JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 121/97

BEFORE: THE HON. MR. JUSTICE FORTE, P.
HON. MR. JUSTICE BINGHAM, J.A.
HON. MR. JUSTICE WALKER, J.A.

BETWEEN DALTON YAP APPELLANT

JAMAICA CITIZENS BANK LIMITED RESPONDENT

Hilary Phillips, Q.C. and **Christopher Dunkley** instructed by **Wright, Dunkley** and **Company** for the appellant

B. St. Michael Hylton, Q.C. and **Hilary Reid** instructed by **Myers, Fletcher** and **Gordon** for the respondent

November 29, 30 ,December 1, 2, 3,1999 and June 15, 2000

FORTE, P:

I have read in draft the judgment of Walker J.A. and agree with his reasoning and conclusion therein. There is nothing further I could usefully add.

BINGHAM, J.A.:

I also agree.

WALKER, J.A.:

This is an appeal from a judgment given by Panton J in the Supreme Court in favour of the respondent (the plaintiff at the trial) against the appellant (the defendant at the trial) for the sum of US$106,226.04 with interest at a rate of 12% per annum from June 30, 1994 and costs to be agreed or taxed. The sum awarded represented the extent of the loss sustained by the respondent bank in respect of the operation of a telemarketing account in the name Worldwide Marketing Limited (the "WWM" account). The account was opened by the appellant in his capacity as General Manager, Technology and Operations employed to the bank.

The case made by the plaintiff at the trial rested substantially upon the evidence of the following witnesses:

1. **Mr. Lloyd Wiggan**

He was Managing Director of the plaintiff bank having assumed that position in November, 1992. Prior to that time he had been General Manager for Technology and Operations, a position which he had held for 4 years. He had been replaced in that position by the defendant. He said that during the first quarter of 1993 the defendant raised the issue of telemarketing as part of the business of the bank and that the matter was discussed at a meeting of executives of the bank. At that meeting it was decided that telemarketing was a

risky business with which the bank should not become involved. Subsequently he proceeded on vacation leave and upon his return to work on July 14, 1993 he learnt that the bank had become engaged in telemarketing . As a result of correspondence which was brought to his attention he had a discussion with the defendant during the course of which he told the defendant that there was widespread concern about the operation of the bank's telemarketing accounts. At this time he was assured by the defendant that all the accounts had been closed. Subsequently he was advised by an officer of the bank, Mrs. Alarene Knight (formerly Wong) that all such accounts had in fact been closed. He said that he recruited the defendant whom he regarded as a highly competent person. Between 1988 and 1993 the defendant's performance in his work at the bank was of a high level.

2. **Mr. Ewart Scott**

He was appointed General Manager, Retail Banking and Marketing at the plaintiff bank in 1993. During that year he had overall responsibility for the marketing department which included credit card marketing and the credit card operations of the bank. In 1993 Mrs. Knight was the Manager of that area of the bank's business. The credit card operations division of the bank was responsible for opening and closing accounts. He was present at the meeting held in early 1993, of which Mr. Wiggan gave evidence and he confirmed that it was decided at that meeting that the business of telemarketing was too risky for the bank to

undertake. He had nothing to do with the opening of telemarketing accounts at the bank and only became aware that such accounts had been opened by virtue of a memorandum dated May 3, 1993 sent to him by Mrs. Knight On August 9, 1993, he ordered the immediate closure of two of those accounts, namely the Worldwide Marketing and Rick Greenlese accounts.

On the following day a letter was faxed to him by Visa's Vice President, Mr. Dawson, urging him to "insure that Worldwide Marketing is terminated as a Visa merchant". On August 17 he replied to Mr. Dawson advising that certain named merchant accounts had been closed, and that although the Worldwide Marketing account was not one of those closed, no further transactions were being processed on that account.

3. **Miss Marcia Green**

She was the current Manager of the Credit Card Centre, having earlier in 1993 been a supervisor in the credit card operations section of the bank. In 1993 she supervised the opening of the telemarketing accounts as to which the defendant gave the necessary instructions. The instructions to open new merchant accounts would usually come from the marketing department of the bank but in relation to these telemarketing accounts no such instructions had been forthcoming.

4. **Mr. George Beckford**

In 1993 he was Assistant Manager, Credit Card Centre of the plaintiff bank and in that capacity reported directly to the defendant. In March, 1993 telemarketing accounts were opened on the instructions of the defendant. His (Mr. Beckford's) evidence is summarized in part as follows in the judgment of the trial judge:

> "By a memorandum dated May 3, 1993, VISA International advised Mr. Beckford that Travel Connection was 'possibly...accepting fraudulent transactions'. A form was attached to the memorandum, and Mr. Beckford was asked by the writer of the memorandum to investigate the matter and complete the form and return it to VISA.
>
> Mr. Beckford said that he discussed this memorandum with the defendant who called the representatives of the merchants regarding this issue ad then he (defendant) called VISA. Whereupon, according to Mr. Beckford, 'we were comfortable that everything was working alright'... In Mr. Beckford's view, the defendant had taken appropriate action.
>
> At a meeting attended by the witness, Mrs. Knight, Miss Green and one George Laing (Lumsden) on July 19, 1993, there was a proposal to open a merchant account in the name Worldwide Marketing using a local address. VISA International, he said, had asked them to cease processing transactions that did not originate in the region where the processing was being done. That, he said, was the reason for the local address so that the transactions would originate locally so they would be able to process it. The defendant, he said, was the person who gave the instructions for the account to be opened.
>
> During cross-examination by learned attorney-at-law, Mr. Wright, the witness Beckford said that he was not in a position to say whether the defendant, in giving

> instructions for the opening of the accounts, had been acting pursuant to instructions from the Marketing section."

5. **Mrs. Alarene Knight (formerly Wong)**

She was employed to the plaintiff bank from 1990 to 1996. Between 1990 and 1992 her job title was Credit Card Centre Manager. In 1992 her position changed to Credit Card Centre Manager, Marketing with responsibility for selling the bank's services to merchants desirous of accepting credit cards in the course of doing business. Merchants had to be visited before entering into an agreement with the bank for the provision of credit card service. Her evidence as it continued is summarized as follows in the judgment of the trial judge:

> "In order to perform this task properly, the merchants had to be visited before the plaintiff entered into an agreement with them. Instructions would be given to Credit Card Operations for the account to be opened. When all the opening processes had been completed, 'and the merchant is fully on board', a monthly transaction report is sent by Credit Card Operations to Marketing.
>
> The offending telemarketers did not appear on the monthly transaction report. Nor had they gone through the regular processes prior to opening. They had not been checked nor approved by the marketing section. These telemarketers were Travel Connection, Floral Exchange, LMP Marketing, Worldwide Marketing and International Concepts.
>
> Mrs. Knight received on May 3, 1993, information from VISA International that Travel Connection may have been accepting fraudulent transactions. She immediately reported the matter to Mr. Scott who requested the defendant to deal with it urgently.

On July 2, 1993, VISA International sent Mrs. Knight a letter which reads thus:

> 'Enclosed are "Fraud Transaction Screening Program" reports regarding the following merchants affiliated with your bank:
> - LMP Marketing Limited
> - International Concepts
>
> Please note the report on LMP Marketing reveals that on 2 July, 1993, that merchant deposited 238 transactions totalling US$10,261.00, this in spite of communications from this office regarding the fact that LMP Marketing is depositing fraudulent sales drafts. This merchant is listed as a hotel and it seems highly unlikely that 238 deposits would be made of even amounts from US$27.00 to US$93.00.
>
> LMP Marketing is depositing fraudulent charges, violating the Visa Local Paper rule, and is laundering sales drafts.
>
> By fax to Mr. Dalton Yap dated 29 June 1993 your centre was notified that LMP Marketing was depositing fraudulent sales drafts with your institution, and various questions were asked in order to determine the exact nature of the business, where Visa account numbers are being obtained, and so forth. To date a reply has not been received.
>
> The enclosed report on International Concepts reveals 16 transactions were deposited for a total of US$9,583.00. All were for US$598.95 each. This is the exact amount per transaction deposited by two other merchants of your centre, Travel Connection and Floral Exchange, which are also listed as hotels. These merchants have been laundering drafts from the same telemarketers in the United States. Therefore, it is highly likely that International Concepts is involved in the same laundering scheme.

Because of the reasons stated above and the reasons stated in the numerous communications and phone calls to your centre, it certainly appears that your bank is becoming a haven for telemarketing laundering operations by fraudulent telemarketers based in the United States.

In view of the above, LMP Marketing, Floral Exchange and Travel Connection should be terminated, and no further deposits of Visa transactions should be made. Also an immediate investigation should be made of International Concepts and if irregularities are noted, that merchant should also be terminated. It should be noted that US$598.95 seems like a high price to pay for a hotel room.

In order to protect your centre from future charge backs, it is strongly recommended that deposits by these merchants be frozen if applicable laws and regulations do not preclude such action.

By Tuesday, July 6, 1993, please advise this office of the action taken regarding the above-mentioned merchants.

Regards, Joseph Dawson
Vice-President

Mrs. Knight took this letter to Mr. Scott and, in dramatic manner, she described how she stormed a meeting that Mr. Scott was in so as to demand his attention.

On July 6, 1993, Mr. Dawson wrote to Mrs. Knight enclosing 'two more reports on LMP Marketing' and instructing that this merchant must be terminated. This letter and others were copied by Mrs. Knight to Mr. Wiggan who was then out of office but who returned on July 14. On his return, he sent a note to Mrs. Knight indicating that the defendant had informed him that all

> six accounts had been closed... Mrs. Knight confirmed the holding of a meeting on July 19 called by the defendant. There, a proposal was made in respect of Worldwide Marketing and the provision of a local address. This amazed Mrs. Knight as she felt that the plaintiff was on the verge of losing its licence with VISA, yet discussions were taking place on how to circumvent VISA's regulations. No decision was reached at this meeting.
>
> Closing an account, according to Mrs. Knight, requires the sending of a memorandum from the Marketing section to the Operations Section. There was such a memorandum from George Lumsden and Mrs. Knight to Lesley Hew... After the closure of an account, a bank would then deal with the merchant on the basis of the provisions of the merchant agreement. If a merchant account was closed and a credit came in the bank would still process it".

The evidence of the defendant Dalton Yap

His employment with the plaintiff bank commenced on September 12, 1988. He boasted impressive credentials and excelled in his job. So far as is relevant to this appeal his evidence was summarized in the judgment of the trial judge as follows:

> "The defendant testified that he became involved with telemarketing when Mr. Ewart gave him a letter... and said to him: 'Dalton, just run with this agreement or letter and work with Mr. Bill Todd'. He said he understood that to mean that he should 'put them on the line, just hook them up to the system.' His explanation of his understanding continued thus: 'work with Mr. Todd and find out how the whole business could be set up or what is the processing fee, who are the people and that sort of stuff'.
>
> Bill Todd and one Richard McGranahan became like service providers who produced some merchants such as

Travel Connection, Floral Exchange etc. (the offending telemarketers).

The 'Market and Service Agreement' referred to earlier was received by the defendant from Richard McGranahan. The defendant copied and sent it to Mr. Scott who made no further contact with the defendant on it. Although there was no further contact, the defendant, acting on the original instructions to 'run with it', communicated information to Messrs Sapp and McGranahan for software purposes so as to facilitate the opening of the merchant accounts.

The defendant expected that the Marketing section would have carried out credit checks etc. in relation to the various merchants. He saw no need to have gone back to Scott for further instructions as the agreement that was sent down was pretty clear as to what was to be done. Mr. Scott, according to the defendant, was very much aware of the establishment of the relationships.

According to the defendant, Mr. Scott's evidence has been aimed at shifting blame from himself to the defendant. 'I mean, the man fired me at the end of the day', he said... The defendant... at first stated that he did not recall being present at the meeting which Mr. Scott said was held in February, 1993, and at which the decision was taken not to enter into telemarketing arrangements. However, shortly after he had said that he did not recall, he went on to say that Mr. Scott was present and that ' it was an executive meeting between all the executives at the time, which included Mr. Wiggan'. On the next page he said 'I don't recall. It could have been but I don't recall that decision was discussed at any executive meeting'. All executive meetings, he said, were minuted.

With reference to the various queries that VISA International made in relation to the conduct of certain merchant transactions and the possibility of fraud the defendant said that he would have 'picked up the telephone and called Bill Todd or Richard McGranahan and said 'look, I got another fax from these people. What

is going on'?... or he would have gotten details and forwarded them to Richard McGranahan 'for him to look at, to deal with, for his information'....

In a letter dated June 21, 1993, ... from VISA International directly to the defendant, instructions are given for the termination of the account of Travel Connection. Based on information 'obtained from you, and on information developed by VISA in this case, it certainly appears that 'laundering' is occurring in this case', states the letter. When asked what action he took, the defendant stated that he didn't exactly remember save to say that like previous faxes, he forwarded them to McGranahan 'to let him know that the VISA folks' were very much concerned about the merchants he had introduced to the bank...The defendant said that he did not know that VISA had powers to cancel a merchant. To him, only the Retail Banking section could have given him instructions to close as it was from them that he had had the instruction to open. All they had to do, he said, was scribble a note, 'Dalton, close this account right away'. He does not remember discussing this with anyone...In addition, the defendant had fears as to the legal consequences to the plaintiff of closing an account without good reason.

During cross-examination, reference was made to the defendant's letter of July 7, 1993, to VISA, informing that LMP Marketing, Floral Exchange and Travel Connection had been terminated. However, the witness agreed that LMP Marketing had a second account opened on July 8 but he did not personally know the circumstances involved in the opening of the latter account. The defendant also said that Worldwide Marketing was opened after the July 19 meeting; and that there were persons connected with Travel Connection that were linked to Worldwide Marketing. From the figures presented ...the defendant agrees that Worldwide Marketing contributed most to the loss suffered by the plaintiff as a result of the activities of the various merchants".

The Findings of Panton J at the trial

The judge concluded that the defendant was not liable for any loss resulting from any of the telemarketing activities in which the plaintiff was involved prior to July 6, 1993. However, the judge found that the defendant acted in breach of his contract of employment with the plaintiff in reopening the account in the name LMP Marketing Limited (the "LMP" account) and in opening the WWM account and was liable for the loss resulting from the operation of the latter account. More expansively, these findings were expressed in the following terms:

> "I find that the account for LMP Marketing, though closed on the 6th July, 1993, was re-opened about two days later. The defendant, I find, sought to avoid providing answers in relation to this re-opening while he was being searchingly cross-examined by Mr. Hylton. In my judgment, the defendant was the person who gave the instructions for the re-opening.
>
> There is absolutely no doubt that the defendant was, at the time of the re-opening of this account, fully aware of the implications of this act. He knew of the likelihood of loss to the plaintiff thereby.
>
> The opening of Worldwide Marketing Ltd.
>
> The re-opening of LMP Marketing was not the only activity of the defendant in this regard after the closure of the accounts on the 6th July, 1993. Another significant act was his opening of Worldwide Marketing Ltd. At the stage at which this account was opened, there is no doubt that the defendant knew that such an act was inimical to the interests of the plaintiff. VISA had given instructions for the closure of all such accounts, pointing to possible fraudulent dealings. Furthermore, the July 6 memorandum from Marketing to Operations was in

> effect. Most damaging perhaps is the fact Worldwide Marketing Ltd. involved persons who had been connected with the already closed accounts. The opening of this account clearly violated VISA's regulations as well as the plaintiff's now known policy.
>
> In my judgment, the re-opening of LMP Marketing and the opening of Worldwide Marketing constituted a breach of the defendant's contract of employment with the plaintiff. This was clear defiance of the plaintiff's policy. It follows that the defendant is liable for the losses sustained by the plaintiff from this breach. In the case of Worldwide Marketing Ltd.; he is liable for the loss recorded that is US$106,226.04. In respect of LMP Marketing... there does not appear to have been a loss to the plaintiff; in any event, no loss was pleaded".

It was a specific finding of the judge that prior to July 6, 1993 there was no policy of the plaintiff bank which forbade the business of telemarketing but that such a policy which he described as the "now known policy" was instituted as of that date. July 6, 1993 was also the date after which the WWM account was opened and the LMP account re-opened. The judge found that these two accounts were, respectively, opened and reopened by the defendant in breach of his contract of employment with the plaintiff. It was common ground at the trial that no loss was occasioned to the plaintiff by the operation of the LMP account and the judge's finding of liability in the defendant was not founded on any loss incurred in that regard.

The Appeal

The grounds on which the present appeal is prosecuted challenge the judge's findings of fact and award of interest and costs. The centre-piece of the

appeal is the WWM account. Crucial to the opening of this account was a meeting of executive officers of the respondent bank which was held on July 19,1993. Present at that meeting were Mr. Scott, Mr. Beckford, Mrs. Wong, Mrs. Green, Mr. Lumsden and the appellant, all senior officers of the bank and Mr. Greenlese representing the Worldwide Marketing Organisation. It was at this meeting that the subject matter of the WWM account was first broached. Shortly afterwards the account was opened by the appellant. The tenor of a memorandum dated July 21, 1993 which followed that meeting is supportive of a conclusion that Mr. Lumsden, whose responsibility it was as acting head of the bank's marketing department to vet and approve new merchant accounts, was quite prepared to approve the WWM account provided proper safeguards were put in place. That memorandum was couched in the following terms:

"**JAMAICA CITIZENS BANK LIMITED**

Interoffice correspondence

PRIVATE & CONFIDENTIAL

TO: Dalton Yap
G.M. - Technology/Operations

DATE: July 21, 1993

SUBJECT: WORLDWIDE MARKETING

With reference to our meeting of July 19, the proposal put forward by Worldwide Marketing appears to be an attractive source of new business and one which could utilize the capabilities of our credit card technology.

> Although the processing agent, Ciebrand is apparently a company of unquestionable integrity, the fact that they are dealing with WMM does not add any value to our comfort level of risk.
>
> I think the potential for considerable exposure exist given the 180 day charge back potential time span. The risk factor of the amount of lodgments of such a period has to be weighed against the potential processing fee income. I think that we should look even beyond a mercantile report and seek a bank guarantee through standby letter of credit for the full amount of all potential risk.
>
> A. George Lumsden
> Assistant General Manager - Retail Banking
> c.c. Ewart Scott"

A note written by the appellant on the face of that memorandum reads:

> "George,
>
> I agree with the standby LC we should put this in motion and contact WWM for this.
>
> Dalton".

Miss Phillips Q.C. for the appellant took us painstakingly through the evidence in an attempt to show that contrary to the judge's finding, as of July 6, 1993 there was no "now known policy" in relation to telemarketing business being conducted by the respondent bank. It was counsel's submission that the judge did not give due effect to the meeting of July 19 which she contended authorized the opening of the WWM account. Nor did the judge pay due regard

to Mr. Lumsden's memorandum of July 21, which indicated that the writer saw the WWM account as "an attractive source of new business". As supportive of her argument Miss Phillips pointed to the fact that the judge made no reference to Mr. Lumsden's memorandum in the course of his judgment. She also observed that Mr. Lumsden did not give evidence at the trial.

Mr. Hylton Q.C. for the respondent submitted that the "now known policy" so described by the judge did not connote a discontinuance of the bank's business of telemarketing simpliciter, but meant "no telemarketers in breach of the local paper rule". The local paper rule by which the processing of telemarketing transactions that did not originate in the region where the processing was done was forbidden formed part of Visa International's operating regulations and applied to Visa's operations in Jamaica. The opening of the WWM account, Mr. Hylton argued, was clearly an attempt on the part of the appellant to circumvent this rule. Counsel argued that it was in failing to comply promptly with Visa's instructions to close the telemarketing accounts that were identified, and by opening and re-opening the WWM and LMP accounts against the instructions of Visa that the appellant committed a breach of his contract of employment. There was, in fact , no direct evidence to establish that it was the defendant who re-opened the LMP account and this was conceded by Mr. Hylton, Q.C. for the plaintiff, although Mr. Hylton argued that on a totality of the evidence such an inference was possible. Furthermore, as Mr. Hylton submitted, the evidence proved that it was to the knowledge of the

appellant that the same people who were suspected by Visa of fraudulent practices were behind the WWM account and, probably, also behind the LMP account. The "same people" to whom Mr. Hylton referred were Arlene Bell, who was also concerned with the closed account in the name of Travel Connection, and Mr. Greenlese who was connected to the closed Greenlese account. The appellant denied any knowledge of Bell's connection with the WWM account, knowledge which the respondent attempted to prove by correspondence passing between the parties on August 17, 1993 , the same date on which the appellant returned to his office from vacation leave. But, at best, this was evidence of knowledge that would have been gained by the appellant long after the opening of the WWM account in July, 1993, an event upon which it could, therefore, have had no bearing. In the case of Mr. Greenlese, the appellant admitted knowledge of Mr. Greenlese's connection with both accounts at the time of opening the WWM account. But the fact is that whatever the state of the appellant's knowledge as regards the connections of Mr. Greenlese or, for that matter, Arlene Bell, the appellant could incur no personal liability for the opening of the WWM account in circumstances where that event came about as the result of a collegiate decision taken by competent executive officers of the bank and not as a consequence of an independent act of the appellant.

Miss Phillips' argument is a compelling one in which I find merit. In my view the meeting of July 19 was crucial to the opening of the WWM account, and Mr. Lumsden's memorandum which followed that meeting was clearly

indicative of his approval of the opening of the account with proper safeguards as he suggested. As far as safeguards went, it is clear that responsibility for securing the same lay with the bank's marketing department and not with its operations department of which the appellant was head. In the result no safeguards were put in place. For this default the marketing department was blameworthy as Panton J recognised when he said in his judgment:

> "Considering the critical role that the Marketing Department was expected to play in relation to investigation and closure, it seems unreasonable for the plaintiff to be attempting to exonerate the persons employed in that department."

It is clear that the WWM account was opened shortly after the meeting of July 19,1993 by the appellant with the tacit, if not expressed, approval of the respondent's marketing department (as represented by Mr. Lumsden). At all material times it was the responsibility of that department to vet and approve new merchant accounts. The finding of Panton J of the existence of a " now known policy" at the bank at the time of the opening of this account is not sustainable on the evidence and it must follow, therefore, that the judge also fell into error in finding that the WWM account was opened in breach of such a policy. Prior to July 6, 1993 the defendant enjoyed the reputation of being a model employee of the respondent bank. His work was of an exceptionally high level. In the words of the judge:

> " He shone, if one accepts the various evaluations that were done of him by the managing directors and the Board; and there is no reason not to accept them. He

> went on various courses as his experience broadened. Technology is his forte. He has a diploma in electronic engineering from the Radio College, Canada. When he entered banking in 1982 he did so as an executive trainee in the computers department as a member of a task force to implement a computerised banking system at Citibank".

With such an excellent reputation it was highly improbable that the appellant would have committed the bank to taking on the WWM account knowing, as the judge found, of the likelihood of loss to the bank. That the appellant had in mind an intention to comply with Visa's regulations, including Visa's local paper rule, is evident from a letter dated July 7, 1993 addressed by him to Visa's Vice President, Mr. Joseph Dawson. That letter reads as follows:

> "July 7, 1993
>
> Mr. Joseph Dawson
> Vice President
> VISA International
> P.O. Box 026098
> Miami, Florida 33102
>
> Dear Mr. Dawson,
>
> **TERMINATION OF MERCHANTS**
>
> Effective July 6, 1993 the processing of sales vouchers for the following merchants has been terminated by our centre:
>
> LMP Marketing Limited
> Floral Exchange
> Travel Connection

However, we will continue to accept credits to cardholder accounts from these merchants for transaction reversals and possible chargebacks.

International Concepts is currently being investigated and has been asked to provide us with details of their business process in order to ensure compliance to VISA International Operating Regulations. We also plan to institute internal policies to certify new merchant acquisitions.

As the Executive having responsibility for these new businesses and who has been directly dealing with you on these matters since inception, your letters to Alarene Wong were inappropriate and had raised undue alarms. In future please direct all correspondence to my attention in order to avoid unnecessary misunderstandings.

As a principle member of VISA, it has always been our intention to adhere to VISA International's Operating Regulations. Your vigilance is noteworthy and we are looking forward to continue to build a healthy franchise in Jamaica.

Sincerely yours

Dalton F. Yap
General Manager, Technology & Operations

c.c. Ewart Scott, General Manager, Retail Banking
George Lumsden, AGM, Retail Banking
Alarene Wong, Manager, Card Centre, Marketing

As can be seen, this letter was copied to the above-named officers of the bank, none of whom demurred to the intention stated therein to "institute internal policies to certify new merchant acquisitions".

Hardly is there a business venture that does not involve an element of risk. Every businessman knows that. If the WWM account had been profitable the respondent would have been the real beneficiary of such profits and the appellant would have been hailed as an instant hero. As it turned out it resulted in losses to the respondent. That was unfortunate for the respondent, but on the evidence it was not misfortune which could fairly be attributed to conduct amounting to a breach of the appellant's contract of employment.

For these reasons the appeal is allowed with costs here and below to the appellant to be agreed or taxed.