[2020] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL NO 88/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**APPELLANT**
AND	**NCB STAFF ASSOCIATION (Bringing the claim in a representative capacity on behalf of all the members of the Association)**	**RESPONDENT**

Walter Scott QC and Ms Anna Gracie instructed by Rattray Patterson Rattray for the appellant

Crafton Miller, Mrs Patricia Roberts-Brown, Jonathan Neita and Ms Lesley-Ann Stewart instructed by Crafton S Miller & Co for the respondent

10, 11, 12, 13 June 2019 and 3 July 2020

PHILLIPS JA

[1] I have read in draft the judgment of my sister Foster-Pusey JA and I agree with her reasoning and conclusion.

FOSTER-PUSEY JA

Background

[2] On 17 December 1980, following intense negotiations and discussions between the appellant and the respondent, the appellant implemented a Profit Sharing Scheme ("PSS") with staff members.

[3] The agreed terms were reflected in Staff Circular No 33/1980/P ("the Circular"), paragraphs 2 and 3 of which (after amendment) state:

> "2. The maximum annual amount to be distributed shall be 6% of the consolidated profits before tax, as agreed by the Auditors before making allowances for the payments under the Scheme, provided that such profit is in excess of 25% of "Shareholders Funds", i.e. issued Share Capital, Reserves (excluding Capital Reserves) and Retained Earnings, as shown in the audited accounts of the immediately preceding financial year.
>
> 3. This amount shall be paid as soon as practicable after 30th September each year after consultation with [the appellant's] Auditors who will make allowance for such payments in the relevant year's accounts."

[4] By letter dated 23 December 2002, the appellant delivered disappointing news to the respondent and its members. The appellant informed the respondent that on Thursday, 19 December 2002, its directors had approved the audited financial statements for the year ended 30 September 2002. Prior to the approval of the audited accounts, the auditors assessed whether a profit-sharing payment was due. The appellant outlined the computation said to have been prepared by the auditors and advised that:

> "Based on this computation, there is a shortfall of $50.5 million from the required return of 25% of relevant

> shareholders' fund. The external auditors provided the Board with this opinion… Therefore, no profit sharing is payable…"

[5] A sum attributable to minority interests had been deducted from the "consolidated profits before tax" amount for the year 2002. The appellant stated that, according to its auditors, it was required to do this, due to a change in accounting standards which impacted the approach to be taken for the 2002 accounts and accounts thereafter. There is no dispute that, but for the deduction of the sum attributable to the minority interests, the required threshold would have been met, and a profit-sharing payment would have been due to the staff members.

[6] The respondent challenged this approach, arguing that no such deduction had been made in the past and this approach did not accord with the terms of the Circular.

[7] After years of discussions failed to resolve the issue, the respondent, by way of a fixed date claim form filed on 14 February 2006, which was later amended on 10 July 2014, sought declarations that, among other things, the deduction of the sum attributable to the minority interests was incorrect as it did not accord with the proper interpretation of the Circular, the appellant could not unilaterally deduct minority interest profit, and that the profit-sharing payment was due for the financial year ending September 2002. The respondent also argued that the profit-sharing scheme had been incorporated into the contract of employment between the appellant and its staff members.

[8] Sykes J (as he then was) ("the judge"), heard the matter over a number of days in July, September, and November 2016 as well as in May 2017. The hearing included intense cross-examination of the witnesses for both parties.

[9] After the parties had completed their submissions, the judge shared cases with them on the issue of good faith, and invited them to make further submissions as to whether it arose for consideration, and whether the appellant had acted other than in good faith. The parties complied.

[10] On 20 July 2017, the judge granted a number of the declarations sought by the respondent. He also ruled that the appellant had acted in breach of the principle of good faith.

[11] At the request of the judge, the parties made submissions on what interest rate should be awarded and whether it should be compound interest or simple interest. The judge ruled that compound interest was not applicable. On 25 October 2017 he awarded simple interest at the commercial rate of 20.05% on the agreed sum of $142,821,646.39 from 1 October 2002 to the date of payment.

[12] It must be noted that the appellant filed its appeal on 30 August 2017 before the judge ruled on the issue of interest. The appellant has explained that this accounts for the fact that the notice of appeal does not specifically challenge the period of time over which the judge ruled that interest should run.

[13] The respondent is not challenging the judge's finding that the scheme has been incorporated into the employment contracts of its staff.

[14] In this appeal we have had to consider, as the grounds below will show, broadly speaking:

a. Whether the judge was correct in the findings of fact and or law to which he arrived concerning the interpretation of the Circular, the operation of the profit-sharing scheme and the role, (if any), to be played by the appellant's auditors in determining whether profit-sharing had been triggered;

b. Whether the question of good faith arose on the pleadings and whether it was necessary to consider this issue in order to determine the matter between the parties; and

c. Whether the judge was correct in awarding interest with effect from 2002 although in the amended fixed date claim form the respondent had sought interest from the date of judgment.

The grounds of appeal

[15] The appellant, by its notice of appeal filed 30 August 2017, has challenged the judge's decision on the following grounds:

> "a. The learned Judge erred in fact and law when he failed to consider or failed to adequately consider what the term 'consolidated profits before tax' meant in general accounting terms and what would be the correct method of calculating such a figure whether in relation to the PSS, or for the purposes of declaring to shareholders and the public in general.

b. The learned Judge erred in fact and law when he failed to appreciate that the term 'consolidated profits before tax' was and is an accounting term of art, which, on the evidence of all the experts was taken to mean that minority interest had to be deducted to arrive at the true profit held by the NCB Group. The learned Judge failed to appreciate that the sole area of contention between the experts was whether or not [the appellant] did in fact deduct minority interest for the purposes of calculating its Profit Share Scheme.

c. The learned Judge erred in fact when he failed to give any or any adequate consideration to the fact that at the time that the Profit Share Scheme had been devised there was no Group in existence; only [the appellant], and as a result, the application of the scheme and the calculation thereof would be determined by modified accounting principles over time taking into consideration any mergers and acquisitions and any other changes to its corporate structure.[This ground was abandoned at the hearing of the appeal].

d. The learned Judge erred when he failed to give any or any sufficient regard to the role of the auditors in light of the evidence that there needed to be adjustments to the figures to take into consideration any losses sustained by a minority as well as any provisions already made which may affect the consolidated profits before tax.

e. The learned Judge having found that from 1977 the issue of profit was raised and vexatious and that the parties had always intended the profit share to be a part of the contract, failed to give any or any adequate regard to the role of the independent auditor in determining whether the profit share scheme was triggered.

f. The learned Judge erred when he failed to appreciate or give any or adequate appreciation to the fact that the dispute between [the appellant] and [the respondent] concerning the status of the profit share scheme was only resolved in these proceedings. Accordingly, the historical arguments advanced by [the appellant] would have always been centered on whether [the respondent] was entitled to a share in the profit and not the method of calculation of the profit share.

g. The learned Judge erred when he failed to consider the fact that apart from the bald assertion of Mr. Stewart, there was no evidence that the minority interest was included. There was no evidence of any calculations provided to the court for the period 1994 to 2002 and the expert report of Mr. Christie, which is required to state all the documents which were considered, did not refer to any financial statements or to any previous calculations. This notwithstanding the evidence that Mr. Stewart was a member of the Board of Directors and was able to produce historic documents going back to 1977.

h. The learned judge erred in law in finding that the PSS would be calculated in the same way that it has always been calculated before it became a term of the contract of employment in the absence of any or any sufficient evidence that the inclusion of minority interest was contemplated by the parties or that its inclusions [sic] was necessary for the clause to have any effect to give business efficacy to the agreement or agreed to by the parties on the evidence. The learned judge erred in fact and law in finding that for the financial year ended September 2002, the threshold for profit-sharing had been triggered having failed to consider the calculations of the independent auditors in determining the calculations based on the acceptable accounting standards applicable at the time and the fact that the deduction of minority interest was the only calculation which reflected what the true profit of [the appellant] was.

i. The learned Judge erred in fact and in law when he formed the view that [the respondent] had been paid under the Profit Share for the entire period of 1980-2002 in circumstances where there was no evidence of the number of times that the profit share was triggered conversely there was evidence of years in which [the appellant] experienced a loss and therefore no profit share would be triggered.

j. The learned Judge erred in fact and in law when he construed that the proper interpretation to be given for the purpose of the calculation of the PSS was to include profits not owned by [the appellant].

k. The learned Judge erred in fact and in law when he found that on the face of the fixed date claim form, affidavits and submissions that the issue of good faith arose as a case for [the appellant] to answer. The fixed date claim form being the originating document was at no time amended and stands as the case that [the appellant] was called upon to meet.

l. The learned Judge erred in fact when he concluded that 'there has never been a deduction of minority interest for the purposes of the PSS since the scheme was introduced' in circumstances where there were no calculations before him in respect of previous years showing that the PSS was triggered solely due to the fact that the minority interest was included.

m. The learned judge erred in fact and in law when he found that [the appellant] had acted in bad faith towards the employees in circumstances where he found that there was no dishonesty on the part of [the appellant], and that though the reason given by [the appellant] for the deduction of minority interest was wrong there was no evidence of the advice given or the circumstances in which the advice was given.

n. The learned Judge erred when he relied on the evidence of Mr. Christie as a basis for his finding of bad faith in that Mr. Christie gave evidence that [the appellant] had never deducted minority interest in circumstances where Mr. Christie's evidence was not based on first-hand knowledge but was limited to information which he received and Mr. Christie never stated the source of this information.

o. The learned Judge erred in awarding commercial interest in circumstances where there was no evidence led or submissions made in support of this claim."

The proceedings below

[16] On 14 February 2006 the respondent filed a fixed date claim form supported by the affidavit of Jean Ducasse, former secretary of the respondent. Over eight years later, on 10 July 2014, the respondent filed an amended fixed date claim form. In her oral

submissions, Mrs Patricia Roberts-Brown, attorney-at-law for the respondent, informed the court that over the period 2006 to 2014 the parties had discussions in an attempt to settle the matter. At one stage they were even contemplating referring the matter to arbitration. I will return to this hiatus in the proceedings, when considering the challenge to the period over which the judge awarded interest.

[17] These were the declarations and reliefs which the respondent sought in its amended fixed date claim form:

> "1. A declaration that the profit-sharing scheme (herein referred to as 'PSS') and the Terms, Conditions and Rules governing the PSS as set out in Staff Circular No. 33/1980/P dated December 17, 1980, with subsequent amendments thereto is the approved and governing document by both [the respondent] and [the appellant] to determine the formula and threshold to trigger the profit-sharing mechanism.
>
> 2. A declaration that the Terms and Conditions and rules governing the PSS and particularly item two (2) of the Staff Circular No. 33/1980/P dated December 17, 1980 cannot be unilaterally amended by [the appellant].
>
> 3. A declaration that [the appellant] cannot unilaterally deduct Minority Interests' profit from profit before tax in order to establish whether a profit sharing payment has been triggered in accordance with the rules laid down in Staff Circular No. 33/1980/P.
>
> 4. A declaration that [the appellant's] Auditors Price Waterhouse Coopers erred in deducting the Minority Interest profits from profits before tax contrary to Staff Circular No. 33/1980/P.
>
> 5. A declaration that [the respondent] and [the appellant] have a contract with regards to profit sharing which forms part of the contract of employment of members of [the respondent].

6. A declaration that [the appellant's] Auditors Price Waterhouse Coopers are to interpret the profit sharing formula as set out in Circular No. 33/1980/P dated December 17, 1980 and not as it deems fit and ought to have calculated the profit sharing for the financial year ended September 30, 2002 in accordance with the stipulated formula used for the previous sixteen (16) years by them.

7. A declaration that for the financial year ended September 30, 2002, the Auditors should not have and indeed erred in making a special circulation of Group Profit before tax for the purpose of dealing with the Profit Sharing Scheme established and agreed upon since 1980.

8. A declaration that for the financial year ended September 30, 2002 the threshold for profit sharing has been triggered and the members of [the respondent] are entitled to share in the profit to be calculated on the basis of Staff Circular No. 33/1980/P.

9. An Order for Costs to [the respondent] to be agreed or taxed.

10. Interest on the judgment sum at the commercial rate at the date of judgment; and

11. Such further and other reliefs as this Honourable Court deems fit."

[18] Apart from the affidavit of Mrs Jean Ducasse, the respondent's case was also supported by affidavits of Mr Paul Stewart, president of the respondent and Mr Orville Christie, accountant. The appellant relied on the affidavits of two of its employees, Mr Euton Cummings and Mr Malcolm Saddler, as well as that of Mr Alok Jain, accountant from Price Waterhouse Coopers (PWC), the accounting and auditing firm that had been auditing the appellant's accounts from before 1980 and up to the time of hearing in 2016. Although Mrs Ducasse did not attend the hearing, Mr Cummings' and Mr Saddler's affidavits were crafted to respond to hers. The judge decided that he would rely on

whatever facts that they had accepted were true, and in addition, he would refer to the exhibits attached to her affidavit as Mr Stewart had relied on them. This approach has not been challenged.

[19] The oral evidence of Mr Stewart, Mr Christie, Mr Jain, Mr Cummings and Mr Saddler were heard over nine days of trial.

[20] The judge granted judgment for the respondent in terms of the following declarations and decisions:

> "a) The profit-sharing scheme (PSS) and the terms, conditions and rules governing the PSS as set out in the Staff Circular No. 33/1980/P dated December 17, 1980, with subsequent amendments thereto is the approved and governing document by both [the respondent] and [the appellant] to determine the formula and threshold figure to trigger the profit-sharing mechanism.
>
> b) The terms, conditions and rules governing the PSS and particularly item (2) of the Staff Circular No. 33/1980/P dated December 17, 1980 cannot be unilaterally amended by [the appellant].
>
> **c) [The appellant] cannot unilaterally deduct minority interests' profit from profit before tax in order to establish whether a profit-sharing payment has been triggered in accordance with the rules laid down in Staff Circular No 33/1980/P.**
>
> d) [The respondent] and [the appellant] have a contract with regard to profit-sharing which forms part of the contract of employment of members of [the respondent].
>
> **e) For the financial year ended September 30, 2002, the auditors should not have and indeed erred in making a special circulation of Group Profit**

before tax for the purpose of dealing with the PSS established and agreed upon since 1980.

f) For the financial year ended September 30, 2002, the threshold for profit-sharing has been triggered and the members of [the respondent] are entitled to share in the profits to be calculated on the basis of the Staff Circular No 33/1980/P.

g) Costs …

2 …

3 …

4. Interest at the commercial rate is granted to [the respondent].

5. The parties are to make additional submissions on the rate to be applied and whether it should be compound interest or simple interest. The Court will hear additional submissions on September 11, 2017." (Emphasis supplied)

[21] The parties made written submissions on the question of interest as was required by the judge. Importantly, the judge did not request submissions to deal with the period over which interest should be granted. As indicated earlier, on 25 October 2017, the judge ordered that compound interest was not applicable as it was neither pleaded nor proved and simple interest was to be applied at the commercial rate over the period 1 October 2002 to 25 October 2017, the date of judgment. The parties agreed on a rate of 20.05% per annum.

[22] At this point it is helpful to note that the appellant has challenged paragraphs (c), (e) and (f) of the declarations which were granted, the period over which interest has been awarded, and certain findings made by the judge in respect of an obligation of good faith on the appellant's part.

This court grants a stay of execution of the judgment

[23] On 18 May 2018, F Williams JA ordered a stay of execution of the judgment pending the determination of the appeal. As a condition of the stay, the appellant had to open accounts in the names of both parties and thereafter retain the sum of $142,821,646.39, the agreed judgment sum, in an account with an interest rate of 20.05% per annum, being the interest rate ordered by Sykes J. Interest on that sum, as at 16 January 2018, totaled $435,963,890.51 and was to be placed in a separate account. By the consent of the parties, this latter sum will bear interest at the commercial banks' weighted time deposit rates as published by the Bank of Jamaica.

The appellant's submissions

[24] Queen's Counsel, Mr Walter Scott, submitted that a review of the oral and documentary evidence was crucial as the instant case was highly fact-specific. He argued that the respondent's witnesses, including Mr Stewart, failed to specifically refer to any profit share calculations for the years prior to 2002 to show that the minority interest was not taken into consideration. As a consequence, the respondent failed to prove that the minority interest was never deducted in previous years.

[25] He submitted, further, that the words 'consolidated profits before tax' were used as a term of art and not in reference to a line item on the profit and loss account. Consolidated profits before tax implicitly meant that in the event that the appellant or later the Group, acquired a controlling interest in a subsidiary, the minority interest in that subsidiary would be deducted in order to arrive at the appellant Group's consolidated profits before tax. Queen's Counsel emphasized that the formula called for the

'consolidated profits before tax' of the Group; however, this could not include profits belonging to third parties.

[26] Queen's Counsel submitted that it followed that the respondent failed to prove that it was the line item styled 'consolidated profits before tax', and not the "term of art" of the 'consolidated profits before tax', that was the basis for the calculation. The judge, therefore, erred when he found as a fact that the appellant well knew that minority interests were not taken out of the sum identified as 'consolidated profits before tax' for the purpose of determining when PSS was payable.

[27] In addition, the parties had intended that the auditors should agree to the process in the profit-sharing scheme. Queen's Counsel submitted that there was no evidence that a profit share had ever been paid as a result of a decision of the board of directors which was not approved by the auditors. While the judge was partially correct in finding that the auditors would check the arithmetic of the accounts department of the bank, the auditors had to ensure that correct adjustments were made to the figures in the accounts. They, therefore, had veto power.

[28] Queen's Counsel submitted that the advice which came from the auditors was correct regardless of the International Accounting Standard ("IAS") of 2002 as it was agreed that the Jamaican Statements of Standard Accounting Practice ("JSSAP"), and IAS required the same treatment of minority interests. As a consequence, the judge ought properly to have found that both JSSAP and later IAS would have a bearing on the interpretation of a document created in 1980.

[29] Insofar as the interpretation of the Circular was concerned, Queen's Counsel relied on a number of cases: **Reardon Smith Line Ltd and Anor v Yngvar Hansen-Tangen** [1976] 1 WLR 989, **Chartbrook Limited v Persimmon Homes Limited and others (Appellants) and another (Respondent)** [2009] UKHL 38, **Attorney General of Belize and Others v Belize Telecom Limited and another** [2009] UKPC 10, **Proteus Property Partners Limited v South African Property Opportunities PLC** [2011] EWHC 768, **Arnold v Britton and Others** [2015] UKSC 36 and **Aedan Earle v National Water Commission** [2014] JMSC Civ 69. He submitted that in construing a commercial contract the courts should consider the matrix of facts existing at the time the contract was made in order to ascertain the likely intention of the parties. In that exercise, the court must have regard to "commercial business sense". It could not have been the intention of the draftsmen to pay the staff on profits earned by a third party (the minority). This is why the auditors were not mere mathematicians.

[30] In concluding on this issue, Queen's Counsel submitted that the appellant was therefore correct when it deducted a sum attributable to the minority interests, before it arrived at what was the 'consolidated profits before tax', in order to establish whether a profit share payment had been triggered in accordance with the Circular. For the financial year ended 30 September 2002, the auditors properly made a special circulation of group profit before tax for the purpose of dealing with the profit share scheme. As a consequence, profit sharing was not triggered so as to entitle the members of the staff association to share in the profits. The judge, therefore, erred when he accepted the

evidence and calculations of Mr Orville Christie and concluded that the profit share was triggered in 2002.

[31] Mr Scott submitted that upon a careful review of the pleadings and documents which were before the judge, no issue of good faith arose before the court. The respondent had submitted that its members had a legitimate expectation that the formula would have been applied in keeping with previous years until an agreement was reached between the parties to do otherwise. It did not, however, plead, adduce evidence or make submissions on the basis that there was an absence of good faith by the appellant in the performance of the contract. The parties made submissions on the issue of legitimate expectation.

[32] The appellant relied on **McPhilemy v Times Newspapers Limited and Others** [1999] 3 All ER 775 and submitted that pleadings should mark out the parameters of the case that is being advanced by each party. Furthermore, the cause of action arose in December 2002. Any amendments to introduce a fact ought to have been made by the latest December 2008. Although the Civil Procedure Rules (CPR) permit the amendment of a statement of case after the end of a relevant limitation period, this rule does not allow the court of its own motion to amend pleadings to insert a new cause of action or fact to be considered. Even if the court has such a discretion at trial, this discretion cannot be exercised when the limitation period has already passed. In support of the arguments on this issue Queen's Counsel relied on the Limitation Act of 1623, 21 James I Cap. 16, **Div Deep Limited, Mahesh Mahtani and Haresh Mahtani v Topaz Jewellers Ltd and Raju Khemlani** [2017] JMCC Comm 26, **Reeves v Butcher** [1891-4] All ER Rep

943, **Read v Brown** (1888) 22 QBD 128, **Donovan v Gwentoys Ltd** [1990] 1 All ER 1018, **Charlesworth v Relay Records Limited and Ors** [2000] 1 WLR 230 and **Warner v Sampson and Anor** [1959] 2 WLR 109.

[33] Mr Scott emphasized that even if the judge had a discretion to consider a new fact in respect of good faith in contracts, it is not currently a part of the general law in Jamaica and would have to be introduced by Parliament. He acknowledged that the common law in England has advanced, and the courts there can consider the issue in a case where it is properly pleaded and evidence adduced. The courts there can imply a term in a contract, particularly, but not limited to contracts of employment, that the employer will not exercise his contractual discretion in an arbitrary, capricious or irrational manner, but will exercise this discretion with good faith. Queen's Counsel submitted, however, that in the instant case there was no discretion which the bank exercised in an arbitrary, capricious or irrational manner. He relied on **Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)** [2013] EWCA Civ 200 and **Brogden and Anor v Investec Bank Plc** [2014] EWHC 2785 (Comm).

[34] He submitted that the judge erred both in fact and in law when he made a finding of bad faith on the part of the appellant. This is because the bank did not introduce any new term to the Circular, there was no proof that minority interest was included throughout the relevant period and there was no pleading within the limitation period that the appellant had acted in bad faith.

[35] On the matter of the period of time over which the judge awarded interest, Mr Scott highlighted that the respondent had pleaded "Commercial rate at the date of the Judgment", and did not apply to amend its case at any time over the many trial dates. While mindful of **British Caribbean Insurance Company Limited v Delbert Perrier** (1996) 33 JLR 119, Queen's Counsel submitted that the instant case was before the court for 11 years and there was no explanation for the delay between November 2006 and May 2015. He submitted that the court could take this delay into account when determining an appropriate rate, whether it be the rate expressly requested in the pleadings or some other rate.

The respondent's submissions

[36] Mr Crafton Miller and Mrs Patricia Roberts-Brown made the oral submissions for the respondent. Counsel submitted that on the evidence before the court below, the appellant, in its payment of the PSS, used the formula without any deductions apart from those specifically set out in the formula. The appellant did not, at any time, deny that PSS was paid over the years without the deduction of the minority interest. What the appellant had asserted was that the change in accounting standards in 2002 required that it deduct sums attributable to the minority interest. None of the appellant's witnesses asserted that it had deducted minority interests in the past before determining whether a profit share payment was due. The appellant's accounting professionals, Mr Jain and Mr Cummings, could not speak to how the appellant treated with minority interests in previous years. The court had no other option but to accept the respondent's evidence, through Mr Stewart, that minority interests were included (that is, were not deducted) in

the identification of the figure for 'consolidated profits before tax'. Counsel highlighted that the judge noted that minority interests, and in particular Edward Gayle & Company, by 1994, had become part of the NCB family. The formula to calculate the PSS had been used for 22 years prior to the year 2002 without any mention of minority interests being deducted from 'consolidated profits before tax'. Counsel submitted that the appellant had never deducted minority interests at any time prior to the 23 December 2002 letter from Mr Aubyn Hill.

[37] Counsel argued that the judge meticulously reviewed the expert evidence related to the line item identified in the NCB financial statements as 'consolidated profits before tax' and correctly concluded that the appellant had not followed a practice of deducting minority interests out of the sum identified as 'consolidated profits before tax'. The judge, however, concluded that the separation of minority interests was to take place upon actual distribution of profits attributable to the shareholding but not at any time before.

[38] Insofar as the role of the auditors was concerned, counsel submitted that the judge was correct in concluding that the Circular did not give the auditors a veto power. Instead, the auditors were to verify the correctness of the calculation. The judge rejected the assertion made by the appellant that the respondent had accepted that the appellant was bound by the recommendation of the auditors, as there was no evidence to support this.

[39] On the question as to the interpretation of the Circular, counsel submitted that the judge adopted Lord Hodge's summary of the court's task in ascertaining the objective meaning of language which the parties have chosen to express their agreement, as

outlined in **Wood v Capita Insurance Services Limited** [2017] UKSC 24. Having done so, the judge interpreted its provisions correctly.

[40] Counsel disagreed with a position taken by the appellant, in its written submissions, that there was an implied term in clause 2 of the Circular that the auditors had the right to determine the items to be used to calculate the profit share. Counsel submitted that there was no need to improve on clause 2 of the Circular. What was necessary was for the court to discover what the instrument meant. Counsel relied on **RBTT Bank Jamaica Limited v YP Seaton et al** [2014] JMSC Civ 34.

[41] In addressing the question as to whether the judge was correct in concluding that the appellant had an implied duty of good faith imposed on it under the commercial contract, counsel submitted that the contract between the parties was one in which it was proper for the judge to so find. Counsel relied on **Yam Seng Pte Ltd v International Trade Corp Ltd** [2013] 1 CLC 662. When the appellant wrote to the staff, by letter dated 23 December 2002, stating that the profit share was not payable, it had not disclosed that minority interests were being deducted for the very first time. Counsel urged that this was a breach of good faith. Counsel reiterated that a reasonable and honest person would not make a unilateral decision to change the formula without consultation. Furthermore, the appellant's claim that its auditors had advised it to change the treatment of minority interests because of a change in accounting standards for 2002, was knowingly misleading.

[42] Counsel also relied on **Beverley Williamson and another v The Port Authority of Jamaica** [2019] JMCA Civ 8 and argued that this court ruled that the company in that case had breached its duty of good faith to its employees in relation to their contract of employment and the exercise of discretion not to pay the appellant's retirement benefits. The court made this ruling although good faith had never been put forward in either this court or the lower court.

[43] The concept of good faith, counsel argued, cannot be regarded as a cause of action or a new fact to be considered. The instant case always concerned a breach of contract based on common understandings in the past between the appellant and the respondent through multiple circulars, letters and Heads of agreement. However, if the court should feel that it is a cause of action, case law suggests that there is no need to specifically identify a cause of action in a matter. Counsel relied on **Medical and Immuniodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42, **Roxanne Peart v Shameer Thomas, Brenda O'Connor, Angella Thomas, The Board of Management of the Snowden All Age School, The Ministry of Education and The Attorney General of Jamaica** [2017] JMSC Civ 60 and **Bhasin v Hrynew** 379 DLR (4th) 385. Counsel however contended that there were no new facts to consider and no brand new cause of action and so no need to amend the claim. Counsel submitted that the judge was correct when he found that good faith arose in light of the conduct of the parties over the years. The judge stated that good faith is not restricted to mean dishonesty. Dishonesty is merely an extreme form of lack of good faith.

[44] Counsel, relying on **Peter Persaud and Others v Pln Versailles & Schoon Ord Ltd** (1970) 17 WIR 107, also contended that developments in the law do not have to be by way of legislation. Consequently, the judge had the discretion to utilize and apply the good faith principle in contracts, which emerged from other common law jurisdictions.

[45] Relying on **British Caribbean Insurance Company Ltd v Delbert Perrier**, and responding to the appellant's submission that the respondent would have had to amend its pleading to be awarded interest for the period before judgment, counsel submitted that there was no need for the pleadings to be amended, as it is within the discretion of the court to state the period for the interest to be paid, for justice to be done to the injured party. Counsel relied on section 48(g) of the Judicature (Supreme Court) Act, the **Roxanne Peart** case and **Casilda Silvest and anor v Rupert Ellis and anor** [2015] JMSC Civ 63.

The judgment of the court below

Important aspects of the findings made by the judge

[46] The judge wrote a comprehensive judgment. In order to properly assess whether the grounds of appeal have been made out, quite a number of the paragraphs in his judgment have been set out for ease of reference, while others have been summarized.

[47] The judge assessed the reliability and credibility of the respondent's main witness, Mr Stewart. He wrote:

> "[11] Mr Stewart swore in his affidavit that discussions were taking place about this PSS even before 1977. Mr Stewart is in a position to know this. To say that he was a veteran at

> [the appellant] would do him a disservice. One could properly say he has been a chief cornerstone for worker's rights. He went there as a young man in 1968 and became an activist for worker's rights and better compensation. As an ordinary member, he attended meetings and clearly took an active role in [the respondent]. He eventually rose to become president of [the respondent]. His personal knowledge of the twists and turns of this issue is unrivaled and far exceeds any witness from [the appellant]. By the time Mr Cummings joined [the appellant] in 2004, Mr Stewart had completed over two decades there and had at least 27 years head start of Mr Cummings in terms of knowledge of this issue."

[48] The judge examined the meaning and concept of the phrase 'consolidated profits before tax' which was used in clause 2 of the Circular. At paragraph [106] of the judgment he stated that it was common ground and was in fact agreed that the concept of 'consolidated profits before tax' only arises where there are two or more companies. He stated that it was also common ground that when profits are to be distributed and depicted in financial statements there is a separation so that the correct amount of profit is given to the shareholders.

[49] The judge carefully considered the evidence given by Mr Cummings, one of the appellant's witnesses, and wrote:

> "[108] This is Mr Cummings' understanding of the issue. According to Mr Cummings, no distribution was made in 2002 because [the appellant] was advised by its auditors that in accordance with International Accounting Standard 27 ('IAS')-consolidated financial statements and accounting requires that profit attributable to minority equity holdings should not be included in the financial statements dated 20th September 2002. He also said that the auditors advised that the profit attributable to minority shareholdings should not be included in 'consolidated profits before tax' for the purpose of

> determining whether disbursement is due under the profit-sharing scheme. Mr Cummings told us that before 2002 the auditors utilized Generally Accepted Accounting Practices ('GAAP') to prepare [the appellant's] audited financial statements. However, in 2002, the use of IAS became mandatory.
>
> [109] The court will say at this early stage that this explanation from Mr Cummings is already suspect because the clear and undisputed evidence is that minority interest is not a creation of the IAS standard of 2002 but has been around well before that year. Thus the explanation advanced by Mr Cummings appears to have its foundations built on sand. It may be said that Mr Cummings is a human resources specialist and not a man steeped in the intricacies and nuances of accounting."

[50] Later on in the judgment, the judge also reviewed the evidence of Mr Jain, another of the appellant's witnesses. In light of Mr Jain's evidence, the judge concluded that the concept of consolidated profits was well known to accountants before 2002. He noted that Mr Jain never advanced the proposition that there was no such thing as 'consolidated profits before tax'. Mr Jain said that there must be proper attribution of profits in the correct amounts to the shareholders. Further, Mr Jain did not say that 'consolidated profits before tax' somehow impeded that process. From Mr Jain's evidence, and from the evidence in the case, the judge came to the understanding that one does not arrive at a division of the profits unless there is knowledge of what is the total profit of the entire group. The judge stated that there was "not one iota of evidence" that said that as the business operated at every step of the process from the start of the financial year right through to the end, and until the preparation of the financial statements there was a constant separation and division of profits and expense between majority and minority shareholders. The judge also concluded:

> "[113] What this means is that Mr Jain cannot assist with whether the principles of which he spoke were in fact applied to [the appellant] in the context of determining whether the PSS was triggered. He could not say whether there was any actual instance in the many years PWC was [the appellant's] auditors [sic] the sum minority interests were deducted from the figure identified as 'consolidated profits before tax'.
>
> [114] Mr Jain said that PWC has been the auditors since 1977, that is to say, the auditors were the same for every single year between 1977 to 2002, which is to say, PWC, whether called PWC or not, was involved in the preparation of financial statements 3 years **before** Circular 33 came into existence and 22 years post 1980 but somehow there is no recollection or document of any kind indicating whether or not minority interests were deducted from the sum identified as 'consolidated profits before tax.'" (Emphasis added)

[51] The judge, having considered the evidence of Mr Jain and Mr Saddler, remarked that the two highly trained and competent men said that the IAS standard in 2002 did not change the way consolidated accounts were prepared and presented in financial statements.

[52] The appellant's own witness, Mr Saddler, acknowledged that, had the minority interest not been deducted, the PSS would have been triggered. The judge made specific reference to this at paragraph [120]. He wrote:

> "Under further cross-examination, Mr Saddler accepted that had the minority interest not been deducted for the year 2002 the PSS would have been triggered."

From the evidence, no dispute remained on this issue.

[53] The judge reviewed the evidence of the respondent's witness, Mr Christie, also an accountant. He indicated that he understood from Mr Christie and the other two accountants, that the fact that there is an item known as 'consolidated profits before tax'

and presented by that name or a similar name in financial statements by the appellant, established that when the appellant used the expression 'consolidated profits before tax' in Circular 33 it knew exactly what it wanted to say because it was a known and common expression at the time. The judge indicated that it was also known from 1980 that in financial statements, the line item called 'consolidated profits before tax' was actually presented in the appellant's financial statements. He understood that from this line item tax was deducted and then the minority interests were taken out. He concluded that this was well known at the time of Circular 33. The judge accepted, "without reservation", Mr Christie's view that had the parties wished to exclude minority interests from 'consolidated profits before tax', they would have said so, since the rest of the formula in clause 2 actually went on to define what was meant by "shareholders' funds." In continuing his review and assessment of Mr Christie's evidence the judge wrote:

> "[125] In effect, Mr Christie is saying that in this particular case having regard to the history known to him, and now the court, anyone who used the expression 'consolidated profits before tax' in 1980 it would be understood that there was no taking out of minority interests at the time because inherent in the expression is the idea that minority interests are included hence the expression 'consolidated profits before tax'. However, when it comes to the actual distribution of profit attributable to the shareholdings it is at that point that separation takes place.
>
> …
>
> [130] Let it be noted that Mr Christie in this paragraph is saying that for the purpose of attributing profit to the various shareholders the standards indicate how that is to be done. This is not a case about determining minority interests for the purpose of attributing profits but for determining whether the PSS was triggered. They are quite distinct things and there is no doubt in this court's mind that [the appellant] never, for

> one moment, had in mind the calculation for distribution of profits when it came up with clause 2. His thesis has been that for the purpose of the formula in this specific case minority interests are not taken out before tax.
>
> [131] At first the court thought that there was some inconsistency in Mr Christie's evidence but on closer examination, there is no inconsistency. What impressed the court most is his statement that if PWC was always going by the accounting standard the question is, what is it that prevented this issue from arising before 2002? And why rely on it in 2002 for the first time when [the appellant] never [sic] done so in the previous 22 years? Mr Christie's evidence has demolished the reason advanced by [the appellant] for not paying out under the PSS in 2002. It has nothing to [sic] with any change in accounting standard since that change did not have the causative power being attributed to it. This necessarily means that there are implications for [the appellant] under the heading of good faith which is addressed later on in this judgment."

[54] The judge considered the question as to whether he could accept the evidence from the appellant's witnesses on the question of the change in accounting standards. He wrote:

> "[132] [The appellant] was asserting that it was the change in accounting standard that led to deduction of minority interests for the purpose of the PSS in 2002. No other reason was advanced. Also [the appellant] has not said that the assertion by Mr Stewart that in previous years the minority interest was not deducted from the line items of consolidated profits before tax is not true.
>
> [133] As the extracts from [the appellant's] witnesses have shown that reason does not hold up under analysis. The way in which [the appellant] has chosen to frame this aspect of the case does indeed lend credence to [the respondent's] view that regardless of how clause 2 is eventually interpreted by the court in this case there has never been a deduction of minority interests for the purposes of the PSS since the scheme was introduced. No witness from [the appellant] has

challenged this position. This too will be developed later on in this judgment under the heading of good faith.

[134] If it is true (and the court accepts that it is) that the change in the accounting standard did not change the way accountants treated minority interests before 2002, the intriguing question is why would [the appellant] need to state this as the reason for excluding minority interests from the expression 'consolidated profits before tax' when according to the experts that treatment was the same before and after the change [sic] standard? The best explanation in light of the evidence is that [the appellant] well knew that minority interests were not taken out of the sum identified as 'consolidated profits before tax' for the purpose of determining when PSS was payable and for some reason, not explained, wanted to avoid the PSS trigger and so came up with this explanation.

…

[136] Whatever was the configuration of [the appellant] and its subsidiaries in 1980 it is well established that by 1994, that Edward Gayle & Company, the company at the eye of this particular storm, became part of NCB family when it acquired Mutual Security Bank in 1994. This came from Mr Stewart and was not challenged. He also said that over that period he did not know whether Edward Gayle was profitable or not. This court understands this to mean that since Edward Gayle came into the NCB fold payouts under the PSS were made since Mutual Security Bank was acquired which also since [sic] means that PSS was activated since Edward Gayle was acquired. If [the appellant] and its auditors were applying the accounting standard and not the formula in the years post 1994 why is it that the disputes between [the appellant] and [the respondent] since 1994 on the PSS never centred on actual calculation but rather on whether any payouts under the PSS should be made? Indeed the very dispute between [the appellant] and [the respondent] when [the appellant] embarked upon and abandoned its ill-fated judicial review proceedings was not about deduction of minority interests from the 'consolidated profits before tax' but about whether the PSS should be paid."

[55] The judge therefore concluded that the reason advanced by the appellant in 2002 for refusing to make payments under the PSS, namely the change in accounting standards, was not the true one since such treatment of minority interests that was being relied on was not new or novel and was a well-established accounting principle before 2002.

[56] In determining the manner in which he should interpret clause 2 of the Circular, the judge looked at the history of its development. He noted that the context of clause 2 was the desire of the employees of the then Barclays Bank Jamaica Limited to secure a profit-sharing agreement with the bank. The claim was made in 1977 by the employees, and, at some point the matter was referred to the Ministry of Labour. At that meeting, the appellant and the employees agreed in principle that profit-sharing would take place. The judge noted further, that the details were not finalized in 1977. In January 1980, however, the appellant made a payment. That payment was not based on a fixed formula but apparently was done pending formal arrangements for the determination of when the PSS was activated. He wrote:

> "[144] Discussions continued. The result was Circular 33. The Circular stated the formula arrived at. It is not an accounting document. It is a document designed to confer benefit on employees of [the appellant]. The accounting concept of minority interests existed in 1980. It is equally true that the concept of 'consolidated profits before tax' also existed in 1980. As noted earlier, it was known that unless stated otherwise when one speaks of 'consolidated profits before tax' that expression necessarily included minority interest. This is the evidence of Mr Christie. All the accountants seem to be agreed on this.

[145] From a review of the evidence including the financial statements, there is an item known as 'consolidated profits before tax' or 'profits before tax' or 'profits before taxation and extraordinary items' and that line item was identified in the financial statements. This means that the parties at the time of Circular 33 knew that there was such a thing 'consolidated profits before tax.' This proves that at the time of Circular 33 [the respondent] and [the appellant] quite well knew what 'consolidated profits before tax' meant and that was why there was no further refinement. The fact that the financial statements have a specific line item called 'consolidated profits before tax' proves that such a concept was known and understood to mean exactly that.

[146] In light of this context and background, this court finds that clause 2 of Circular 33 when it uses the expression 'consolidated profits before tax' does not mean that minority interests are to be deducted at that stage. If that had been intended that would have been said. Recall that the persons who were having discussions about this are all persons used to financial statements and examining financial information. Had it been intended to exclude minority interests from the expression or line items 'consolidated profits before tax' that would have been said to make clear that that was what was meant. This is all the more so because as the financial statements themselves demonstrate, tax is in fact deducted from the line item 'consolidated profits before tax' and then the distribution of profits takes place according to shareholding size. This court finds that having regard to the surrounding circumstances including the accounting standards the use of the expression 'consolidated profits before tax' was indeed a very specific term and that term meant all the profits from all subsidiaries before the tax.

[147] It is this court's view that the statement 'as agreed by the auditors' means that the auditors were to verify the correctness of the calculation. It was a check on the arithmetic of [the appellant] and not that the auditors were given veto power. The Circular 33 had no such thing in mind as veto power being vested in the auditors. [The appellant] through the affidavit of Mr Cummings has advanced the proposition that '[the respondent] appears to have accepted that [the appellant] is bound by the recommendation of the auditors' (para 34). There is no evidence for this. This is not the case

> at all and the court does not accept that evidence from [the appellant]."

[57] In light of Mr Cumming's evidence, which the judge described as the appellant's "Damascus Road revelation", the judge saw a fundamental flaw in the appellant's approach to the issue. He noted that Mr Cummings was using the change in accounting standards in 2002 to say what a document meant when it was created in 1980. The judge considered that if the logic of Mr Cummings, Mr Jain and Mr Saddler was correct, then as the standards changed so would the meaning of clause 2. This also persuaded him that Mr Cummings' evidence on the issue had to be rejected.

[58] In light of the assertion made by the appellant's witnesses that the auditors had a veto power as to whether the PSS was activated, the judge reviewed the evidence concerning calculations of the PSS over the years. He wrote:

> "[151] Mr Saddler, as noted earlier, stated that [the appellant] would do its own calculations and send them to the auditors. Mr Saddler also said he cannot recall even a single instance where the auditors disagreed with [the appellant's] calculations in the years PSS was activated before 2002."

[59] Having outlined his interpretation of the Circular the judge concluded that it did not produce "an absurd result or a commercially stupid arrangement". He noted that the respondent and the appellant had been trying since 1977 to come up with a final method of having the employees participate in the profit of the appellant. He opined that there was nothing in the formula that required the appellant to break any laws and the formula did not require the appellant to misrepresent the profits payable to minority interests. In addition, the new IAS standard introduced in 2002 could not alter the meaning of the

document created in 1980. In continuing his analysis and in outlining his conclusions the judge also stated:

> "[153] This court accepts the calculations of Mr Orville Christie and therefore PSS was activated in 2002. The interpretation advanced by [the appellant] through all its witnesses was not within the understanding [sic] [the appellant] in 1980 and never surfaced before 2002 when [the appellant] was seeking to hang its interpretation in the IAS 2002 hook. It was never contemplated that minority interests would be deducted from the consolidated profits before tax. The formula is clear and free from any ambiguity. It is simply amazing that after 20 years of applying the formula without problem a problem should suddenly arise solely because there was a change in accounting standard that did not affect the fundamental principle that the person with controlling interest cannot claim the entire profit as his own. The formula does not require [the appellant] to claim all the profit as its own. The formula requires [the appellant] to determine the consolidated profits before tax, something that it has done quite well for over 20 years, for the purpose of the PSS.
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> …
>
> [176] Mr Scott has taken the view that Mr Stewart has not substantiated his position and has been making naked assertions that prior to 2002 minority interest have never been deducted for the purpose of the PSS. The court takes a different view of the matter. Mr Stewart, as indicated earlier, is in a unique position to speak. Mr Saddler accepted that as president of [the respondent] Mr Stewart would be a member of the board. Mr Stewart has made the assertion that the formula has in fact been calculated in a particular manner. He did not say so explicitly but the court understands him to be saying that formula has in fact been calculated in the way indicated by Mr Christie. He would know this because he has been in [the appellant] since the PSS was instituted and would know how its calculated.
>
> [177] Mr Christie made it clear that one of the factors he took into account was his information that minority interests have never been taken out by [the appellant] in any previous year. He was not challenged on this in cross-examination. No

> witness from [the appellant] has said that what Mr Stewart and Mr Christie have asserted about how the calculation was made in the past is not true. Mr Saddler says that that method is wrong but he did not say that Mr Christie was incorrect in his assertion.
>
> [178] All this provides a strong basis for the court to say that [the appellant] in fact has always done the calculation in the manner indicated by Mr Christie. If this is so then the employees would expect that [the appellant] acting in good faith would continue with that methodology because the IAS did not require that 'consolidated profits before tax' be calculated any differently from how it was calculated in the past when determining whether the PSS is activated.
>
> [179] The court has already decided that at the very least since January 1, 1993 but certainly by June 2, 1993, if not before, the PSS became a part of the contract of employment of the employees. The court has also found that 'consolidated profits before tax' did not have the meaning now being advanced by [the appellant] when Circular 33 came into existence. The court is also of the view that [the appellant], in fact, interpreted and applied clause 2 in the manner contended for by [the respondent] and this explains the absence of any dispute over the calculation of the PSS since the publication of Circular 33. The dispute before 2002 was whether it would be paid in any given year but not about the method of calculation."

The law

[60] It is a well-established principle of law that, when a question of fact has been tried by a judge without a jury, and it is not suggested that he has misdirected himself in law, an appellate court, in reviewing the record of the evidence, should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him, therefor, are unsatisfactory by reason of material inconsistencies or inaccuracies, or if it appears unmistakably from the evidence

that in reaching them he has not taken proper advantage of having seen and heard the witnesses, or has failed to appreciate the weight and bearing of circumstances admitted or proved (see **Watt (or Thomas) v Thomas** [1947] AC 484).

[61] Further at page 486 of the case of **Watt (or Thomas) v Thomas**, Viscount Simon stated:

> "… an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

[62] In the case of **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, the Privy Council ruled that it is only in cases where the findings of the tribunal are not supported by the evidence, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings. Similarly, in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, it was stated, in part, at paragraph 12:

> "... It has often been said that the appeal court must be satisfied that the judge at first instance has gone '**plainly wrong'**. See, for example, Lord Macmillan in **Thomas v Thomas** [[1947] AC 484] at p 491 and Lord Hope of Craighead in **Thomson v Kvaerner Govan Ltd** 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: **Piggott Brothers & Co Ltd v Jackson** [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole.** That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. **Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence**: **Choo KokBeng v Choo Kok Hoe** [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169." (Emphasis added)

[63] This court has adopted and consistently applied the principle of law as enounced in **Watt (or Thomas) v Thomas**. Dukharan JA, in the consolidated cases of **Ronald Chang and another v Frances Rookwood et al** [2013] JMCA Civ 40, summarized the extent of this court's jurisdiction in reviewing factual decisions made by a judge in a court of first instance. At paragraph [26] he said:

> "These principles were followed with approval in **Watt v Thomas** [1947] AC 484. Lord Thankerton said at page 487 that, where a question of fact has been tried by a judge without a jury, and there is no question of his having misdirected himself, 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 the decision of the judge cannot be explained by any advantage which he enjoyed by reason of having seen and heard the witnesses**. Lord MacMillan developed the same point at page 490. He said that the printed record was only part of the

evidence. What was lacking was evidence of the demeanor of the witnesses and all the incidental elements which make up the atmosphere of an actual trial. He said at page 491:

> 'So far as the case stands on paper, it not infrequently happens that a decision, either way, may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong'." (Emphasis supplied)

Analysis

[64] Counsel for the appellant has submitted that the instant case is highly fact-specific. I agree. Furthermore, although the appellant has challenged certain conclusions to which the judge arrived on the basis that they were incorrect in fact and in law, the majority of the conclusions to which the grounds of appeal refer, insofar as they touch on conclusions relating to the issue of the application and interpretation of the Circular by the parties, are findings of fact. It is because of this that I have not found it necessary to refer to the majority of the cases cited by counsel in their arguments. I nevertheless thank counsel for their industry.

[65] On the other hand, the question as to whether good faith properly arose on the pleadings is one of law. It is also a question of law as to whether the judge properly

awarded interest for a period before the date of judgment, when the pleadings referred to interest on the judgment sum at the commercial rate at the date of judgment.

[66] Where the findings of fact are concerned, therefore, it will be necessary to determine whether it was permissible for the judge to have arrived at the challenged findings of fact in the face of the evidence as a whole. Can it be said that the findings of fact are plainly unsound? Does it appear from the evidence that the judge did not take proper advantage of having seen and heard the witnesses? Did he fail to appreciate the weight and bearing of the circumstances admitted or proved?

[67] Having reviewed the judgment, as well as the record of appeal, it is my respectful view that the judge reviewed the evidence thoroughly and gave detailed reasons for the findings to which he arrived.

'Consolidated profits before tax' - Grounds A-J and L

[68] The judge explored in detail the history and matrix of facts leading to the parties settling the terms of the Circular.

[69] He also thoroughly considered what the term 'consolidated profits before tax' meant in general accounting terms. He concluded that the meaning of the term did not change for the purposes of the calculation of the PSS. It was a line item that was well understood. The judge made it clear that the court was considering the meaning of the term insofar as the calculation of PSS was concerned. It turned out however that there was no special meaning that needed to be used, as 'consolidated profits before tax' is a line item in the financial statements.

[70] As the judge noted, where dividends are to be declared to shareholders, then a different process is involved. The matter before the court did not involve ascertaining the true profit held by the appellant. The judge was required to, and did in fact, interpret Circular 33, which addressed the question of the profit-sharing agreement. Since 'consolidated profits before tax' is a line item which can be clearly identified in the financial statements, there was no basis for the judge to see it as a "term of art".

[71] None of the appellant's witnesses, in their evidence, testified that the appellant had ever, before 2002, deducted minority interests for the purposes of calculating PSS. It would have been difficult for them to say so, because the appellant's witnesses testified that minority interests were being deducted in 2002, because of a change in accounting standards. As the judge correctly stated, the appellant had not advanced any other reason for the deduction of the minority interests. It turned out, however, that the reason that the appellant had advanced was false.

[72] What was the role of the auditors? The judge, having heard the evidence, concluded that the auditors did not have any veto power as to whether the PSS should be paid, but were required to do an arithmetic check. The appellant was claiming that it had to rely on the advice of the auditors who told it that, due to a change in accounting standards, minority interests were to be deducted before a determination is made as to whether a profit-sharing payment was triggered. As the evidence reflects, it turned out that this was false and that there was no change in how minority interests were to be treated. That was the importance that the appellant was ascribing to the advice of the auditors. No other.

[73] On the other hand, the appellant's own witness Mr Saddler said that the appellant would do its own calculations of the profit share and send it to the auditors, and to the best of his recollection, the auditors had never disagreed with the appellant's calculations. This is not surprising if, as the judge found, 'consolidated profits before tax' is a line item in the financial statements and the formula is clear. The application of the PSS formula did not require adjustments to any figures in order to take into consideration any losses sustained by a minority. The independent auditors only had an arithmetical role where calculation of the PSS was concerned. On the evidence, the judge was clearly entitled to make this finding. In addition, it was open to the judge to have found that the JSSAP and IAS had no bearing on the interpretation of the 1980 Circular.

[74] The judge noted that the parties had never had an issue concerning the method of the calculation of the PSS. It was open to the judge to so find, especially since the appellant did not, at any time, suggest that it had, in the past deducted minority interests before determining whether the PSS was triggered. On the contrary, the appellant claimed that something new had occurred, these new accounting standards, and that is why it was now required, on the advice of its auditors to deduct minority interest. Interestingly, the appellant's own auditors, PWC, who had served in that capacity before the PSS was reduced into Circular 33 and up to the time of the hearing, were unable to say whether minority interests had been deducted at any time in the past in determining whether PSS was triggered. This was very telling. If the auditors had been playing the role of exercising a veto power over the years, shouldn't they have been able to speak to the issue?

[75] A further review of the evidence is also useful. Mr Paul Stewart, in his affidavit, provided evidence that profit share payments were made over the period 1980 - 1995, and in 2001. The appellant suffered losses over the years 1996 - 1998 and, in 1999, the respondent agreed to forego payment as the appellant had made a very small profit. It was therefore not correct for the appellant, in its grounds of appeal, to state that there was no evidence of the number of times that the profit share was triggered over the period 1980 - 2002.

[76] In the financial statements, it is indicated that the appellant's subsidiaries together with the appellant are referred to as "the Group". Upon a review of the financial statements included in the evidence, by the agreement of the parties, minority interests existed in the Group for at least the period 1991 – 2002 (up until 7 August 2002). The judge therefore correctly stated that minority interests existed in the group prior to 2002. In fact, from as early as 1994 Edward Gayle & Company, which played a role in the dispute which arose, was a part of the Group, and only 50.5% of it was owned. Profit share payment was made in 1994 and 1995. Issues concerning how minority interests ought to be treated, and in particular the minority interest of Edward Gayle & Company, could, therefore, have come up in 1994 and 1995. But clearly, they had not.

[77] The appellant has argued that, apart from the bald assertion made by the respondent's witness, Mr Stewart, there was no evidence that minority interests had been included. The evidence led by Mr Stewart could not properly be seen as a bald assertion. Mr Stewart deponed that, based on the formula, the appellant was to pay the PSS, not out of profit due to the appellant, but based on the formula – 'consolidated profits before

tax'. He stated that there was nothing in the formula that mentioned Bank alone or Group alone; from "day one" it referred to 'consolidated profits before taxation'. He emphasized that, as bankers doing an analysis of a balance sheet, they well knew the meaning of 'consolidated profits before taxation'. He insisted that in calculating the profit share "We are looking at one degeh degeh thing which is a formula that is from the consolidated profits".

[78] The appellant has argued that there was no evidence of any calculations provided to the court for the period 1994 - 2002 although Mr Stewart was a member of the board. It was in fact curious that neither the appellant nor the respondent was able to produce any such records. It could be, as the respondent seemed to suggest, that this was due to the manner in which the claim progressed. The respondent, for some time, was under the impression that the focus of the appellant was a denial that the PSS was a part of the employment contract of the staff and was instead, a matter in the exercise of the discretion of the appellant. Nevertheless, it would certainly have been important for the appellant to also show calculations which excluded minority interests before PSS was triggered. The point is, the appellant would not have done so, because it was saying that minority interests had to be deducted, on the advice of its auditors, due to a change in accounting standards.

[79] The judge assessed Mr Stewart and found that he possessed more knowledge of the profit-sharing scheme than any other witness in the matter, having been an employees' representative, who served on the appellant's board for many years. He had knowledge and experience and the judge found him to be reliable. The appellant's

witnesses, did not at any time, claim that minority interests had been deducted in the past.

[80] It is also helpful to highlight certain other aspects of the evidence which was before the judge. In a memorandum dated 16 December 1980 the appellant's general manager of staff and administration recommended that the appellant make available for distribution, 6% of the Group's 'consolidated profits before tax' instead of the 4% previously agreed. There followed a calculation in which the appellant's general manager outlined profits before tax and before profit sharing and thereafter a deduction of the profit sharing.

[81] In a memorandum dated 13 December 1988 the appellant's general manager and the managing director had prepared a draft calculation of the profit share due to be paid. They stated that there was an agreement with the staff association that six percent of the Group's consolidated pre-tax profits was distributable among all pensionable staff.

[82] By Circular dated 11 December 1989, addressed to all managers, the managing director of the appellant referred to the profit-sharing agreement which was in force under which 6% of the Group's pre-tax profit is shared. He then outlined the amounts paid out under the scheme for 1987, 1988 and 1989.

[83] In a letter dated 23 April 1996, the deputy managing director of NCB Group Limited wrote to the chairman of the respondent, Mr Stewart, and indicated that it was likely that the Group would record a loss. He went on to indicate that when an agreement had been

made to pay staff a minimum of four weeks regardless of the level of profit made, no one anticipated that the group would have been in the situation in which it found itself.

[84] By letter dated 21 July 1998 the managing director of the bank, Mr Dunbar McFarlane, wrote to Mr Stewart, chairman of the respondent and highlighted the financial situation of the Group. Profit share was the last item addressed in the letter. He stated that under the then arrangement, profit share tripped in once the Group's consolidated pre-tax profits exceeded 25% of the Issued share capital plus reserves. He indicated that given the proposed injection of equity into the Group it may have been an opportune time for the parties to revisit the arrangement.

[85] It is important to note that at no time in any of the highlighted pieces of correspondence from the appellant, or in its draft calculations concerning the PSS, was there ever a deduction or a reference to a deduction in respect of profit attributable to minority interests.

[86] The appellant's witness, Mr Cummings, agreed that the formula set out in the Circular remained unchanged from 1980. He stated, further, that the appellant had never urged that the formula had changed.

[87] Mr Saddler, the appellant's witness, accepted that, had the sum attributable to minority interests not been deducted for the year 2002, the PSS would have been triggered. The judge, therefore, had other evidence, apart from that of Mr Christie, that the PSS was triggered in 2002.

[88] In the course of its submissions before us the appellant no longer claimed that it was a change in accounting standards which mandated that minority interests be deducted from the figure identified as 'consolidated profits before tax'. Counsel for the appellant has acknowledged that the reason which the appellant advanced for the deduction was wrong, as it was not true that the deduction was required due to a change in accounting standards. Nevertheless, counsel argued, it is important to identify the profits that are attributable to the appellant, as it would be unfair to take into account profits which belong to the minority interests. The judge addressed this issue and I agree with his approach. This is not a case about how profits were to be attributed, it was about what would trigger the profit-sharing scheme with the employees according to the formula in the Circular. As the judge correctly stated, the two issues are different.

[89] I agree with the judge that the formula in the Circular is "clear and free from any ambiguity". The appellant, with its argument that the term 'consolidated profits before tax' was a "term of art", was seeking to complicate the meaning of the Circular.

[90] In all the circumstances the appellant has not demonstrated that the decision of the judge is unsound or that the conclusions to which he arrived are unsatisfactory. The evidence as a whole clearly supports the decisions to which the judge arrived on the PSS and the interpretation of the Circular.

[91] These grounds of appeal therefore fail.

Good faith - Grounds K, M, and N

[92] The following paragraphs of the judge's reasons are relevant for a consideration of this issue.

[93] The judge made it clear that the PSS had been incorporated into the relevant contracts of the appellant's employees. He wrote:

> "[103] Since Mr Forrest's letter was written during the financial year 1992/1993, the court finds, on a balance of probability, that by the end of the financial year ending 30th September 1993 that two things were agreed between [the appellant] and [the respondent]: (a) the PSS had become part of the contract of employment and (b) whenever it was payable by virtue of the threshold being met, the minimum payment was 4 week's salary."

[94] Importantly, the judge indicated the manner in which, in his view, the issue of good faith arose. He wrote:

> "[154] After the conclusion of oral submissions, the court invited the parties to make additional submissions on the issue of whether good faith as a principle of law should be applied in this case. The submissions came in the form of written submissions. This came about because the court, in doing its own research, came across the Canadian Supreme Court decision of **Bhasin v Hrynew** 379 D.L.R. (4th) 385. In that case the court introduced the concept of good faith as a general organising principle of contract law. This court, in light of that invited further submissions because the court was of the view that this principle may be more applicable to private law litigation than the public law concept of legitimate expectation that was relied on by [the respondent].
>
> [155] From the outset Mr Miller has been pressing the argument that the employees had a legitimate expectation that the calculation that was used in previous years would be applied in 2002. There are two possible ways to understand this view. First it may mean that [the appellant] applies the

> correct interpretation and do [sic] the calculations in accordance with the formula. Second, it may mean that if [the appellant] wanted to change its calculation it should not advance a false reason for the change but speak the truth, the whole truth and nothing but the truth about the reason for the desire to change the calculation and then engage in dialogue with [the respondent]… From the way in which [the respondent] has argued its case from the beginning the court is of the view that it is speaking to the second way of advancing the argument.
>
> [156] Mr Scott in his additional submissions suggested that the court should not consider this principle of good faith for two reasons. The first was that the case for [the respondent] was not pleaded as one of lack of good faith on the part of [the appellant]. Second, the principle is not part of Jamaican law. Learned Queen's counsel added that this development should be left to the legislature.
>
> [157] … The court is satisfied that the issue of good faith was raised in the affidavits, by cross examination and actually addressed in oral and written submissions albeit that the wrong legal concept was used but in the end, with the additional submissions, both sides were given the opportunity to address the point."

[95] He identified two implied terms as follows:

> "[187] In this case the court is convinced that there are two implied terms. The terms were implied once the PSS became part of the contract of employment with the employees and this was either in January 1, 1993 or June 2, 1993. The first term to be implied is that the PSS would be calculated in the same way that it has always been calculated before it became a term of the contract of employment. The reason for this is that clause 2 was being used as the formula since December 17, 1980 …
>
> [188] The second implied term is that there would be consultation with [the respondent] if [the appellant] wished to change the method of calculating any aspect of the formula…
>
> …

> [190] The nature of this contract was such that any alteration of its terms would necessitate dialogue with [the respondent]. No one is suggesting that [the appellant] cannot wish to change its position in relation to the PSS but it must do so in good faith. If [the appellant] wanted to change the formula for determining whether the PSS is activated it ought to have done so in a manner that is open, transparent, proper, conscionable and fair. What the court is saying is that the reason advanced by [the appellant] was inaccurate because Mr Christie demonstrated, and the evidence of Mr Stewart supported, that had the calculation been based on accounting standards, as [the appellant] is now claiming, and not the formula then this issue would have surfaced before 2002 or put another way the way of doing calculation would not have been what it has been for 20 years.
>
> [191] The court concludes that the two implied terms were breached by [the appellant]."

[96] At paragraph [167] of the judgment, the judge acknowledged that, as yet, there was no general legal principle of good faith in commercial contracts in Jamaican jurisprudence, and stated that the instant case did not require him to decide whether such a principle should be adopted in Jamaica. He noted that other common law jurisdictions had, however, adopted such a principle. He also noted that the appellant had relied on the judgment of Leggatt J in **Yam Seng Pte Ltd v International Trade Corporation Ltd** in its argument that a generalized principle of good faith had not been adopted in English Law. The judge, however, pointed out that Leggatt J observed that "refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide". The judge expressed the view that even if there was no express term of good faith, there was no impediment to finding that such a term could be implied in certain circumstances.

[97] After referring to the cases of **Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd** and **Brogden v Investec Bank** [2014] EWHC 2785 (affirmed on appeal [2016] EWCA Civ 1031; [2016] All ER CD) 171), the judge concluded at paragraph [174]:

> "... The point is that the concept of good faith has now 'escaped' its traditional confines at fiduciary relationships, insurance contacts, unconscionable bargains and has found its way into employment contracts. The case before the court is an employment circumstance albeit arrived at by collective bargaining."

[98] The judge expressed the view that there was nothing inherent in the reasoning, or inherent in the concept of good faith, which dictated that such a term could only be implied in the employment context when a contractual discretion was conferred on either contracting party.

[99] Although the judge stated that good faith had found its way into employment contracts, in the course of his analysis on the issue, he placed heavy reliance on principles from the **Yam Seng Pte Ltd** case in which Leggatt J had strongly proposed a generalized principle of good faith in commercial contracts. It should be noted however, that to date, as far as my research has revealed, the English courts have still not adopted a general legal principle of good faith in commercial contracts.

[100] **Yam Seng Pte Ltd v International Trade Corporation Ltd** was referred to in **Paymaster Jamaica Limited v The Postal Corporation of Jamaica** [2018] JMCA Civ 6. In that matter, counsel for the appellant had argued that the Postal Corporation had acted in bad faith when it relied on a clause within the sub-agency agreement that

allowed either party to terminate the agreement if either party had failed to perform any of its obligations. Counsel for the appellant in that case had relied on **Yam Seng Pte Ltd v International Trade Corporation Ltd**, which he argued, provided useful guidance on the existence of an implied duty of good faith in commercial contracts. Straw JA (Ag) (as she then was) stated:

> "[109] In **Yam Seng Pte Ltd (a company registered in Singapore) v International Trade Corporation Ltd**, a decision of the Queen's Bench Division, Legatt J examined the issue of whether there was a general application of the principle of good faith as an implied duty in the performance of contracts. He noted that the House of Lords had recognised that 'commerce takes place against a background expectation of honesty' (paragraph 136). He stated also that 'what good faith requires is sensitive to context' (paragraph 141) and that 'the test of good faith is objective in the sense that it depends not on either party's perception of whether the particular conduct is improper but on whether in the particular context the conduct could be regarded as commercially unacceptable by reasonable and honest people' (paragraph 144).
>
> [110] It is difficult therefore to conclude that the learned judge misinterpreted the facts when he found that the uncontradicted evidence supported the view that the respondent declined to enter into arrangements with the appellant due to the issue of unreconciled payments. Similarly, it is difficult to conclude that he erred or could be shown to be palpably wrong in his determination that issues relating to the alleged breach of contract "is best dealt with by a trial court where evidence may be lead and tested in the usual manner."

[101] Our court did not expressly address the issue as to whether, in Jamaica, we had adopted as part of our law, a general application of the principle of good faith, as an implied duty in the performance of contracts.

[102] It is also necessary to refer to a recent decision of this court. In **Beverley Williamson and Richard Roberts v The Port Authority of Jamaica** [2019] JMCA Civ 8, Morrison P, in outlining the nature of the issue which arose for consideration, stated at paragraph [1] of the judgment:

> "This appeal is concerned with a contractual discretion vested in an employer to grant a retirement benefit to former employees in certain circumstances. It is common ground between the parties that such a discretion is not unfettered and that the employer is in such a case under a duty to (i) act in good faith towards the employee in its consideration of whether or not to grant the benefit; and (ii) arrive at a rational decision; that is, a decision which is not arbitrary or capricious."

[103] The case did not, therefore, address or relate to the question as to whether we had adopted as part of our law, a general application of the principle of good faith, as an implied duty in the performance of contracts. The judge, however, clearly felt that it was time for the common law in Jamaica to march with the times and accept that principle as a part of our law.

[104] It is therefore important for me to consider the case of **Bhasin v Hrynew** [2014] 3 S.C.R. 494, decided in November 2014 by the Supreme Court of Canada. The judge had referred to this case when he decided to request written submissions from the parties on the issue of good faith. Neither the appellant nor the respondent included this case in their lists of authorities or made submissions on the case. The respondent only referred to the case in its written submissions, when it mentioned the fact that the judge had relied on the case in relation to good faith being a general organizing principle of contract

law. In light of the conclusion to which I have come on the good faith issue, I nevertheless felt it would be useful to examine the case.

[105] Mr Bhasin, through his business Bhasin and Associates, was an enrolment director for Canadian American Financial Corp ("Can-Am"). Mr Bhasin's contract included a term that the contract would automatically renew at the end of the three-year term, unless one of the parties gave six months' notice to the contrary. Mr Hyrnew, one of the respondents and another enrolment director, was a competitor of Mr Bhasin. The relationship between Mr Bhasin and Can-Am "soured in 1999 and ultimately Can-Am decided not to renew the dealership agreement with him" (see paragraph 2 of the judgment). In May 2001 Can-Am gave notice of non-renewal under the Agreement. At the expiry of the term, for reasons related to how both Can-Am and Mr Hyrnew had behaved, Mr Bhasin lost the value in his business in his assembled workforce. Mr Bhasin sued Can-Am and Mr Hyrnew. The litigation ultimately ended up in the Supreme Court.

[106] At first instance, Moen J in the Alberta Court of Queen’s Bench, found that it was an implied term of the contract that decisions about whether to renew the contract would be made in good faith. The first instance court found that Can-Am was in breach of the implied term of good faith, that Mr Hyrnew had intentionally induced breach of contract and the respondents were liable for civil conspiracy. The trial judge found Can-Am had acted dishonestly with Mr Bhasin in the events leading up to the non-renewal of the contract and had misled him in various ways.

[107] The Court of Appeal allowed the respondents' appeal and dismissed Mr Bhasin's lawsuit. It found that he had not sufficiently pleaded breach of the duty of good faith, and held that the lower court erred by implying a term of good faith in the context of an unambiguous contract containing an entire agreement.

[108] Mr Bhasin appealed the decision. The Supreme Court of Canada, in its judgment delivered by Cromwell J, considered two main questions:

a. Did Canadian common law impose a duty on parties to perform their contractual obligations honestly and if so,

b. Did Can-Am, his previous employers, breach that duty?

The court also considered whether Mr Bhasin had properly pleaded/breach of the duty of good faith.

[109] Insofar as the pleading issue was concerned, the Supreme Court found that the allegations in the statement of claim had clearly put the questions of improper purpose and dishonesty in issue. It found that those facts were sufficient to put Can-Am's good faith in issue, and that the question of whether this conduct amounted to a breach of the duty of good faith was a legal conclusion that did not need to be pleaded separately. The court highlighted that the defendants had not moved to strike the pleadings or seek particulars of the allegation of wrongful termination in the statement of claim.

[110] The court also found that good faith was a "live issue that was fully canvassed in a lengthy trial" and the written submissions by both parties at trial had referred to it. In

addition, even in opening at trial, Mr Bhasin's counsel raised the issue of good faith. The trial judge had found that any deficiency in pleadings did not cause prejudice to the respondents. The court opined that this was an assessment which the trial judge was uniquely positioned to make, and her conclusion was to be treated with deference on appeal.

[111] Having surveyed cases in the Canadian common law in relation to good faith performance of contracts, Cromwell J said that at the time of the appeal the state of the law was "piecemeal, unsettled and unclear". He expressed the view that:

> "enunciating a general organizing principle of good faith and recognizing a duty to perform contracts honestly will help bring certainty and coherence to this area of the law in a way that is consistent with reasonable commercial expectations." (see paragraph 62)

[112] Cromwell J stated that the objection to Can-Am's conduct did not fit within any of the existing situations or relationships in which duties of good faith had been found to exist, and the relationship between Can-Am and Mr Bhasin was not an employment or franchise relationship. In addition, the decision not to renew the contract could not be classified as a contractual discretion. He then indicated that:

> "The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts." (see paragraph 72)

[113] At paragraph 73 he answered this question in the following manner:

> "In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means

> simply that parties must not be or otherwise knowingly mislead each other about matters directly linked to the performance of the contract."

[114] He stated further:

> "I am…concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honesty contractual performance..." (see paragraph 74)

[115] In concluding on this new facet of the Canadian common law Cromwell J stated at paragraph 93 of the judgment:

> "A summary of the principles is in order:
>
> 1) There is a general organizing principle of good faith that underlies many facets of contract law.
>
> 2) In general, the particular implication of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of the principle in particular types of situations and relations.
>
> 3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligation."

[116] In applying this new principle, the Supreme Court referred to the clear finding of fact made by the trial judge that Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause", and found that there was no basis to interfere with that finding on appeal. Consequently, Can-Am had breached its duty to perform the agreement honestly.

[117] The Supreme Court concluded that in light of Can-Am's breach of contract, in that it failed to be honest with Mr Bhasin about its contractual performance, in particular, with respect to its settled intentions regarding renewal, Can-Am was liable for damages. The court further stated that the damages were to be calculated on the basis of what Mr Bhasin's economic position would have been, had Can-Am fulfilled that duty.

[118] The legal position in the Canadian common law is therefore clear that the principle of good faith in the performance of contracts, even where there is no issue of the exercise of a contractual discretion, is recognised as a general organising principle in contract law. However, as indicated above, that is not the same in respect of the English common law. It remains to be seen what decision we will make in this jurisdiction on the issue of good faith as an implied duty or general organising principle in the performance of contracts. As will be seen in the paragraphs which follow, we did not find it necessary to address that issue in this matter for a number of reasons.

[119] One of the reasons relates to the pleadings and evidence in this matter. The judge stated that the issue of good faith in the performance of the contract was raised in the affidavits, by cross-examination, and was addressed in oral and written submissions, albeit that the wrong legal principle was used. The appellant has argued that the judge erred in so concluding in light of the contents of the pleadings and the evidence in the matter. Having examined the fixed date claim form and the affidavits filed by the parties, with due regard to the deference to be paid to the judge’s views as the trial judge, I agree that the issue of good faith was not raised in the pleadings. It was also not raised in the oral evidence in the matter.

[120] In both its skeleton submissions filed 6 June 2016, and its closing submissions filed 20 December 2016 in the matter below, the respondent had argued that the appellant had paid its members PSS in accordance with the formula agreed, which is a term in their contract of employment. It argued that this had given rise to a legitimate expectation that the formula would have been used for 2002, as no changes were discussed with it, and the appellant could not unilaterally amend the contract. It argued that the appellant should not be allowed by the court to breach its "contractual obligation".

[121] The respondent had also submitted that the appellant's action, in changing the formula (which cannot be done unilaterally), constituted it acting in a high handed manner "unfairly and not in good faith". As a result, the members of the respondent had lost trust and confidence in the appellant. The respondent submitted that the appellant had an obligation to act in good faith and pay the PSS in keeping with the formula laid down. Furthermore, the employer should not do anything to damage or destroy the mutual trust and confidence between employer and employee. The respondent also referred to a number of cases on the issue of legitimate expectation.

[122] The appellant, on the other hand, did not refer to the issue of good faith in the performance of contracts, or the doctrine of legitimate expectation, in either its skeleton arguments or its closing submissions which, like those of the appellant, were filed on 6 June and 20 December 2016.

[123] It is true that, eventually, both parties made submissions on the issue. However, the detailed written submissions, filed 14 July 2017, directly addressing the issue of good

faith, were made at the invitation of the judge. This took place after the evidence had been taken and concluded on 23 November 2016, and the closing submissions made by both parties in December 2016. As reflected in the judgment, the judge had the view that the principle of good faith could have been more applicable than the "public law concept of legitimate expectation" that had been relied on by the respondent.

[124] The record reveals that the appellant, no doubt due to the state of the pleadings in the matter, did not conduct its case on the basis that good faith in the performance of the contract was a live issue in the matter. In light of all the circumstances, it was therefore unfair to the appellant for the judge to have proceeded to place emphasis on the concept at the stage which he did and to, thereafter, arrive at conclusions adverse to the appellant on that basis.

[125] Furthermore, in my respectful view, it was not necessary for the judge to have proceeded to consider the issue of good faith, and seek to traverse new territory in the law.

[126] The judge had, earlier on in the judgment, decided that the PSS had been incorporated into the employment contracts of the appellant's staff (see paragraph [103] of the judgment). Once the formula was applied and the threshold met, the PSS was payable. Payment was not a matter within the discretion of the appellant, and so no issue arose as to the manner in which any discretion ought to have been exercised. Furthermore, the judge decided that the meaning of clause 2 of the Circular was clear and unambiguous (see paragraph [153] of the judgment). Importantly, this was not a

matter in which the appellant had a power or right conferred on it pursuant to the contract, which would necessitate the court considering whether it had exercised this power or contractual right in good faith.

[127] There was no need to imply into the contract, as the judge did, that "the PSS would be calculated in the same way that it has always been calculated before it became a term of the contract of employment". This is because the judge ruled on the clear interpretation of the Circular which governed the basis on which the PSS would be payable. Neither was there the need to imply a term that there would be consultation with the respondent if the appellant wished to change the method of calculating any aspect of the formula. Furthermore, there was no need for the judge to conclude that the implied terms to which he referred had been breached. There was no claim for damages for breach of contract.

[128] The main issues which the judge had to determine were whether the PSS had been incorporated into the employment contract of the appellant's staff as well as the correct interpretation of clause 2 of the Circular. The judge had decided that the Circular had been incorporated into the staff's employment contracts, and had been arrived at after years of negotiation and discussion. In light of the terms of the Circular, once the relevant threshold was met, the PSS was due and payable. Since the appellant did not have any discretion as to whether the PSS would be paid, and any payment was not in the exercise of a contractual right on the part of the appellant, it would inexorably follow that the operation of the Circular and the PSS could not be changed unilaterally. Any change in the formula or the manner in which the PSS operated would, of necessity, have

to involve discussions and negotiations, and failing same, determination through a relevant dispute resolution mechanism.

[129] It was, therefore, not necessary for the judge to consider and rule on the issue of good faith, and proceed to imply terms into the contract between the parties, in order to grant the declarations which were made, and which resolved the issues which came to the court for determination. Furthermore, his findings that there was a breach of the terms which he had implied into the contract between the parties, was not reflected in any of the declarations or orders which he granted.

[130] Importantly, one of the declarations granted by the judge, and which was not challenged by the appellant in its appeal, was that the terms, conditions and rules governing the PSS and particularly clause 2 of the Circular, cannot be unilaterally amended by the appellant.

[131] In this court the appellant has, however, challenged the declaration which was granted that it cannot unilaterally deduct minority interests' profit from profit before tax, in order to establish whether a PSS has been triggered pursuant to the Circular. The appellant has focussed much of its arguments around the meaning of the term 'consolidated profits before tax', submitting that it is a "term of art" which would necessarily involve the deduction of minority interests. It also challenged various findings of fact which the judge made in his consideration of the meaning of the term and the role of the auditors. In pursuing its arguments in this way, the appellant was, in effect, as I understood it, arguing that when it deducted minority interests, it was neither

unilaterally amending the Circular, nor unilaterally deducting minority interests. Instead, it would be complying with the Circular because 'consolidated profits before tax' was a 'term of art' and not a line item in the financials. As has been demonstrated in the earlier section of this judgment, it was not necessary to consider the good faith question in order to resolve the fundamental issues relating to the PSS, the Circular and this particular declaration which the appellant has challenged.

[132] As the evidence before the judge clearly demonstrated, and as counsel for the appellant had candidly acknowledged before us, the reason which the appellant advanced for the deduction of minority interests from the line item 'consolidated profits before tax', was untrue. Nevertheless as I have indicated above, this was not an appropriate case in which the good faith principle in the performance of contracts could have, or needed to have been utilized to determine the matter between the parties. Consequently, the findings made by the judge that the appellant acted in bad faith, in light of the particular circumstances in this case cannot stand. Howevever, although I agree that the appellant's ground of appeal that good faith did not arise on the pleadings is correct, this would not affect the outcome of the appeal insofar as the declarations granted by the judge are concerned. In my view, none of the declarations which were granted required, or related to any breach of terms implied into the contract between the parties, as a result of the application of the good faith principle in the performance of contracts.

[133] In light of all of the above, in my respectful view, this was not a case in which it was necessary for the judge to have entered into uncharted waters in respect of the good faith principle in the circumstances of this case.

Interest - Ground O

[134] At paragraph [14] of his reasons for judgment as regards the award of interest, the judge ruled that the respondent did not plead compound interest and "so that is the end of the matter on compound interest". At paragraphs [16] and [17] the judge referred to **British Caribbean Insurance Company Limited v Delbert Perrier** and concluded that, on the basis of that case, the respondent was entitled to "commercial interest".

[135] The judge thereafter considered the issue of the appropriate rate of interest. At paragraphs [25] – [26] the judge wrote:

> "[25] The court agrees with Mr Scott that the Bank of Jamaica statistical digest can be used to derive an interest rate. Mr Scott suggested that the rate should be 15.15%. The problem here is that Mr Scott has relied on [sic] table for the period to January 2017 to March 2017. It is not immediately clear why this period was selected and the written submissions on this selection were not very illuminating. The court sees no legitimate reason for limiting the period from which to derive an interest [sic] to January 2017 to March 2017 unless it can be said that that period was a representative sample of interest rate for the fifteen-year period that the [respondent's] members have been out of pocket and that interest should be for the whole period. That argument has not been made.
>
> [26] The court is of the view that the simple interest at commercial rate should apply for the period October 1, 2002 to the date of payment."

[136] In the instant case there is no dispute as to whether interest should have been awarded at a commercial rate. The sole issue concerns the period of time over which the judge ordered that interest should run on the outstanding amount. Was the judge correct to have ordered that interest run commencing 1 October 2002, when the respondent had

pleaded "[i]nterest on the judgment sum at the commercial rate at the date of judgment"? Importantly the respondent also sought "[s]uch further and other reliefs as this Honourable Court deems fit".

[137] The CPR expressly outline the matters which are to be included in a claim form when interest is claimed. Rule 8.7(1) and (3) of the CPR states:

> "(1) The claimant must in the claim form (other than a fixed date claim form) -
>
> (a) include a short description of the nature of the claim;
>
> (b) specify any remedy that the claimant seeks (though this does not limit the power of the court to grant any other remedy to which the claimant may be entitled);
>
> (c) …
>
> (d) …
>
> (2) …
>
> (3) A claimant who is seeking interest must-
>
> (a) say so in the claim form, and
>
> (b) include in the claim form or particulars of claim details of-
>
> (i) the basis of entitlement;
>
> (ii) the rate;
>
> (iii) the date from which it is claimed; and
>
> (iv) where the claim is for a specified sum of money,
>
> - the total amount of interest claimed to the date of the claim; and

- the daily rate at which interest will accrue after the date of the claim."

[138] In this matter the claim was pursued by way of fixed date claim form. Rule 8.8 of the CPR addresses the contents of fixed date claim forms. It provides:

> "Where the claimant uses form 2, the claim form must state-
>
> (a) the question which the claimant wants the court to decide; or
>
> (b) the remedy which the claimant is seeking and the legal basis for the claim to that remedy;
>
> (c) where the claim is being made under an enactment, what that enactment is;
>
> (d) …
>
> (e) where the claimant
>
> (i) is claiming in a representative capacity; or
>
> (ii) sues a defendant in a representative capacity, what that capacity is."

[139] Rule 8.8 of the CPR does not speak to what must be included in a fixed date claim form where the claimant seeks an award of interest. Upon a review of rules 8.7 and 8.8, in my view, the provisions of 8.7(3) would apply to a claimant who files a fixed date claim form and seeks interest.

[140] The award of interest is a discretionary remedy. Section 3 of the Law Reform (Miscellaneous Provisions) Act provides that the court has the power to grant interest and the exercise of this power is discretionary. It states:

> "In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section -
>
> (a) shall authorise the giving of interest upon interest; or
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange."

[141] The court exercises its discretion not only in relation to the rate of interest, but also whether interest will be payable on the entire debt and whether such interest should run for the whole or any part of the period between the date when the cause of action arose and the date of judgment.

[142] The principles which guide an appellate court when it reviews the exercise of a judge's discretion are well established. This court is to defer to the judge's exercise of his discretion, and must not interfere with it merely on the ground that the court would have exercised the discretion differently. The court will only set aside the exercise of discretion by a judge if, among other things, it was based on a misunderstanding by him of the law or the evidence before him. See the judgment of Morrison JA (as he then was) in

Attorney General of Jamaica v John MacKay [2012] JMCA App 1 at paragraphs [19] – [20].

[143] Both parties relied on the locus classicus of **British Caribbean Insurance Company Limited v Delbert Perrier**. In that case, this court outlined the objective of an award of interest. At pages 125 - 127 Carey JA wrote:

> "As his final attack, learned Queen's counsel argued that the award of interest should be set aside because the period was excessive and the rate was too high. Since the judge had an undoubted power to award interest under section 3 of the Law Reform (Miscellaneous Provision) Act, I do not understand Mr. Goffe to be arguing that no interest was awardable but that the rate was excessive.
>
> The question which is posed is on what basis should a judge award interest in a commercial case. **I do not think it can be doubted that where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld**…
>
> If restituto in integrum is the rationale for the award of interest, then the rate at which a plaintiff can borrow money must be the rate to be set by the judge in his award. In civil cases, the object of the entire process is to restore the aggrieved party, the plaintiff to the position he occupied before the wrong…
>
> The second cases[sic] sited was *Birkett v Hayes* [1982] 2 All ER 719[1] which was concerned with awards of damages in personal injury cases. **The only value of that case is to show that where a trial has been unjustifiably delayed by the plaintiff, the court may award interest for a period less than the usual period which is between the date of service and the date of trial**. In the *Myron* [1969]

[1] Correct citation is [1982] 2 All ER 710.

2 Lloyd's Rep. 411 at pp. 417-418, Donaldson, J., (as he then was) said:

> 'It is of paramount importance to the speedy settlement of disputes that a respondent who is found to be under a liability to a claimant should gain no advantage and that the claimant should suffer no correspondent detriment as a result of delay in reaching a decision. Accordingly, **awards should in general include an order that the respondents pay interest on the sum due from the date when the money should have been paid**.'

… In summary, the position stands thus:

> (i) awards should include an order for the defendant to pay interest.
>
> (ii) the rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant; and
>
> (iii) the plaintiff is entitled to adduce evidence as to the rate at which such money could be borrowed." (Emphasis supplied).

[144] Counsel for the respondent have also relied on section 48(g) of the Judicature (Supreme Court) Act, which provides:

> "The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties

> respectively may be completely and finally determined, and multiplicity of proceedings avoided."

[145] In two recent decisions of this court, we have emphasized that the court is empowered to grant other remedies to which a party may be entitled on a claim properly brought by that party. In the instant claim, the issue does not go to as high as another remedy, the issue solely relates to the period of time over which interest was awarded.

[146] In **Attorney General v Peter Bandoo** [2020] JMCA Civ 10 the appellant argued that the respondent had not sufficiently pleaded his loss of earnings, as they did not satisfy the requirements of rule 8.7 of the CPR. Having examined the relevant provisions of the CPR, F Williams JA, who wrote the judgment of the court, stated at paragraphs [20] - [21]:

> "[20] The cumulative effect of these rules is that a claimant has a duty to set out the substance of his claim and the remedies that are being sought from the court.
>
> Further, a claimant has a duty to bring to the fore any documentary evidence necessary to prove his or her claim. However, ultimately it is within the discretion of the court whether to allow reliance on a factual contention, which has not been set out in the particulars of claim.
>
> [21] The court is also empowered to grant other remedies to which a party may be entitled on a claim properly brought by that party. The jurisdiction of the Supreme Court to manage the cases brought before it and to grant remedies to which a party is entitled, apart from residing in the court's inherent jurisdiction, is also reflected in section 48(g) of the Judicature (Supreme Court) Act. …"

[147] F Williams JA, however, proceeded to examine the law applicable to the pleading of special damages and concluded, at paragraph [34] of the judgment, that the claim for

loss of income had not been properly pleaded. The law concerning the need to specifically plead special damages is extensive and it is well understood why, except in a limited range of circumstances, the courts have emphasized that such a claim must be specifically pleaded and proved.

[148] In **Rayan Hunter v Shantell Richards & Stephanie Richards** [2020] JMCA Civ 17 McDonald-Bishop JA also examined the impact of section 48(g) of the Judicature (Supreme Court) Act. At paragraphs [27] - [29] she wrote:

> "[27] The Judicature (Supreme Court) Act ("the Act") supersedes the rules of court and, in section 48, makes provisions as to the concurrent administration of law and equity…
>
> [28] In section 2 of the Act, 'cause' is defined as, 'any suit or other original proceeding between a plaintiff and a defendant…' while it defines 'matter' as including, 'every proceeding in the Court not a cause…'.
>
> [29] In this case, the appellant had properly brought a legal challenge that the service on him was improper and ought to be set aside because the claim forms were nullities. Once it was established that he was entitled to that remedy, then, he ought to have been granted it, despite the omission to state in his application that he was applying for a declaration. That would have been in keeping with equity and fairness. The judge also could have made a declaration on the same basis, once the case was clear that the appellant was entitled to it."

[149] The provisions of the Law Reform (Miscellaneous Provisions) Act make it clear that the award of interest is a matter which is within the discretion of the court. The case law on the area indicates that the usual approach is to compensate the claimant for the period over which he has been deprived of the use of the money.

[150] The respondent claimed interest as at the date of judgment. However, its members had been deprived of the monies from 2002. The dispute concerning the profit share payment arose in or around December 2002 in respect of the appellant's audited financial statements as at 30 September 2002. The claim was filed in 2006 and was amended in 2014. Judgment was handed down in July and October 2017. While the appellant has submitted that there was no explanation for the delay between when the claim was filed in 2006 and May 2015, no positive assertion was made that the respondent deliberately caused this delay. It would not be appropriate to accede to the somewhat faint submissions made by the appellant, and deprive the respondent of interest for the period before judgment, when no evidence was led before the judge that the respondent had, for example, unjustifiably delayed trial of the claim.

[151] The appellant has not established that the judge misunderstood the law or evidence before him in the exercise of his discretion. In accordance with section 48(g) of the Judicature (Supreme Court) Act as well as the provisions of the Law Reform (Miscellaneous Provisions) Act, the judge was entitled to exercise his discretion to grant interest for the period over which the respondent's members had been deprived of the relevant sum.

[152] This ground of appeal therefore fails.

[153] For the reasons outlined above I therefore propose that the appeal be dismissed with costs to the respondent to be agreed or taxed.

FRASER JA (AG)

[154] I too have read the draft judgment of my sister Foster-Pusey JA and I agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

1. Appeal dismissed.

2. The judgments of Sykes J dated 20 July 2017 and 25 October 2017 are affirmed.

3. Costs of the appeal to the respondent to be taxed, if not agreed.