IN THE COURT OF APPEAL OF BELIZE AD 2017

CIVIL APPEAL NO 7 OF 2013

JOSE LUIS MORENO Appellant

v

GAS TOMZA LIMITED Respondent

_____

BEFORE

The Hon Mr Justice Sir Manuel Sosa President
The Hon Mr Justice Dennis Morrison Justice of Appeal
The Hon Mr Justice Samuel Awich Justice of Appeal

O Twist for the appellant.
P Banner for the respondent.

_____

26 March 2015 and 30 May 2017

SIR MANUEL SOSA P

Introduction

[1] On 16 January 2012, Jose Luis Moreno ('Mr Moreno'), thitherto the Manager of the branch of Gas Tomza Limited ('Gas Tomza') at Silk Grass Village in the Stann Creek District ('the Branch'), left the place of business of the Branch never to return. It is common ground between Mr Moreno and Gas Tomza that the former's contract of employment ended on that day. What is primarily in dispute on this appeal, however, is whether it came to an end as a result of breach on the part of Mr Moreno or breach on the part of Gas Tomza. The appeal comes to this Court from a judgment delivered on 14 February 2014 by Legall J ('the Judge') in the court below dismissing Mr Moreno's claim for breach of the contract of employment, with costs.

The claim form and pleadings

[2] The claim form commencing the present litigation was filed in March 2012 and sought payment of the following sums of money as due to Mr Moreno from Gas Tomza for breach of contract:

> '(1) Amount Claimed $169,418.76
>
> (2) Court fees $300.00
>
> (3) Legal Practitioner fixed cost $5000.00
>
> (4) Together with interest from
>
> thereafter duly interest of
>
> _____ per day (*sic*) _____
>
> $174,718.76'

[3] In his statement of case, Mr Moreno alleged that he was employed by Gas Tomza under a contract in writing made on 25 August 2009, to the following un-numbered clauses of which he, by his main averments, particularly (if indirectly) drew attention:

> '**Salary, yearly increases, bonuses and incentives:**
>
> The gross starting salary for this position is at BZD$625.00 weekly less taxes as per the Labor (*sic*) Laws of Belize. Yearly increases and bonuses at the end of each calendar year may be considered and are dependent on sales volumes and profitability of the business. Additionally, the employee is subject to an incentive on sales based on the gallons sold at the end of each month equivalent to one month's salary for sales equaling (*sic*) or exceeding thirty thousand gallons (30,000 gallons) as of September 30, 2009 and for the following months thereafter until the maturity date of this contract.
>
> **Period of Contract and Renewal:**
>
> This contract is valid for a period of six (6) years commencing on August 25, 2009 and expiring on August 25, 2015 at which point either party may opt to renew given the same terms or under new terms.

Termination of Contract before Maturity Date:

This contract may only be terminated before the maturity date if it is proven in a Court of Law that the Employee did not meet any or some of the requirements above-mentioned in the "Terms of Employment". If the contract is terminated before the maturity date then the Company is liable to pay the Employee in *full* payment all moneys due from the termination date to the maturity date of the contract. Both parties may then mutually sign a termination agreement once all moneys due have been paid in full.' (original emphasis)

[4] Mr Moreno further pleaded that, in breach of the last of the clauses set out above ('the termination clause'), his employment was summarily terminated on 16 January 2012 by Gas Tomza, acting by its General Manager (called Judy Jeronimo Talla in Mr Moreno's witness statement but Eduardo Tala Jeronimo in his own witness statement and therefore to be referred to in the remainder of this judgment as 'Mr Jeronimo'). He (Mr Moreno) claimed to be entitled as a result of that breach to –

'a. Incentive on sales - $30,000.00

b. 44 months salary being

period remaining on contract - $110,000.00

c. 44 months rental being

balance due on the remaining

period of the contract - $28,000.00

d. Company related expences (*sic*)

due before termination - $1,418.76

$169,418.76'

[5] Mr Moreno exhibited to his statement of case a copy of the alleged contract of employment.

[6] In its defence, Gas Tomza denied ever having entered into a contract of employment in writing with Mr Moreno and alleged that the sole contract of employment which it had entered into with him was an oral one under which his employment had

commenced on 27 (not 25) August 2009. It averred that the alleged contract of employment exhibited to his statement of case was a fraudulent document.

[7] Gas Tomza went on to plead that it had at no time terminated the employment of Mr Moreno. It alleged that there had been on 16 January 2012 two telephone conversations between Mr Jeronimo and Mr Moreno. The first, which concerned an alleged unauthorised removal of doors from one of Gas Tomza's motor vehicles, had ended when Mr Moreno resorted to 'insulting and vulgar language' and hung up. The second involved Mr Moreno saying he was leaving the workplace and that Mr Jeronimo would thereafter 'know who he (Moreno) is'. Mr Moreno had thus, on the defence of Gas Tomza, abandoned his employment.

The witness statements adduced in evidence

(i) For Mr Moreno

[8] Mr Moreno relied upon witness statements made by himself and two other witnesses.

[9] Exhibited to his own witness statement was the alleged contract of employment in writing.

[10] Paragraph 9 of the statement reads as follows:

> 'I worked faithfully and dutifully for [Gas Tomza] who paid me as per the terms of the contract except for incentive payment due for December, 2010 to December 2011 totaling $30,000.00 Belize dollars made up as follows:
>
> > a. 12 months at $2,500.00 per month or 48 weeks at $625.00 Belize dollars per week ...'

Also exhibited to the statement was a document consisting of several 'Inventory Sheets' purporting to show total monthly sales of gas by the Silk Grass Depot of Gas Tomza from September 2009 to December 2011, inclusive.

[11] Regarding the cause of the termination of contract, Mr Moreno states at paras 10-12 of his statement that –

'10. On 16th January, 2012 at about 3.30 p.m. my employment abruptly came to an end in breach of the terms of the contract when [Gas Tomza's] servant or agent [Mr Geronimo] the General Manager at the time verbally terminated my employment by calling and telling me that I must immediately leave the work station at Silk Grass.

11. At the time I told [Gas Tomza's] agent [Mr Jeronimo] for him to come or send someone for me to hand over the station to, he however told me that he had no time for that and I must just leave the station.

12. On that same date I left the station and had not returned since.'

[12] Mr Manuel E Martin was one of Mr Moreno's two witnesses. According to his witness statement, he was the General Manager of Gas Tomza in Belize in 2009 and was as such authorised to hire and fire Branch Managers throughout Belize. In the discharge of that responsibility, he hired Mr Moreno as Manager of the Branch on 25 August 2009, when he signed, on behalf of Gas Tomza, a contract of employment in writing between it and Mr Moreno. He was no longer employed by Gas Tomza in 2012 and did not know what happened between it and Mr Moreno in that year.

[13] Mr Israel Manzanilla, who was Mr Moreno's other witness, said in his witness statement that he was employed by Gas Tomza as its Accountant/Resource Manager in 2008 and witnessed the signing on 25 August 2009 of a contract 'between' its then General Manager, viz Mr Manuel E Martin, and Mr Moreno.

(ii) For Gas Tomza

[14] Gas Tomza's witnesses, two in number, were Mr Jeronimo and Ms Stivaly Andrade.

[15] In his witness statement, Mr Jeronimo says that he was at the time of trial the General Manager of Gas Tomza in Belize. From October 2008 to August 2010 he worked at the head office of Gas Tomza in Guatemala City but often visited Belize to perform audits of the Belize operations.

[16] According to his statement, Mr Moreno was hired by Gas Tomza as Manager of the Branch on 27 August 2009 under an oral contract by virtue of which his salary was to be $500.00 per week. He remained Manager of the Branch until 16 January 2012, when

he abandoned his work. His employment was at no time terminated by Gas Tomza. Mr Jeronimo's account of the events of 16 January 2012, as set forth at paras 12-13 and 15 of his statement, is as follows:

> '12. ... [O]n the 16th January, 2012 I spoke to Mr. Moreno on two occasions. On the first occasion I spoke to Mr. Moreno by telephone about the unauthorized removal of the doors from a delivery vehicle belonging to Gas Tomza. After I informed Mr. Moreno about this unauthorized removal of the door from the delivery vehicle for no apparent reason Mr Moreno disconnected the phone line after using insulting and vulgar language against me.
>
> 13. Mr. Moreno called me later that day and on that occasion he informed me that he was leaving the Silk Grass Plant and that I would then 'know who he [Moreno] is' ...
>
> 14. ...
>
> 15. At no time did I terminate Mr. Moreno's employment and at no time was I told by Head Office to terminate his employment. Mr. Moreno simply abandoned his job.'

[17] Mr Jeronimo goes on to label the alleged written contract of employment as 'false and fraudulent' and to refer to certain of its clauses as 'fabricated and oppressive clauses ... which demonstrate plainly the fraudulent nature of the said Contract'.

[18] At para 24, the statement reads:

> '24. ... Gas Tomza does not owe Mr. Moreno any commission payments as stated by Mr. Moreno. Gas Tomza did not agree to pay Mr. Moreno commission payments and has not paid Mr. Moreno any commission payment.'

[19] Mr Jeronimo's statement acknowledges that Mr Martin was the General Manager of Gas Tomza at the time of the hiring of Mr Moreno in August 2009 but alleges that Mr Martin was fired 'for incompetence' in or about 2010, when he (Mr Jeronimo) was appointed General Manager. He was, thus, General Manager on 16 January 2012, when, according to the statement, Mr Moreno abandoned his employment.

[20] In regard to Mr Manzanilla, the statement of Mr Jeronimo indicates that he was hired as Accountant in 2008 and is a Justice of the Peace but claims that he 'resigned from his employment with Gas Tomza after he lost certain employment privileges relating to vehicle use and credit for phone'.

[21] Pointing out that the alleged contract in writing does not bear the 'corporate' seal of Gas Tomza, and thus implying that such a seal existed at the relevant time, Mr Jeronimo's statement asserts that no employee of Gas Tomza was authorised to sign such contract and suggestively adds that both Mr Martin and Mr Manzanilla were disgruntled former employees who, together with Mr Moreno, signed the alleged contract on a date later than that of Mr Moreno's hiring (giving a clear indication that such date of signing is believed, by some unidentified person or persons, to be even later than 16 January 2012).

[22] Noteworthily, the statement says at para 23 that –

> '... Since Mr. Moreno abandoned his employment, Gas Tomza's position is that he is not entitled to any payment whatsoever.'

[23] The witness statement of Ms Andrade, for its part, discloses that in 2008 she sought the position of Accountant with Gas Tomza, for which she was unqualified, and was hired instead as a cashier, but that she was subsequently promoted twice: first to the post of Assistant Accountant, in 2009, and then to that of Accountant, in 2011. She says in such statement not only that she herself was not hired under a contract in writing but also that she never saw on the files of Gas Tomza any contract in writing whereby anyone was hired as an employee. Indeed, she goes on categorically to state, at para 18, that 'Gas Tomza does not enter into written contracts of employment with employees'. She further says, at para 19, that she paid Mr Moreno whilst he was employed by Gas Tomza 'a set salary which was reflected on the payroll records' but she omits to say what the amount of such salary was.

[24] Her statement deals with the matter of incentive payments in para 20, which reads:

> '20. Throughout the time as Accountant I have never paid Mr. Moreno any "incentive on sales" as he speaks of in his claim. In fact, neither have I paid any

employee whether management or staff any sum for any "incentive on sales" as described by Mr. Moreno.'

The viva voce evidence at trial

(i) For Mr Moreno

[25] Mr Moreno testified under cross-examination that the alleged contract of employment was prepared by Mr Martin and Mr Manzanilla but that he was present at the time of its preparation and demanded the inclusion in it of certain terms and conditions. He firmly denied that it was prepared after the termination of his employment, insisting that it was prepared at the time of his hiring.

[26] He was questioned as to his own interpretation of the clauses appearing under the sub-headings Period of Contract and Renewal and Termination of Contract before Maturity Date already set out at para **[3]**, above. His answers indicate that, layman that he is, he did not, initially at least, take into account all the words contained in these clauses in interpreting them in the witness box.

[27] Regarding the termination of his employment, he was cross-examined on the basis that he had abandoned such employment. He maintained, however, that, whilst he did leave the plant on 16 January 2012, it was because, at the end of the last of a series of calls made to him by Mr Jeronimo that day, he was ordered by the latter to do just that. (He had, he testified, been accused during the first of those calls of having authorised the removal of a door from one of Gas Tomza's motor vehicles and asked why he had done so.) He stoutly denied that the first call had ended when he hung up on Mr Jeronimo after using filthy language to him and that he had later that same day called Mr Jeronimo and informed him that he was leaving the branch premises.

[28] On the matter of 'incentive payment', Mr Moreno readily accepted that Gas Tomza had never made such a payment to him.

[29] Mr Martin was cross-examined with regard to the alleged contract of employment of Mr Moreno. He gave evidence that such contract was prepared by Mr Manzanilla on his (Mr Martin's) instructions and without any input from Mr Moreno.

[30] Like Mr Moreno, he was questioned about his interpretation of the clauses headed Period of Contract and Renewal and Termination of Contract before Maturity Date. Like

Mr Moreno also, he, himself a layman, interpreted the contract without taking into account every word of it.

[31] Under further cross-examination, Mr Martin indicated that, whilst it was true that Mr Moreno, a Branch Manager, was unique in that he had a contract of employment in writing, the fact was that the other branches of Gas Tomza in Belize had supervisors only, not Branch Managers. Moreover, it was a fact within his knowledge that the contract had been placed in a file in the office of the General Manager of Gas Tomza whilst he occupied that post.

[32] When Ms Banner put it to Mr Martin that Mr Moreno was paid only $500.00 per week when he started working, he flatly disagreed; and she, evidently having no interest in hearing him (Mr Martin) bring up the higher amount of $625.00, quickly moved on to another topic.

[33] Towards the end of her cross-examination, Ms Banner put it quite bluntly to Mr Martin that the alleged contract was 'a fake', eliciting from him the monosyllabic reply that had to have been expected, ie No. Her follow-up, an equally blunt suggestion that it was manufactured when Mr Moreno was no longer in the employ of Gas Tomza, drew a similar negative reply.

[34] Mr Manzanilla, the second witness, as already indicated, of Mr Moreno, said in the course of cross-examination by Ms Banner that he resigned from his position as Accountant at Gas Tomza but not because of the loss of privileges.

[35] He further stated that he assisted in the preparation of the alleged contract of Mr Moreno after Mr Martin dictated most of its content to him.

(ii) For Gas Tomza

[36] Under cross-examination by Mr Twist, Mr Jeronimo stated that the only type of payment other than salary made by Gas Tomza to Mr Moreno during the course of his employment as Manager of the Branch was a rent allowance.

[37] He further said that he had succeeded Mr Martin as General Manager and that as such he had authority to hire and fire. He maintained, however, that Mr Moreno, far from having been fired, had walked off the job.

[38] As regards the contract of Mr Moreno, he said, in general, that Gas Tomza had no written contract with any employee and, in particular, that Mr Martin had lacked the authority to make a contract with Mr Moreno. (It is not clear from the relevant part of the judge's note, as reproduced in the record, at page 75, that the witness was speaking here only of a contract in writing; but he may well have been.) He said, furthermore, that the alleged contract was a fraud perpetrated by three former employees who desired to 'put the company into bankruptcy'.

[39] Ms Andrade, for her part, maintained in cross-examination that she was unable to find a written contract of employment in the offices of Gas Tomza; but she accepted that that did not mean that such a contract did not exist.

The judgment in the court below

[40] The Judge regarded the question already singled out at para **[1]**, above, as the sole question he was required to answer in disposing of Mr Moreno's claim. His answer to that question, viz whether the latter's contract of employment was terminated by breach on the part of Gas Tomza or breach on the part of Mr Moreno himself is to be found in paras 7-9 of his judgment, which read as follows:

> '7. It seems strange to me that [Mr Moreno] who worked with [Gas Tomza] for over two and a half years, and who having given, to use his own words "all my work for the company," and who knew, according to the alleged termination clause of the written agreement (which we will examine below), that only the court could terminate the alleged written contract before 25th August, 2015, would believe that his employment was terminated by a telephone call from the General Manager telling him to leave the plant, assuming that that was stated during the call. In addition, the evidence is that [Mr Moreno] carried on his own business in selling butane gas between 1998 and 2006 for about eight years. He is an experienced businessman. His experience would have told him to enquire from Mr. Jeronimo what he meant by telling him to leave immediately the plant; or insist on something in writing of the alleged termination. Assuming Jeronimo told him that on the phone, and considering all of the above matters, I think [Mr Moreno] acted rashly and inappropriately in leaving his employment and not returning. Bearing in mind his termination clause in the contract, he ought to have stood his ground. Even

apart from that, he ought to have enquired from Jeronimo before leaving the work station, the import of his alleged exhortation to leave the work station.

8. Considering that there was an allegation by Jeronimo that [Mr Moreno] was responsible for the removal of the door from the vehicle, it may well be that since Jeronimo believed that, he therefore told [Mr Moreno] to leave the station, meaning to terminate his employment for being responsible, as Branch Manager, for the missing door. On the other hand, it may well have been that since [Mr Moreno] knew of the favourable termination clause below, he decided to take the opportunity, on being suspected of removing the door, to benefit from the favourable provisions of the termination clause of his alleged written contract.

9. The burden is on [Mr Moreno] to prove that Jeronimo told him to leave the station; and by telling him so, Jeronimo meant to terminate his employment. I am not satisfied on the evidence, and on a balance of probabilities, that [Mr Moreno] has proven that Jeronimo told him so, and that he meant to terminate the employment of [Mr Moreno]. Since [Mr Moreno] said that he did not return to the job, I am satisfied, on a balance of probabilities, that he abandoned his job. This is enough to dispose of this case.'

[41] Although it was not, in his opinion, necessary to do so, the Judge went on to consider whether there was a contract of employment in writing made between Gas Tomza and Mr Moreno. In the event, he devoted more than a half of his judgment to the two-fold question whether there was, first of all, a written contract and, if so, what was its effect, if any.

[42] In deciding whether there was a written contract, the Judge had before him, as has already been pointed out above, two conflicting allegations of fact. Mr Jeronimo and Ms Andrade, on the one hand, gave evidence tending to show there was no such contract. Mr Moreno, Mr Martin and Mr Manzanilla, on the other, all gave evidence tending to show that there was. Having analysed the evidence of both sides, the Judge said at para 18 of his judgment:

'18. I am not satisfied that the discrepancies in the evidence, and the fact that Martin, Manzanilla and [Mr Moreno] are no longer in the service of [Gas Tomza], affect the credibility of these witnesses that the making of the agreement was not

false or (*sic*) fraudulent, when the totality of their evidence is considered. I accept the evidence of [Mr Moreno] and Manzanilla, that [Mr Moreno], Martin and Manzanilla were involved in the process of making terms of the written agreement of employment and that it was made for and on behalf of [Gas Tomza]. I am also satisfied on the evidence that both of them signed the agreement which was witnessed by the Justice of the Peace Manzanilla.'

[43] The Judge thus found that Gas Tomza and Mr Moreno had, on 27 August 2009, entered into a contract of employment, which was neither false nor fraudulent. He then went on to examine the termination clause and, having done so, reached the conclusion that it was so uncertain as to be unenforceable. Refraining from examining any other clause of the contract in the light of the claims for relief before him, the Judge said, at para 23:

'There are other clauses of the contract dealing with remuneration and the duration of the contract; but in the light of my finding above that [Mr Moreno] abandoned his job, I do not see the necessity to address these other clauses of the contract.'

[44] It was thus that the Judge, as already indicated above, dismissed the entire claim of Mr Moreno with costs.

The grounds of appeal

[45] The four grounds of appeal, which were referred to as 3a-3d in the appellant's notice of appeal, but which will, in the interests of simplicity, be referred to in the remainder of this judgment as grounds 1-4, were as follows:

'[1] [The Judge] erred in law in finding and holding that [Mr Moreno] abandoned his job with [Gas Tomza] (refer paragraph 9 of the judgment); [Mr Moreno] say (*sic*) that the finding of facts (*sic*) is inconsistent with the evidence.

[2] [The Judge] erred in law in finding and holding that [the termination clause] was ambiguous and uncertain/vague and therefore enforceable (*sic*) (refer paragraph 22 of judgment); [Mr Moreno] say (*sic*) that the termination clause was certain or clear beyond peradventure.

[3] [The Judge] erred in law when he ordered Mr Moreno to pay cost of $5000.00 to Gas Tomza (refer paragraph 2 of perfected order dated 26.2.2013) since the ...

judge indicated that the contract of employment between [Mr Moreno] and [Gas Tomza] save and except the termination clause therefore the benefits accrued by [Mr Moreno] as a result of the valid part of the contract ought to have been declared in his favor (*sic*) along with interest and cost (*sic*). The parts of the contract are as follows:

> I. Incentive allowance of $30,000.00 earned between 30 December, 2010 and December, 2011 (re paragraph 7A of Statement of Case).
>
> II. Company related expenses of $1,418.78 due before alleged abandonment (re paragraph 7D of Statement of Case).
>
> III. Balance due and owing to [Mr Moreno] being portion of rental, transportation cost including fuel telephone and salary (Re paragraph (*sic*) 3 and 4 of contract) earned before the alleged abandonment.

[4] [The Judge] erred in law when he failed or neglected to make a ruling on [Mr Moreno's] entitlement under the valid portion of the contract ([The Judge] ruled that only the termination clause in the contract was invalid at paragraph 22 of judgment).

[The Judge] ought to have ruled that [Mr Moreno] was entitled to the following which are [Mr Moreno's] entitlement under the valid portions of the contract entered on 25.8.2009.

> I. Incentive allowance of $30,000.00 earned between December, 2010 and December, 2011 (re paragraph 7A of Statement of Case).
>
> II. Company related expenses of $1,418.78 due before alleged abandonment (re paragraph 7D of Statement of Case.)
>
> III. Balance due and owing to [Mr Moreno] being portion of rental, transportation cost including fuel, telephone and salary (re paragraph 3 and 4 of contract) earned before the alleged abandonment.'

The rival contentions on appeal

(i) Ground 1 – abandonment

[46] Proceeding on the premise that the alleged error of the Judge was one of law, Mr Twist nevertheless relied principally on the submission, which he wrongly stated as part and parcel of the ground itself, that the finding of abandonment was at odds with the evidence. He pointed to the fact that there was a contrary version as to the events of 16 January 2012, ie Mr Moreno's version, and suggested that the absence on both sides of confirmatory evidence from an independent witness was better explained and more understandable in the case of Mr Moreno than in that of Gas Tomza. Apart from that, he said, was the fact that the Judge, in finding that there had been a written contract, was effectively branding Mr Jeronimo as an unreliable witness. Mr Moreno's evidence on the whole was, he submitted, in contrast, not substantially contradicted and hence he should have been treated as a witness of truth.

[47] Ms Banner argued that the Judge's pertinent finding was properly arrived at and that this Court ought not to interfere with it in the light of the law as stated in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 and applied by this Court in, amongst other cases, *McLaren v Pow*, Civil Appeal No 7 of 1992.

(ii) Ground 2 – Enforceability of termination clause

[48] It was the main submission of Mr Twist that, contrary to the conclusion of the Judge, the termination clause was 'clear beyond peradventure'. He contended in relation to this clause (at 5.2 of his written submissions) that –

> 'It basically state (*sic*) if [Gas Tomza] terminated the contract before the maturity .0date they must go to the court and prove that [Mr Moreno] did not fulfilled (*sic*) the terms of the contract; and once this is not proven in a court of law the termination would be unlawful and [Gas Tomza] would have to pay [Mr Moreno] the benefits due on the unexpired portion of the contract.'

In his further submission, as I understood it, the Court ought not to be deterred by slight difficulties of interpretation 'once a definite meaning can be established'. He cited in this regard a dictum of Lord Wright in *Scammel v Ouston* [1941] AC 251.

[49] In reply, Ms Banner first directed the attention of the Court to the view expressed by the Judge in the closing sentence of para 9 of his judgment, already set out at para **[40]**, above, to the effect that his finding of abandonment sufficed to dispose of Mr Moreno's entire claim and then invited this Court to forego discussion of this ground if it upheld such finding of abandonment. She nevertheless sought to support the conclusion of the Judge that the termination was unenforceable by virtue of its being, as he put it, 'not only ambiguous but also uncertain'. It was her submission that the reasoning of the Judge in this connection, referred to in passing at para **[43]**, above and contained at para 19 of his judgment, was unexceptionable. She referred to *Scammell* as helpful in determining the degree of certainty required to lend validity to a contractual clause. She further commended to this Court *Jacques v Lloyd D George & Partners Ltd* [1968] 1WLR 625, a decision upon which the Judge placed reliance in rejecting the termination clause as unenforceable.

(iii) Ground 3 – Costs

[50] The argument of Mr Twist in support of this ground was based on the view that the Judge was wrong not to have considered his entire claim for relief upon finding that there was indeed a contract of employment in writing between Gas Tomza and Mr Moreno. In short, it presupposes the success of ground 4.

[51] In his written submissions, Mr Twist set out three heads, viz 'incentive allowance', 'company related expenses' and 'portion of rental, transportation cost including fuel, telephone and salary' under which, as he submitted, the Judge should have gone on to order payment to Mr Moreno of fixed sums of $30,000.00 and $1,418.78 and an undetermined sum, respectively, with interest.

[52] Had the Judge so ordered, he contended, an award of costs to Mr Moreno would have been appropriate.

[53] The counter-argument of Ms Banner is that the order as to costs made by the Judge was eminently correct. She supported his application of the general principle that costs follow the event and his taking into account, in exercising his discretion, of the conduct of the parties.

(iv) Ground 4 – Incentive allowance

[54] In his written submissions, Mr Twist argued that the Judge, having found that there had been a contract of employment in writing between Gas Tomza and Mr Moreno, ought to have ordered the payment to the latter of all four sums referred to as items a, b, c and d at para **[4]**, above. In the course of oral argument, however, he made it clear that he was in the present appeal seeking no more than an order in respect of the first of such sums, ie $30,000.00 by way of incentive payments earned during the period December 2010 to December 2011.

[55] Ms Banner sought leave at the hearing to argue a point not raised in her written submissions, viz that Mr Moreno had waived his right to incentive payments under the contract in writing. She relied on the fact that there was no evidence that Mr Moreno had ever demanded or been the recipient of such a payment. The Court, however, considered that that was not enough to give rise to an inference of waiver and was, moreover, of the opinion that the issue of waiver had not arisen on the pleadings or otherwise. The application was therefore refused.

[56] In the result, Ms Banner's submissions in response largely centred around the point that Mr Moreno's claim was brought under the termination clause of the written contract which the Judge had, rightly as she contended, found uncertain and vague and therefore ignored. As I understood her, she was thus arguing that Mr Moreno's claim for accrued incentive allowance was not brought under a valid clause of the contract. But she did go even farther to express support for the Judge's conclusion that the finding of abandonment removed 'the necessity to address [the remuneration and duration related] clauses of the contract'.

[57] Referring back to ground 3 in the course of her argument of ground 4, Ms Banner emphasised that, notwithstanding the finding that there was a written contract, the end result was that the claim of Mr Moreno was dismissed *in toto*. Furthermore, she said, his conduct in abandoning the place of work (and then bringing a claim) would render any award of costs to him unreasonable.

Discussion

(i) Ground 1 - Abandonment

[58] I respectfully reject the formulation of this ground. If the Judge erred in the respect alleged by counsel, his error was one of fact rather than of law. Put another way, this ground challenges a finding of fact on the part of the Judge. The true question before the Judge was not one as to what constitutes abandonment as a matter of law. Rather, it was one as to whose version of the facts was to be preferred: that of Mr Moreno or that of Mr Jeronimo. Mr Moreno, as has been seen above, testified that he was ordered by Mr Jeronimo to leave the premises of Gas Tomza and that he simply obeyed such order. Mr Jeronimo's evidence, as has also been seen already, was that Mr Moreno left the premises entirely on his own, in other words, without having been ordered so to do. The Judge thus chose between two pieces of conflicting evidence in finding that Mr Moreno had walked off the job of his own free will and that Mr Jeronimo had not ordered him to leave the place of work. In arriving at this finding, the Judge enjoyed the inestimable advantage over this Court of having seen and heard the two witnesses in question as they gave their evidence. The significant benefit that comes from being able to study the demeanour of the witnesses has been available to him but not to this Court.

[59] With respect to the governing principles, Ms Banner, as has already been pointed out above, directed the Court to those enunciated in the decision of the House of Lords in *Thomas* as applied in this jurisdiction in 1991 in *McLaren* and thereafter in other cases. In *McLaren* the principles in question were, sure enough, referred to by the Court; but the case constitutes a rare local example of an appellate court's rejection rather than acceptance of a trial judge's finding of fact. More apposite to the argument of Ms Banner and of less recent vintage is the judgment of this Court in *Panton and Arnold v De Four and De Four*, Civil Appeal No 1 of 1990, in which the relevant finding of the trial judge was not interfered with. In that judgment, rendered on 27 September 1990, that great judge, Henry P, with whom Sir Denis Malone and Liverpool JA agreed, wrote:

> 'The principles on which an appellate court acts where a trial judge's decision is based on his assessment of the credibility of a witness are well known. They are set out by Lord Thankerton in *Watt (or Thomas) v. Thomas* [1947] AC 484 at 487 as follows:

> "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."'

This Court will not easily be persuaded to disturb the findings of fact of a trial judge which have been reached following his or her assessment of the credibility of witnesses whom he or she has seen and heard giving conflicting relevant evidence. But let one thing be clearly understood: the appellate court which decides against disturbance must be satisfied that there was before the court of first instance evidence which would, if accepted, justify its (the latter court's) findings.

[60] The lengthy quotation at para **[40]**, above from the judgment of the Judge reveals that, after having first assumed, for the sake of argument, that the allegation that Mr Jeronimo did order Mr Moreno to leave the premises of the Branch was truthful, he (the Judge) unambiguously found such allegation unproven. That finding, to my mind, is no clear indication that he believed Mr Jeronimo's evidence that he never gave Mr Moreno such an order. But, in my view, the further finding, to be found at the end of the quotation in question, to the effect that, on a balance of probabilities, Mr Moreno abandoned his employment, most certainly is. It cannot be overlooked, in this connection, that the Judge had reminded himself at para 6 of his judgment that:

> ‘The task of the court is to decide who is speaking the truth ... The only witnesses in relation to the alleged termination are [Mr Moreno] and Mr Jeronimo.’

It is, from my standpoint, an inescapable conclusion that the Judge found that, as far as abandonment was concerned, it was Mr Jeronimo who was speaking the truth.

[61] It is of significance in this appeal, as I see it, that whilst the Judge thus believed the evidence of Mr Jeronimo in regard to the question of abandonment, when it came to the issue of written contract *vel non*, he believed that of Mr Moreno as supported by his two witnesses. It was not a simple, straightforward, run-of-the-mill situation in which the testimony of a witness on one side is accepted *in toto* and that of a witness on the other side rejected in equal measure. Where the assessment by the trial judge exhibits this level of relative complexity, I confess to feeling an even greater-than-usual reluctance to interfere with his or her findings of fact. In the instant case, this heightened reluctance drives me inexorably to the admission that, without the advantage of having seen and heard Mr Jeronimo and Mr Moreno at the trial, and having nothing but printed evidence before me, I am in no position to arrive at a satisfactory conclusion of my own on the question of abandonment. In short, I am not prepared to disturb the Judge’s relevant finding of fact; and I consider that this ground, on the basis of the second principle from *Thomas* set out at para **[59]**, above, therefore fails.

(ii) Enforceability of termination clause

[62] Mr Twist’s main submission in support of this ground, viz that the termination clause was ‘clear beyond peradventure’ comes nowhere near to passing muster. It focusses, unacceptably, on the effect of the termination clause in one situation only, viz that where Mr Moreno’s employment is terminated in breach of the contract. In the language of his written submissions-

> ‘... the words of the contract was (*sic*) plain and unambiguous. It basically state (*sic*) if [Gas Tomza] terminated the contract before the maturity date they must go to the court and prove that [Mr Moreno] did not fulfilled (*sic*) the terms of the contract; and once this is not proven in a court of law the termination would be unlawful and [Gas Tomza] would have to pay [Mr Moreno] the benefits due on the unexpired portion of the contract.’

He chose simply to ignore the cogent, indeed irrefragable, criticism directed by the Judge to the termination clause in the following passage (para 19 of the judgment):

> 'The clause, it would seem, is not only ambiguous but also uncertain. On the one hand, it is saying that the contract can only be terminated before the maturity date of 25th August, 2015 if certain things are proven in a court of law; but on the other hand, it states that if the contract is terminated before the maturity date, [Gas Tomza] is still liable to pay compensation to [Mr Moreno]. Therefore if the court terminated the contract for cause as stated in the clause, [Gas Tomza], although [Mr Moreno] was dismissed for cause, is still liable to pay [him] full payment of all monies due to [him] up to the maturity date. This is not only uncertain but also vague.'

Putting the matter differently, the termination clause placed Mr Moreno in a classic, so to speak, 'win-win' situation: termination without good cause before the maturity date would, naturally enough, entitle him to compensation but so, too, bewilderingly, would termination for good cause before such date. The significance or otherwise of good cause was thus the subject of direct contradiction in that it mattered in one situation but not in another. The result was hopeless ambiguity.

[63] Mr Twist turned to the speech of Lord Wright in *Scammel v Ouston* [1941] AC 251 (purportedly as quoted from by the editors of Cheshire, Fifoot and Furmston's Law of Contract, 11th ed, at page 40) in his quest for support for his patently untenable position. He said, as best I could understand him, that it was clear from that speech that a court construing a contract ought not to be deterred by slight difficulties of interpretation 'once a definite meaning can be established (*sic*)', a phrase which he attributed to the learned Law Lord. (The word used by Lord Wright was 'extracted', not 'established': page 268 of the report cited above.) It needs to be borne in mind that when, in *Scammel's* case, Lord Wright, spoke somewhat dismissively of 'mere' (not 'slight') difficulties of interpretation, the question before him and the other members of the House, was not, as here, one only about the validity of a single severable clause in a contract but the vastly more portentous one whether there was a valid contract at all. That aside, and more fundamentally, I do not, for my part, regard this as a case in which a definite meaning can be extracted from the clause requiring to be construed. In that respect, I would accept the corresponding

submission of Ms Banner. The doubt as to the importance or otherwise of good cause is irresolvable and leaves one wondering whether the win-win situation adverted to in the immediately preceding paragraph could possibly have been intentionally created by the parties or was instead the wholly unintended result of drafting fit colloquially to be described as pathetic.

[64] I do not consider it inappropriate, before parting with this aspect of the instant appeal, to draw attention to certain evidence of inexcusable carelessness in the preparation of the Respondent's Written Submissions ('the Submissions'). The first piece of such evidence appears at the end of para 16 which purports to be a quotation from the speech of Viscount Maugham in *Scammell* and reads:

> 'In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words the consensus ad idem would be a matter of mere conjecture *in a way that their meaning can be determined with a reasonable degree of certainty. Lord Wright agreed in finding that the agreement must be sufficiently definite to enable the court to give it practical meaning. The wording of the termination clause in the alleged contract is not only uncertain, but also vague*. (italics mine)

The first part of this passage, ending with the word 'conjecture', is indeed a quotation from the second para of Viscount Maugham's speech; but the italicised remainder, largely of unknown origin, is not. (The phrase at the end 'not only uncertain but also vague' appears also in the judgment of the Judge, at the end of para 19.) The second such piece of evidence is found at para 20 of the Submissions, where Ms Banner writes:

> 'Importantly, Lord Edmund Davies, at p 632 of **Scammell** opined that if the words of the contract are ambiguous they should be interpreted *contra proferentum*.'

The true position is, of course, that it was Edmund Davies LJ who expressed the opinion in question and that he did so in the Court of Appeal case of *Jacques v Lloyd D George & Partners Ltd* [1968] 1 WLR 625. He was not, and could not have been, a Lord of Appeal in Ordinary in 1940, when *Scammell* was decided.

(iii) Ground 4 – Incentive allowance

[65] It is convenient next to consider ground 4. The Judge usefully entered into the question whether there was a contract of employment in writing between Gas Tomza and Mr Moreno and arrived at an answer in the affirmative (paras **[42]**-**[43]**, above) which stands unchallenged in the absence of a respondent's notice. His further conclusion, reached at the end of para 23 of his judgment, viz that-

> '[t]here are other clauses of the contract dealing with remuneration and the duration of the contract; but in the light of my finding above that [Mr Moreno] abandoned his job, I do not see the necessity to address these other clauses of the contract ...',

resonates with the position of Gas Tomza, to which Mr Jeronimo sweepingly gave expression at para 23 of his witness statement (page 90, Record), that-

> '[s]ince Mr Moreno abandoned his employment ... he is not entitled to any payment whatsoever...'

and is nothing short of startling. Mr Moreno was clearly entitled to incentive payment under the sixth clause, un-numbered, of the contract; and his evidence that he earned but was never paid it (already adverted to at para **[10]**, above) was not disputed by Gas Tomza.

[66] Gas Tomza's obviously preferred line of attack (on the ground of waiver) against this claim to incentive payment was, as already noted at para **[55]**, above, properly nipped in the bud. Such semblance of an attack as ended up being mounted by it's valiant counsel could only be doomed to failure. I respectfully reject her contention that this particular claim was brought under the termination clause, the sole clause of the contract held void for uncertainty by the Judge. It was unquestionably brought under the sixth clause of such contract; and the Judge's conclusion that there was no need for it to be addressed by him was entirely illogical and wrong. The evidence as to how and when it was earned and of its calculation was uncontradicted and wholly unaffected by the absence of evidence that Mr Moreno ever claimed it during the time that he was employed and the Judge's finding that he abandoned his job on 16 January 2012, ie after the end of the relevant period December 2010 to December 2011 already noted at para **[54**],

above. Each pertinent incentive payment should have long since been paid by the time 16 January 2012 came around. It is astonishing to suggest (as Ms Banner effectively did) that, had Gas Tomza dutifully made each of these payments in timely fashion, Mr Moreno's walking off the job on 16 January 2012 would have somehow created, in favour of the former, a right to recover the amount of such payments. There was, in my opinion, every reason for the Judge not only to have considered but also granted this claim to incentive payment in the total amount of $30,000.00.

(iv) Ground 3 - Costs

[67] Having reached the conclusion that ground 4, as argued at the bar of this Court (para **[54]**, above), should succeed, I further consider that there necessarily is merit in ground 3. The claim for incentive payments in the sum of $30,000.00 should have succeeded in the court below; and such success should have been fairly reflected in that court's order as to costs. Ms Banner's contention that the Judge was right in applying the general principle that costs follow the event is sound both in the context of the judgment appealed from and in that of the judgment as I would vary it on appeal. There are two winners in the latter context, although the larger victory in terms of money is axiomatically that of Gas Tomza. I would order that, in the court below, it have two thirds of its costs and Mr Moreno one third of his, both to be taxed if not agreed.

Disposal

[68] In the circumstances, I would dismiss the appeal in part and allow it in part. As regards the part of the order signed on 26 February 2013 ('the Order') (page 6, record) which is numbered (1), I would vary it to read: 'The claims in the claim form are dismissed save to the extent that they include the claim for 'incentive on sales' in the amount of $30,000.00 referred to at para 7 of the statement of case, which latter claim is allowed.' As regards the part of the Order numbered (2), I would set it aside and substitute therefor an order that, in the court below, Gas Tomza have two thirds of its costs and Mr Moreno one third of his. I would further order that, in respect of the appeal, Gas Tomza have two thirds of its costs and Mr Moreno one third of his; costs both here and below to be taxed if not agreed. As far as costs in the appeal are concerned, I would propose that the order be provisional in the first instance but become final in 10 days from delivery of judgment in such appeal unless either party shall make application for a contrary order ('the

application'), in which event the matter of costs, I further propose, should be decided on the basis of submissions in writing to be filed and delivered by both parties in 15 days from the date of the application.

Apologies

[69] I unhesitatingly offer sincerest apologies to the parties for the deeply regretted delay, owing to unending pressure of work, in preparing this judgment, for which delay I accept full responsibility.

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SIR MANUEL SOSA P

MORRISON JA

[70] I have had the advantage of reading in draft the judgment prepared by the learned President. I am in full agreement with his reasoning and conclusions and there is nothing that I can usefully add with respect to it.

[71] However, as regards the learned President's apology (in para **[69]**, above) for the delay in delivering the judgment of the court in this matter, I wish to add this: notwithstanding his having, generously, taken full responsibility for the delay in this case, the responsibility for such delays must inevitably lie with the court itself. I therefore wish to associate myself fully with the learned President's apology and to adopt it as my own.

_____
MORRISON JA

AWICH JA

[72] I concur.

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AWICH JA