employ the plaintiff and the plaintiff continued to serve the defendant as Chief Financial Officer.
- (6)** The parties neither discussed between themselves nor expressly agreed that the continuation of the plaintiff's employment on or about the 1st January 2006 amounted to a renewal of the contract.
- (7)** The parties neither discussed between themselves nor expressly agreed that the continuation of the plaintiff's employment on or about the 1st January 2006 amounted to a different contractual arrangement with different terms.
- (8)** By letter dated 3 March 2006, the defendant determined the plaintiff's employment.

Statement of Agreed Issue

The main issue in dispute between the parties is the meaning and effect to be given to the words "renewable annually" in a Contract of Employment made in writing between the Defendant as employer.

- 4.** The plaintiff's evidence is that in 2004 he became aware of an advertisement by the defendant for a Chief Financial Officer. That at the time he was living in Connecticut and working with General Motors as the Finance Manager/Director in New York, USA; that he applied for the job and was eventually hired by the defendant.
- 5.** He said that he was initially engaged by the defendant on a fixed term contract for the period 20 April 2004 until 31 August 2005; that the expiration date of the contract coincided with the defendant's financial year end.
- 6.** The terms of the initial agreement were set out in a letter from the defendant dated 10 March 2004 as follows:

"Dear Darwin,

I am pleased to offer you the position of Chief Financial Officer for Freeport Concrete Company Limited effective April 20th 2004.

As discussed, I am offering you the following:

- Annual salary B\$72,000.

- Annual bonus based on your performance and the net profit of the company. This bonus will be in the form of either a cash payment, the granting of shares, or share options. The value of the bonus will be anywhere from B\$1,000 up to a maximum of B\$10,000.
- Medical insurance coverage up to a maximum monthly payment of B\$500.
- Company vehicle. This will probably be the Jeep Cherokee that I am currently driving.
- Three weeks paid annual vacation.

As our financial year ends on August 31st I would like to propose that your contract with the company and the above mentioned 'employment package' is valid from April 20th 2004 until August 31st 2005.

If you are willing to accept the position based on the above mentioned offer, then please print out this letter, sign it as your acceptance and fax it to me at my private fax number 242-352-6802.

Should you accept the position I will eventually need to see proof of Bahamian citizenship, a reference from your current employer, as well as copies of educational achievements.

Looking forward to your response.

Best regards
(signature)
Ray Simpson
Chief executive Officer"

7. The plaintiff said that after signing that letter signifying his agreement to its terms, but before taking up his appointment he sent the following email to Mr Simpson on 19 March 2004:

"Ray Good Afternoon,

Just as a point of clarification. The clause in my offer letter that refers to the contract expiring in August of 2005, I always assumed this was standard and the contract was renewable. Please advise if my assumption was correct and what would the requirements be for it to be renewed.

Kindest Regards,
Darvin Russell"

8. That in response he received the following email from Mr Simpson on 20 March 2004:-

"Hi Darvin,

Yes of course the contract is renewable and will be renewed subject to you having done a good job to August 31st 2005 and us agreeing new terms. Providing the company is growing and profits are increasing, or holding steady, and you have been part of helping that sustained growth, then, unless you make outrageous demands or the two of us have major problems working together, the renewal of your contract will be a given.

Best regards
Ray"

9. The plaintiff said that Mr Simpson's response was sufficient assurance for him to leave his job in New York and return to The Bahamas with his family.

10. The plaintiff commenced employment on 30 April 2004 as the Chief Financial Officer of the defendant. He said that after working with the defendant for eight (8) months he was "moved...to discuss several provisions of his contract with Mr Simpson". His being "moved" apparently was as a result of him obtaining information that other employees were getting benefits which he was not and which he thought he should have been receiving. His meeting with Mr Simpson resulted in an amendment to his contract as evidenced in the following letter dated 30 December 2004:

"Dear Darwin,

Re: Employment Contract

On behalf of Freeport Concrete Company I am authorized to offer you the following amended contract to serve as our Chief Financial Officer effective April 20th, 2004 through December 31st, 2005. In accordance with this agreement I am prepared to offer you a salary of B\$72,000.00. It should also be noted that in addition to the agreed upon salary the following terms and conditions of your employment do also apply but are not limited to:

- Housing Allowance - \$1,400/month effective January 1, 2005.
- Annual Bonus - \$5,000 - \$10,000 per year based on company performance. Remuneration can be in the form of shares or cash. The determination to be based on CEO's discretion.
- Medical Insurance Allowance - \$500/monthly to cover the cost associated with a comparable plan in the United States.
- Company vehicle.
- 3 Weeks Paid Annual Vacation.

It should also be noted that the contract is renewable annually and also contains a non-compete clause that prohibits the CFO upon his cessation of employment for any reason from operating or controlling a building supply or concrete company in Freeport, Grand Bahama. The prohibition does not apply to operations based solely in New Providence or any other family island that Freeport Concrete Company and its subsidiaries does not currently operate in. Additionally, it does not cover any involvement in a company based exclusively in the United States. The duration of the non-compete clause shall not exceed 3 years from the date employee's employment ends.

In the event the agreement as drafted is satisfactory please indicate by signing and dating below.

Kindest Regards,
(Signed)
Raymond Simpson
Chief Executive Officer

(Signed)
Darvin Russell
Chief Financial Officer"

11. The plaintiff's evidence is that in addition to the benefits set out in the said letter of 30 December 2004, he also received a cellular telephone as well as a gas allowance.

12. He said that on Friday, 3 March 2006 he was called to Mr Simpson's office and presented with two (2) letters – one was a letter of resignation and one was a letter of termination; that he was invited by Mr Simpson either to sign the letter of resignation or to accept the letter of termination; that Mr Simpson said it did not matter to him which one the plaintiff chose, but that he was to hand in the keys for the company's vehicle and return the cell phone; that he had until the end of that day to leave the premises and take his stuff. He said that he refused to sign the letter of resignation and was given the letter of termination, the contents of which are set out hereunder:

"Dear Mr. Russell,

Re: Employment as Chief Financial Officer
by Freeport Concrete Company Limited

This letter serves as notice to you of the termination of your employment as the Chief Financial Officer of Freeport Concrete Company Limited effective immediately.

Kindly turn in your office keys, and company cellular telephone immediately. I confirm that you may indicate a time convenient to you after office hours when you may wish to attend at the Peel Street office to collect any personal possessions which you may have in the office.

I also request that you remove all personal possessions from the company car and return the same, together with the keys, to the Peel Street location by 4pm today.

I confirm that a cheque shall be made available for your collection, or for delivery to you should you so indicate, on Monday 6th March, 2005 inclusive of your notice payment together with all accrued entitlements.

Kindly direct any inquiries which you may have to me at the office telephone number or at my cellular number, both of which are known to you.

Yours sincerely,
(Signature)
Raymond Simpson
President"

13. The plaintiff's evidence is that notwithstanding the matters mentioned by Mr Simpson in his email of 20 March 2004 as possible reasons for the contract not being renewed, he was not told that he was being terminated for any of those reasons; that in

fact he was given no reasons orally or in writing for his summary termination, consequently he says that he was terminated on 3 March 2006 without cause.

14. As regards the company's growth and profitability during the period of his employment i.e. 20 April 2004 to 3 March 2006, the plaintiff said that for the year ended 31 August 2004 the defendant earned a profit, but for the first full year that he was with the defendant, that is the year ended 31 August 2005, as well as the year ended 31 August 2006, it did not. He indicated that the last financial statement which would have been published while he was still employed by the defendant was for November 2005 and so far as he could recall, the company had suffered a minimal loss.

15. The plaintiff said that he and Mr Simpson had no major problems working together, although they did have a disagreement shortly (within a week or 2) before his termination. The disagreement he said was as a result of an email which the plaintiff had sent to Mr Simpson raising concerns about some of Mr Simpson's financial decisions relative to the defendant company.

16. Counsel for the defendant also put to the plaintiff, which he denied, that when he inquired of Mr Simpson why he was being terminated, he was told by Mr Simpson said it was because of his performance.

17. However, none of the above as a possible reason was given, apparently not orally, or in the said termination letter.

18. It is the plaintiff's evidence that as a result of his termination, he suffered the losses set out in his statement of claim, as amended by his viva voce evidence.

19. At the time of his termination the plaintiff said he received a cheque in the sum of \$25,498.65 which he acknowledges ought to be deducted from the funds, if any, this court may find to be due to him. In his statement of claim, the plaintiff quantified his losses as follows and claimed the sum of \$82,918.02 together with interest and costs.

Particulars of Special Damage

1 Salary	\$60,000.00
2 Housing Allowance	12,600.00
3 Medical Insurance Allowance	5,000.00
4 Prorated Bonus	16,666.67
5 Cellular Phone Allowance	2,500.00
6 Use of Company vehicle	3,250.00
7 Gas Allowance	2,400.00
8 Accrued Vacation (through 3/3/06)	6,000.00
	\$108,416.67
Less amount received	<u>25,498.65</u>
TOTAL	<u>\$82,918.02</u>

20. Although the defendant filed a defence on 13 June 2006, it opted not to call any witnesses and offered no evidence in opposition to the plaintiff's claim.

21. However, counsel for the defendant drew to the court's attention that the contract dated 10 March 2004 tendered in evidence by the plaintiff, to which he had not objected, was not mentioned in the statement of claim nor the defence and in his submission, the contract which the plaintiff alleges to have been breached by the defendant is the one dated 30 December 2004 and pleaded in the statement of claim.

22. Nevertheless, he submitted, although, in his view, the plaintiff may have "strayed somewhat afield from his case as pleaded", there was no substantial dispute of facts or issues in this case as evidenced by the Agreed Statement of Facts and Issues set out above.

23. In the end, the parties agreed that, assuming the facts, which are in essence agreed, to be correct, the real issue to be determined by this court is: "what was the employment relationship between the plaintiff and the defendant after 31 December 2005"?

24. As indicated above, the parties agree that the contract of 30 December 2004 was a fixed-term contract, renewable annually, although no mechanism was provided for its renewal or early termination.

25. Counsel for the plaintiff submitted that where a fixed term employment agreement expressly provides that it is "renewable annually" and each party continues to perform its obligations stipulated in the agreement after the expiration of the fixed term, the parties are deemed to have renewed the agreement by their continued performance.

26. Consequently, the plaintiff submits, on or about 1 January 2006, when the defendant continued to employ the plaintiff as Chief Financial Officer, the parties' mutual continued performance of the obligations under the agreement amounted to a renewal of the employment agreement on the same terms and conditions for a further fixed period of 12 months to expire on 31 December 2006. So the defendant's termination of the plaintiff on 3 March 2006 was wrongful and in breach of the agreement; that as a result, the plaintiff was entitled to be paid the balance of his salary and benefits for the period up to 31 December 2006.

27. Mr Tynes drew the court's attention to the fact that the letter dated 30 December 2004 indicated that the contract therein was an amended contract and he submitted that although the plaintiff's statement of claim referred to an agreement dated 30 December 2004, that document was actually an amendment to the original agreement between the parties; that, in fact, the agreement between the parties comprised the initial agreement contained in the letter dated 10 March 2004, the said emails dated 19 and 20 March 2004 respectively and the letter dated 30 December 2004.

28. Mr Tynes also drew the court's attention to what he called "*very important words in the amended contract*" i.e. the words: "*but are not limited to*" following the words "*It should be noted that in addition to the agreed upon salary the following terms and conditions of your employment do also apply...*," and he submitted that it was clear that the 30 December 2004 document was saying that there may be terms and conditions that may apply but which were not necessarily incorporated in that document.

29. Counsel for the plaintiff submitted further that the contents of the said emails were part and parcel of the original terms of employment of the plaintiff by the defendant company and that the import of the words "*renewal will be a given*" in the email by Mr Simpson in response to the plaintiff's inquiry as to what would be the requirements for renewal, was that unless the employer raised one of the matters mentioned in his email as a basis for not renewing the contract, renewal of the contract was "a given."

30. In counsel for the plaintiff's submission, there were changes made to the original contract to the extent that the document of 30 December 2004 purports to be an amending document and contains provisions different from the 10 March document. However, he submitted, the representation by Mr Simpson in the email of 20 March 2004 that the renewal of the contract would be "a given", which in Mr Tynes' view meant "automatic", had not changed by the document of 30 December 2004, which included the provision that "the contract is renewable annually."

31. Notably, the changes to the initial contract were as follows:

- (1) the plaintiff would receive a housing allowance of \$1,400.00 per month commencing 1 January 2005;
- (2) the minimum annual bonus was increased from \$1,000 to \$5,000 per annum based on company performance;
- (3) the term of the contract was extended to 31 December 2005 to coincide with the calendar year instead of the company's financial year;
- (4) a "renewable annually" term was added; and
- (5) a non-compete clause was added.

32. It was pointed out by counsel on both sides that the contract provided no mechanism for renewal. However, Mr Tynes for the plaintiff submitted that the fact that the contract contained no such mechanism also implied that renewal was automatic; and further, the inclusion of the unqualified phrase "*the contract is renewable annually*" in a fixed-term agreement, in his view, demonstrated the contemplation of automatic renewal by the parties.

33. In support of the plaintiff's position Mr Tynes referred the Court to the case of *Greenland Bank v. American Express Bank*¹ which, although not an employment case, dealt with the issue of fixed-term bonds on which the question of automatic renewal arose.

34. In that case the words which the court was asked to construe were "this guarantee may be renewed for successive periods of one year on the terms thereof or such other terms as we may from time to time agree until 10 June 2013" and the court found that those words contemplated automatic renewal, or as Mr Tynes submitted, that automatic renewal was not "far fetched."

35. In Mr Tynes' further submission, unlike the *Greenland* case in which the question was one of construction of the language used in a document, the words in the contract in this case, he said, were clear: "renewal is a given" which, in his view, meant "automatic."

36. Counsel for the defendant did not share Mr Tynes' view. In his submission, if the Court were to accept the plaintiff's submission that the defendant's continued employment of the plaintiff post 31 December 2005 amounted to an automatic renewal of the agreement for a further term of one year, the Court would be implying an unnecessary term into the contract which would then conflict with an express term, that is, that the agreement was to expire on 31 December 2005.

37. In Mr Sweeting's submission, the phrase "renewable annually" implied that the parties will (or won't) take steps to renew; that is, that they will take some active steps to

¹ [2008] EWHC 421 (Ch)

strike a new agreement to cover the period after the date their expired and if they did not, the contract could not be said to have been renewed.

38. Further, Mr Sweeting, citing the case of *Wilcock v. West Anglia Great Northern Railway Limited*² in support, submitted that “renewable” contracts must be specifically renewed. In that case, the plaintiff was hired by the defendant under a contract that provided “your initial appointment will be on a 2-year renewable contract basis.” The contract also contained a clause excluding any claim for unfair dismissal if the contract was not renewed. When the contract ended it was not renewed and Mr Wilcock applied to the Industrial Tribunal for relief for unfair dismissal. His claim was dismissed and on appeal to the Employment Appeal Tribunal, Mr Justice Lindsay said:

“There is a world of difference it seems to us, between a contract for two years but terminable thereafter on notice, and the contract which was before the Industrial Tribunal. A contract for two years terminable thereafter on notice has a minimum term and runs on automatically if nothing is done, but where one has a contract as here, two years renewable, then unless something is done the contract expires by effluxion of time. Nothing was done and the Industrial Tribunal found it to have expired by effluxion of time”.

and, in counsel for the defendant’s view, the learned judge was saying that one had to do something specific to renew a fixed-term contract. In the submission of counsel for the defendant, as was the case in *Wilcock* so it is with the case at the bar, nothing was done to renew the contract so it expired by effluxion of time.

39. In further support of its contention that the agreement had not been automatically renewed, notwithstanding the plaintiff continuing to work and to be paid by the defendant in accordance with the contract that had expired on 31 December 2005, counsel for the defendant referred the court to the case of *Murgitroyd & Co Ltd v. Purdy*³, a case in which an attorney, Mr Purdy, was hired on a 2-year fixed-term contract with a non-compete clause. At some point Mr Purdy tried to vary the terms of the contract from a fixed-term to an employment contract but could not, so he continued to serve under the fixed-term contract. At the end of the 2-year period nothing was done to renew the fixed-term contract but Mr Purdy continued to work each day until he gave his notice and left *Murgitroyd & Co.* and set up his own business nearby. *Murgitroyd & Co.* sued. Mr Purdy said that the contract had expired and the non-compete clause was no longer effective against him.

40. Counsel for the defendant, relying on *Murgitroyd*, pointed out that the facts in *Murgitroyd* were similar to the case at the Bar, although he conceded that the contract in *Murgitroyd* contained a specific mechanism for renewal, which mechanism was never invoked. However, he relies on the fact that the court in *Murgitroyd* found that the contractual relationship between the parties following the expiry of the original agreement was the same save that Mr Purdy, and in his submission, Mr *Murgitroyd*, could no longer be bound by the fixed period of the agreement. In his further submission, the parties in *Murgitroyd* continued in an indefinite contractual relationship with one another, which he says is precisely the situation in the present case.

41. In Mr Tynes’ view, neither *Murgitroyd* nor *Wilcock* was relevant to the case at the Bar in that *Murgitroyd* specified a mechanism for renewal which was not invoked whereas no such mechanism was specified in this case; and in the case of *Wilcock*, the

² Ch. (1997) UKEAT 1081

³ [2005] IEHC 110 and [2005] IEHC 1159

issue in dispute was not whether or not the contract had come to an end or was renewed but rather whether the provisions in the relevant statute relating to unfair dismissal applied to fixed-term contracts for more than two years.

42. The defendant submitted further that the plaintiff's inquiry as to the requirements for the contract to be renewed was evidence that the plaintiff understood that renewal of the contract was not automatic, but was subject to certain conditions being met.

43. In the defendant's submission, as I understood it, the condition that the parties were to agree new terms was a clear indication that it was intended that they agree new terms before the contract was renewed and since the contract was a fixed-term contract it could not have been renewed without some new specific agreement.

44. Under cross examination the plaintiff responded in the affirmative to a question put to him by counsel for the defendant as to whether he had agreed new terms for the renewal of that contract (i.e. the one dated 10 March 2004). However I note here, as pointed out by counsel for the plaintiff, the letter dated 30 December 2004 was actually an amendment to the contract of 10 March 2004 which was to expire 31 August 2005 and not a renewal as put to the plaintiff and to the extent that changes were made to the initial contract, the document of 30 December 2004 was necessary.

45. Mr Sweeting submitted that on the plaintiff's evidence, the defendant suffered losses during the time the plaintiff was in its employ, so that another of the requirements for renewal was not met.

THE LAW AND THE AUTHORITIES

46. It is not disputed that employer/employee relationships may be created orally or in writing; nor is it disputed that such relationships may be created for an indefinite period or for a fixed term. Employment relationships for indefinite periods may be discontinued at the instance of either party giving the requisite notice and/or compensation. In the case of the latter, the relationship usually ends at the expiration of the fixed term. A problem however arises, as in this case, when the parties continue their relationship after the expiration of the fixed term without discussing or expressly agreeing that the relationship would continue and on what terms.

47. It is also not disputed that the parties were operating under a fixed-term contract of employment up to 31 December 2005. The issue, as stated above, is what was their contractual relationship post December 31 2005 when the plaintiff continued to work for and be paid by the defendant?

48. The plaintiff says it was a fixed-term contract on the same terms and conditions as the contract which expired on 31 December 2005 and he was entitled to his salary and benefits for the remainder of the contract period, that is, to 31 December 2006.

49. The defendant says it was an open-ended contract of employment terminable on reasonable notice, in which case the defendant was entitled, as it did, to look to section 29 of the Employment Act, 2001, to determine what was reasonable notice and compensation to which an employee of the plaintiff's position would be entitled; that it was on the basis of section 29 that the plaintiff was paid \$25,498.65 in lieu of notice.

50. Mr Tynes for the plaintiff submitted that section 29 of the Employment Act, 2001, did not apply to fixed-term contracts. In his view, assuming that the contract was

renewed for a further period of one (1) year, the language of section 29 makes it clear that it did not apply to contracts for a fixed period.

51. Mr Sweeting, in his closing submissions, appeared to be resiling from a position he had taken earlier, that is, that Mr Tynes was “probably absolutely correct” to say that section 29 did not apply to fixed-term contracts. His new position seemed to be that he was not sure that the section did not apply to fixed-term contracts as, in his view, it did not make any distinction between fixed-term contracts and open-ended contracts of employment.

52. However, as I understood Mr Sweeting's submission, in this case, the fixed-term contract having expired, the contract that was in place at the date of the plaintiff's termination was an open-ended contract and section 29 was where one looked to determine notice and compensation when dealing with such contracts. So in the end, I am not certain that Mr Sweeting was maintaining his submission that section 29 applied to fixed-term contracts.

53. On the other hand, Mr Tynes' position was that at the date of his termination the plaintiff was on a fixed-term contract and the defendant could not use or rely on the provisions of section 29 to terminate its relationship with the plaintiff, because to do so would amount to a breach of the defendant's contractual obligations, which is really the basis of the plaintiff's claim.

54. Mr Tynes also referred to the case of Paula Deveaux v. Bank of The Bahamas⁴ in which their Lordships pointed out that the Employment Act, 2001, was not a codification of the Common Law.

55. It is clear that section 29 of the Employment Act, 2001, makes provision for the minimum period of notice required to be given by an employer to terminate the contract of employment of an employee. However, in my view, by the nature of fixed term contracts, the provisions of section 29 of the Employment Act would not apply to them, and I so find.

56. As regards the authorities cited by counsel on both side, I note here that none of them were “on all fours” with the present case and of those cited, none were local cases. Further, in my view each of the cases is distinguishable from the present case on their own facts and each of them included a mechanism for renewal, whereas no such mechanism was included in the contract between the parties in this case.

57. Mutuality of intention is the essence of contract, employment or otherwise. Parties may agree whatever they wish and in this case, they were free to continue or discontinue their relationship after 31 December 2005, or to come to a new agreement on different terms. The defendant had no obligation to continue employing the plaintiff after the 31 December 2005 and I accept counsel for the defendant's submission that the words “renewable annually” implied that the “parties will (or won't) take steps to renew” the contract.

58. However, the defendant having given the plaintiff its assurance that “renewal would be a given” provided certain conditions were met, and not having informed the plaintiff on or before the expiration of the contract on 31 December 2005 that the contract would not be renewed because one or more of the aforesaid conditions had not been met, in those circumstances, in my view, the words “renewable annually” coupled

with the words "renewal would be a given" imply that renewal of the contract would be automatic, unless one or more of the aforesaid conditions were not met.

59. I therefore accept the plaintiff's contention that the contractual relationship between the parties post 31 December 2005 was one of a fixed-term nature on the same terms and conditions, including the fixed term for one (1) year to expire on 31 December 2006.

FINDINGS

60. On the totality of the evidence, the authorities so far as they are relevant to the issues at hand and the submissions of counsel, I make the following findings:

- a. That the fixed-term agreement between the parties which expired on 31 December 2005 comprised the terms set out in the letter of the 10 March 2004, the emails of the 19 and 20 March 2004 and the letter dated 31 December 2004.
- b. That the relationship between the parties after 31 December 2005 was one of a fixed-term contract on the same terms and conditions as the contract which expired on 31 December 2005, which contract had been renewed on the same terms and conditions for a further period of twelve (12) months from 1 January 2006.
- c. That the defendant's purported termination of the plaintiff by letter dated 3 March 2006 was wrongful and in breach of the said contract and that the plaintiff is entitled to damages which damages were sufficiently mitigated, to the extent that they needed to be mitigated, by the plaintiff's attempts to secure other employment for the period up to and including 31 December 2006, and not having secured such employment until July 2007.

ASSESSMENT OF DAMAGES

61. The contract provided for the following payments to the plaintiff:

- | | | |
|----|--------------------------------|------------------------------|
| a. | Salary | \$72,000 per annum |
| b. | Housing | \$1,400 per month |
| c. | Medical Insurance | \$500.00 per month |
| d. | Bonus | \$5,000 - \$10,000 per annum |
| e. | 3-weeks vacation pay per annum | \$1,384.62 per week |

62. The plaintiff says that except for the claims for housing allowance and pro-rated bonus, all of his claims were calculated for the 10-month period between March and December 2006 and on the basis that his continued employment with the defendant after 31 December 2005 was on a fixed-term contract for one (1) year.

63. As regards the housing allowance, the plaintiff testified and the defendant confirmed that he had been paid his housing allowance for the month of March. He therefore claimed the sum of \$12,600.00 as housing allowance for the 9-month period from April to December 2006.

64. The plaintiff's claims for loss of salary in the sum of \$60,000.00, loss of housing allowance in the sum of \$12,600.00 and loss of medical insurance premium allowance in the sum of \$5,000.00 are all allowed.

65. The plaintiff said that for the period April 2004 to April 2005 he received a \$10,000.00 bonus; that he was terminated approximately one (1) month before he was due to be paid another annual bonus. Consequently he claims the sum of \$16,666.67 for the 20-month period April 2005 to December 2006 at \$10,000.00 per annum.

66. On the plaintiff's evidence, although the company earned a profit in the first fiscal year that he was there, the defendant did in fact have losses for the periods ending August 2005 and August 2006. It appears from the contract that regardless as to the company's profitability the plaintiff was entitled to a bonus of at least \$5,000.00 per annum. However, on the assumption that the lower end of the range would be on the basis of the company not doing so well, I would allow the sum of \$8,333.33 as loss of bonus for the 20-month period April 2005 to December 2006 at \$5,000.00 per annum.

67. The plaintiff also claimed the sum of \$6,000.00 as accrued vacation. He was entitled under the contract to three (3) weeks vacation per annum. His evidence, which was not controverted or denied by the defendant, is that up to 3 March 2006 he had only taken two (2) weeks' vacation and he was therefore owed an additional four (4) weeks' vacation pay @ \$1,384.61 per week. The sum of \$5,538.44 is therefore allowed under this item.

68. The contract provided for the plaintiff to have the use of a company vehicle. He said he used the vehicle for business as well as personal purposes and that he was also provided with gasoline. He calculated his loss on the basis of an estimated lease payment @ \$325.00 per month for a vehicle. In his estimation, to rent a vehicle for a month would normally be in the region of \$1,000.00 per month, much less than he was claiming. He pegged his loss at \$3,250.00.

69. As regards the gasoline allowance, the plaintiff said that his gasoline bill for the vehicle provided by the defendant was approximately \$60.00 per week or \$240.00 per month. In his estimate, approximately 70% of the gasoline usage was for personal and he estimated his loss at approximately \$168.00 per month. He therefore amended his claim under this item from \$2,400.00 to \$1,680.00.

70. The plaintiff said he was provided with a cellular telephone by the defendant which he used for business as well as personal purposes; that the telephone bill was about \$250.00 per month and of that sum he attributed about \$50.00 to \$100.00 to his personal use. He therefore amended his claim under this item from \$2,500.00 to between \$500.00 and \$1,000.00.

71. In my view, the plaintiff's claims for use of the company vehicle, gas allowance and use of a cellular telephone ought not to be allowed for two (2) reasons.

72. Firstly, those items are claimed as special damages which must not only be pleaded, but also proven, and unlike the other items for which specific monetary value was provided in the contract, the plaintiff provided no "evidence" other than his word or ipse dixit therefor. See the following dicta of the Learned Justices of Appeal in the case of *George Lubin v. Miriam Major*5:

"....a person who alleges special damage must prove the same. It is not in general sufficient for him merely to plead special damage and thereafter recite on oath the same facts or give evidence in an affidavit without any supporting credible evidence aliunde and sit back expecting

the tribunal of fact to accept his evidence as true in its entirety, merely because the aforesaid evidence is not controverted.....”

73. Secondly, in my view, those items fall into the group referred to by the Court of Appeal in the case of *Lyford Cay Members Club Limited v. Nabil Chahwan*⁶ as “non-convertible items.”

74. In that case the judgment of the court was delivered by Hall, JA, as he then was and with whom the other justices agreed. Hall, JA at pages 6 and 7 said:

“...It would be noted that the Tribunal included all of Mr Chahwan’s benefits and, even if this was permissible, it is not always apparent on what basis the items were quantified. We must, however, decide whether all of the items were properly included and, in my view, some were not.

Many modern contracts of employment in addition to a basic salary, confers on employees – particularly Senior Managers – a basket of benefits, for example, housing and transportation allowances, which enhance the value of the basic salary by reducing the calls on that salary to meet the usual incidents of living and working. There are a variety of reasons for so separating the employee’s total package of remuneration. The more obvious are to reduce the liability of the employer to have his “income” taxed or, from the perspective of the employee, to reduce the composition of what would be the employee “pensionable emoluments.” When a court has to decide which, if any, of the items in such a basket should be taken into account in determining the salary of an employee, in the absence of clear words in the contract of employment, the court would have to devise a method by which to assess each item.

I am aware of no general guideline in this regard and I would take the pragmatic approach of considering whether the item in question is one which, if the employee did not take advantage of it during the continuation of his employment he would be entitled to take, instead, the cash equivalent to do with as he preferred. If the item is so receivable as cash at the option of the employee, I would consider it a “convertible” item, that is, one for which he should receive the cash equivalent if he is prematurely terminated. Any benefit which, if not taken advantage during the continuation of his employment would be lost, I regard as non-convertible” and merely an incident to the actual performance of his duties. (Underline mine).

75. So, applying the test in the *Lyford Cay* case above, as I understand it, I would allow the plaintiff damages in the sum of \$91,471.77 made up as follows:

1 Salary @\$72,000 p.a. for 10 mths	\$60,000.00
2 Housing Allowance @ \$1,400 p.a. for 9 mths	12,600.00
3 Medical Insurance Allowance @\$500 p.a. for 10 mths	5,000.00
4 Prorated Bonus \$5,000 p.a. for 20 mths	8,333.33
8 Accrued Vacation (4 weeks)	5,538.44
	<hr/>
	\$91,471.77

76. I note here that although the defendant paid the plaintiff and the plaintiff acknowledges having received the sum of \$25,498.65, no evidence was provided by either side as to how that sum was arrived at; the defendant merely said that it paid to the plaintiff in accordance with the guidelines set out in section 29 of the Employment Act.

77. Nevertheless the sum of \$25,498.65 is to be deducted from the aforesaid sum of \$91,471.77.

78. Judgment will therefore be entered for the plaintiff in the sum of \$65,973.12 together with interest at the rate of 10% per annum from the date of judgment until payment.

79. Costs shall be paid by the defendant to the plaintiff, to be taxed if not agreed.

Delivered this 31st day of July A.D. 2008

Estelle G. Gray Evans
Justice (Acting)

