ZULKARNAEN BIN ZAINUL **Appellant/Plaintiff**

AND

VIDDACOM (B) SDN BHD **Respondent/Defendant**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 3 of 2024)

Steven Chong, C.J., Lunn and Sir Peter Gross JJAs
Date of Hearing: 4 June 2025.
Date of Judgment: 14 July 2025

Civil Law- Appeal allowed: Judge's dismissal of A.'s claim for loss and damages for wrongful termination of contract of employment set aside. A.'s claim for B$180,000 allowed. Costs: R. to pay A.'s costs below and on appeal, to be taxed if not agreed.

A. employed on five-year fixed term contract: no express termination clause; incomplete/missing text. R's letter to A. of termination of employment asserted A. redundant. Now, R asked Court to imply term in contract of right to termination of employment without cause on notice/payment in lieu.

Implying term in contract as a matter of fact: test is 'necessity'; reasonableness is a necessary requirement, but not of itself sufficient to imply a term.

Judge erred in relying on s. 92(f) of Evidence Act, Cap.108; written contract not required for contract of employment. Judge erred: in considering terms in contracts of employment of two other employees; finding them to have 'standard and uniform' terms; and implying the termination clause there provided into A.'s contracts of employment. Those contracts were different from each other and were not standard and uniform terms. No evidence A. had any knowledge of any of those terms. Term implied by judge, that Respondent had right to terminate Appellant's employment without cause, not justified in law and failed to meet 'necessity' test of implication of terms in fact.

Mr Mohd Noorsuhaimy Bin Hj Kasmany and Ms Dyg Nasreen Erzayanty Binti Awg Kamaruddin (M/S Fathan & Co.) for Appellant/Plaintiff.
Mr Mohd Shazale Bin Hj Mat Salleh (M/S Mohd Shazale Salleh Advocates & Solicitors) for Respondent/Defendant.

Cases cited:
Nur Khadijah bte Md Zan v Lembaga Pemegang Amanah Kolej Islam (LAKIM) Berdaftar (2019) ILJ 10
Khoo Peng Wai v Pemginaan Terasia Sdn Bhd (2016) ILJU 11
Liverpool City Council v Irwin & Anor [1977] AC 239
Reigate v Union Manufacturing Company (Ramsbottom) Company [1918] 1 KB 592 at 605
Phiong Khon v Chonh Chai Fah [1970] 2 MLJ 114
Reda & Another v Flag Ltd [2002] UKPC 38, at paragraph 57

Gregory Dominic Hodges v JPH Sendirian Berhad (Civil Suit No. 140 of 2017)
Marks & Spencer v BNP Paribas Securities Services Trust Co, (Jersey) Ltd, [2015] UKSC 72; [2016] AC 742
Nazir Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2; [2017] ICR 53

Lunn, J.A.:

1. The Appellant appeals against Judge Hazarena Bte POKSJ DP Hj Hurairah's dismissal in the Intermediate Court on 30 March 2024 of his claim against the Respondent for damages for breach of his contract of employment with the Respondent and her order, dated 25 May 2024, that the Appellant pay the Respondent B$49,935 in costs, together with interest at 6% per annum from 15 June 2024.

2. The Appellant was employed by the Respondent as a Base Manager following his signed acceptance on 16 October 2016 of a Letter of Offer, dated 16 October 2016, signed by the General Manager on behalf of the Respondent. The offer was conditional on the Appellant passing the Respondent's approved medical examination and being found medically fit to work.

3. The terms and conditions of employment were set out in over three pages of the Letter of Offer, including:[1]

> "*Title: BASE MANAGER*
> *Salary: B$8,000.00*
> *Contract Duration: 5 YEARS*
> *Probation: 3 months*
> *Place of work: Vidda Muara Integrated Supply Base*
> *Work days and Hours: Monday-Friday: 0700 hrs-16:00 hrs*
> *Saturday 0700 hrs-12 00 hrs*"

4. Next, the letter set out no fewer than ten separate heads of benefits to which the Appellant was eligible. Then, it stated:

> "*You will remain on probation for a period of three (3) months. During this probationary period, either party may terminate the employment by giving one (1) working day notice in writing. On satisfactory completion of your probationary period, your employment will be confirmed. A written letter of confirmation will be issued to you to confirm your successful completion.*
>
> *are found guilty of criminal breach of trust, insobriety, and misconduct, persistent neglect of duty or absenting yourself without leave. The company maintains the right to enforce disciplinary action in the case where conduct of the employee is detrimental to the well-being of other employees or the Company itself*."

5. The letter concluded with an invitation to the Appellant to indicate within three days of the date of the letter on a reply slip whether he accepted or declined the conditional offer of employment.

Temporary Salary Reduction

6. By a letter from the Respondent, dated 8 October 2021, entitled '*TEMPORARY SALARY REDUCTION*', the Appellant was advised that, in the context of general economic challenges

[1] CBD, pages 1-3.

and an upper management review of the means to protect the future well-being of the company, that:[2]

> "*Effective by the month of November 2021, selected employees will have a reduction of 20% in their monthly [basic] salary. In addition, this reduction will take for the whole 3 months and probably will be extend up to six months."*

Termination of Employment

7. By a letter, dated 6 November 2021, signed by three directors of the Respondent, including Bintang Anak Siangin, entitled "*TERMINATION LETTER*" the Appellant was informed:[3]

> *"…your employment with Viddacom (B) Sdn Bhd has been terminated. Termination will be effective immediately as of today 6 November 2021 (Saturday).*
>
> *Viddacom(B) Sdn Bhd has decided to revisit the organisation structure and planning for rationalisation of our cost. We found out that there is a redundancy role and responsibility for Base Manager Position that possible to be led by local candidate. In view of these circumstances, we have no alternative but to terminate you immediately. We want to make it clear that you have been a valuable employee and this termination is not related with your job performance. We highly appreciate your performance during your service with Vidda Muara Integrated Supply Base (Vidda MISB) for this pass two years.*
>
> *Your final pay check shall be up to end of month (November 2021). You will entitle redundancy pay with the amount of one month salary with entitlement of one-way return of air flight to (Singapore) and international package per trip."*

8. Having been advised that he was, *"…only allowed to be in the base within 8 November-20th November period*", the Appellant was informed:

> "*Signing this letter does not indicate agreement, but only signifies you have been informed of the above action and have received a copy of the termination immediate notice*."

There is no dispute that the Appellant signed the letter, dated 11 November 2021.

Letter of Demand

9. By a Letter of Demand, dated 7 December 2021, to the Respondent, the Appellant's solicitors took issue with the reasons given by the Respondent for its termination of the Appellant's contract of employment in the Respondent's letter, dated 6 November 2021, and asserted:[4]

> "*Our client states that the Contract was a fixed term contract of five (5) years and parties are bound by the terms thereof, your company could not terminate the same without reasonable cause. It is our client's instructions that redundancy as stated in the said Letter does not justify the early dismissal of our client and as such, the dismissal is without just cause and excuse*."

10. Having asserted that the Respondent was thereby in breach of the contract, compensation at the rate of the monthly salary of B$8,000 for the period remaining up and until the expiry of the fixed contract, to a total of B$180,000, was claimed.

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[2] CBD, page 7.
[3] CBD, page 6.
[4] CBD, page 8.

The Appellant's case

11. By a Statement of Claim, dated 7 February 2022, the Appellant reasserted the claim that in terminating the Appellant's employment by the letter of 6 November 2021 the Respondent was in breach of the contract of employment, which it was averred was a "*fixed term contract*". Of the issue of redundancy, it was averred that:[5]

> *"…at the time of the termination, there was no redundancy as the job functions and duties of a Base Manager was only held and carried out by the Plaintiff. Moreover, if the position can be replaced by a local candidate, the position is not redundant in the first place. In the circumstances, the early dismissal was without just cause and excuse."*

Reply to Defence

12. In the Reply to the Defence, the Appellant took issue with the averments made at paragraph 2 (a) and (b) of the Defence, set out below, and averred that, *"…in the absence of termination clause*" the Respondent was not entitled to terminate the Appellant's employment before the expiration of the contract.[6]

13. At the trial evidence was adduced by affidavit and orally from the Appellant and a fellow employee at the Vidda Muara Integrated Supply Base, Abdul Rahman bin Haji Jaafar.

The Respondent's case

14. In the Defence, dated 16 March 2022, the Respondent averred that: [7]

> *"…it was, inter-alia, an express or implied term of the employment contract that:*
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> *(a) notwithstanding that the employment contract was for a fixed duration, either party may terminate the Plaintiff's employment by giving a minimum of one month's notice or upon payment of a sum equivalent to one month salary in lieu of notice; and*
>
> *(b) the Defendant may terminate the Plaintiff's employment for reasonable cause*."

15. Next, it was contended that in issuing the '*Termination Letter*' and by payment of $8,000 to the Appellant in lieu of notice, that being the equivalent of the Appellant's monthly salary, the Respondent had lawfully terminated the Appellant's employment. Then, it was asserted that, in consequence of the Appellant's acceptance of that payment, the Appellant was deemed to have accepted the defendant's reasons given for the determination of his employment and was estopped from contending that the termination was not for reasonable cause.[8]

16. At the trial the Respondent adduced affidavits and oral evidence from Rovelin Equales Serion, an accountant employed by the Respondent, and from Bintang Anak Siangin, a director of the company. The former gave evidence of the deteriorating financial position of the Respondent in 2021 relevant to the unilateral 20% reduction of the salaries of certain of its employees imposed by the Respondent in October 2021. Bintang Anak Siangin said that, notwithstanding the 20% reduction in salaries, it was decided in early November 2021, given that typically they were paid higher salaries, to replace foreign employees with local employees

[5] ROA, pages 109-111 at paragraph 5 page 110.
[6] ROA, page 120.
[7] ROA, pages 116-118 at page 116 paragraph 2.
[8] ROA, page 117, paragraph 3.

and the Respondent decided to terminate the employment of the Appellant and five other foreign employees holding senior positions. The Appellant was replaced by an existing local Bruneian employee, namely Hairul Azmi at a monthly salary of $5,000. The latter was appointed Base Manager by a letter from the Respondent, dated 6 November 2021.[9]

17. Bintang Anak Siangin also gave general evidence of the terms and conditions in contracts of employment entered into by the Respondent. She said that contracts of employment with foreign employees are and always have been on a fixed term basis as that is the government's requirement.[10] In particular, she referred to the letters of employment of two foreign employees, namely Nur Hasmin Kamarollzaman, dated 9 September 2014, on his appointment as a Technical Support Specialist to the operation manager, and Longchik bin Yaakob, dated 1 November 2018, on his appointment as QSHE Manager. Whilst the latter contract of employment stipulated a fixed term of three years, no term was stipulated in the former contract. Each of those documents contained the provision:[11]

> "*Notice of Termination of employment must be given in writing. Please note that the Company may also terminate your employment without notice or payment in lieu of notice in the event that you are found guilty of criminal breach of trust, insobriety, and misconduct, persistent neglect of duty or absenting yourself without leave. The company maintains the right to enforce disciplinary action in the case where conduct of the employee is detrimental to the well-being of the other employees of the Company itself*."

Judgment

18. Having comprehensively reviewed the evidence adduced by the Appellant and the Respondent at trial, in her Judgment the Judge addressed the issue of why the Appellant's employment had been terminated. Of that issue, she said: [12]

> "*I am inclined to think that the plaintiff's position was not made redundant, but rather replaced by cheaper local employee*."

Pleadings

19. Having made that statement, the Judge reviewed the pleadings and concluded that although, *"...there is sufficient evidence illustrating the defendant company's cash flow issues, however, this is a material fact that was not pleaded by the defence*."[13] In those circumstances, she said:[14]

> "*Therefore, I find that the defendant has failed to raise a defence that the redundancy was necessary due to the company's financial issues. Therefore, at this juncture, it appears that the plaintiff has sufficient proof that his contract was terminated without proper cause*."

Did the Respondent have the right to terminate the Appellant's employment?

20. Then, the Judge went on to consider whether the Respondent had the right to terminate the Appellant's employment. Having adverted to two judgments of the Industrial Court of

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[9] ROA, page 153 at paragraphs 23-24. CBD, page 85.
[10] ROA, page 140 at paragraph 12.
[11] ROA, page 150. Affidavit of Evidence-in-Chief of Bintang Anak Siangin; paragraph 14. CBD, pages 98-101 at page 99; and pages 102-108 at page102.
[12] Judgment, paragraph 87.
[13] Judgment, paragraph 94.
[14] Judgment, paragraph 95

Malaysia in relation to the issue of the determination of employment in fixed term contracts[15], the Judge said that, "*Case law seems to suggest that fixed term contracts can only be terminated if there is just cause*." Of those circumstances, she said, "*I have already found that there was no proper reason for terminating the defendant's employment*."[16]

The Letter of Offer

21. Finally, the Judge went on to consider what rights to terminate the Appellant's contract of employment were to be found in the Letter of Offer. First, the Judge noted that such termination clause that was to be found in the Letter of Offer stated only, *"... are found guilty of criminal breach of trust, insobriety and misconduct, persistent neglect of duty"*.[17] Having regard to the context of that incomplete sentence and the remainder of that paragraph, which was quoted in its entirety earlier, the Judge concluded that it was obvious that, *"...there are missing terms*".[18]

22. In her earlier review of the evidence, the Judge noted that in her evidence Bintang Anak Siangin had, *"...compared the termination provisions of the Plaintiff's employment letter with those of other employees, suggesting that the missing termination clause should be implied based on the terms in similar contracts*."[19] Further, that it was the Respondent's case that, *"...the omission of the termination clause in the Plaintiff's employment letter is an oversight or error in the document's preparation. By referencing the termination clauses in the contract of other employees, particularly those in similar positions or with similar roles, the company aims to establish a precedent for the implied terms in employment contracts within the organization*."[20]

23. The Judge said that the termination clause found, *"...in other LO's for other employees in the defendant company*" provided:[21]

> "*Notice of termination of employment must be given in writing. Please note that the company may also terminate your employment without notice or payment in lieu of notice in the event that you are found guilty of criminal breach of trust, insobriety, and misconduct, persistent neglect of duty or absenting yourself without leave. The company maintains the rights to enforce disciplinary action in the case where conduct of the employee is detrimental to the well-being of the other employees or the company itself."*

24. The Judge noted that the Respondent invited the Court to rely on section 92 of the Evidence Act, Cap.108, "*and case law to imply the termination clause into the LO*."[22] She referred to statements in the speech of Lord Wilberforce in the House of Lords in *Liverpool City Council v Irwin & Anor*[23] of the test to be applied and the circumstances in which implied terms might be read into a contract as being "*necessity*" and in the speech of Lord Edmund-Davies, citing with approval the judgment of Scrutton LJ in the Court of Appeal in *Reigate v Union Manufacturing Company (Ramsbottom) Ltd*, and noting that, *"...the touchstone is necessity not merely reasonableness*." The Judge referred specifically to the observations of Scrutton LJ in

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[15] Judgment, paragraphs 97 and 98; *Nur Khadijah bte Md Zan v Lembaga Pemegang Amanah Kolej Islam (LAKIM) Berdaftar* (2019) ILJ 10 and *Khoo Peng Wai v Pemginaan Terasia Sdn Bhd* (2016) ILJU 11.
[16] Judgment paragraph 99.
[17] Judgment, paragraph 100.
[18] Judgment, paragraph 106.
[19] Judgment, paragraph 49
[20] Judgment, paragraph 102.
[21] Judgment, paragraph 110.
[22] Judgment, paragraph 104,
[23] *Liverpool City Council v Irwin & Anor* [1977] AC 239, at pages 254F and 266 D.

Reigate v Union Manufacturing Company (Ramsbottom) Ltd, as to the circumstances, absent an express term, in which it was permissible for the Court to imply a term.[24]

s. 92 Evidence Act

25. Earlier in her judgment, the Judge had quoted the provisions of section 92 of the Evidence Act *in extenso.* First, it provides that when the terms of, inter-alia, a contract is required to be reduced to a form of a document and has been approved according to section 91 of the Act, "*…no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument for the purpose of contradicting, varying, adding to, or subtracting from it terms.*" Secondly, it provides for stipulated exemptions to the operation of the provision. Section 92 (f) provides that, *"…any fact may be proved which shows in what manner the language of a document is related to existing facts*."

26. The Judge said that in the judgment of the Federal Court of Appeal of Malaysia in *Phiong Khon v Chong Chai Fah* [25]the Court held that, *"…evidence of surrounding circumstances is admissible to explain or interpret written contracts for example evidence as to the course of dealing with the property,*"[26] There, in construing a document that was relevant to disputed land, the Court noted that the document was, *"…extremely vague and ambiguous. Without hearing extrinsic evidence it is impossible to know what are the arrangements set out in the document.*"[27]

27. The Judge said, "*I accept the defendant's argument that Court should look at the defendants' practice in applying standard and uniform employment contracts*."[28] Having referred to "*proviso (f)*" of s. 92, the Judge said that, *"… the examples of other employees contracts maybe use (d) to determine the actual termination clause in the plaintiff's LO. I accept the defendant's arguments in that the terms of previous contracts ought to be implied into the terms of the LO. Ensuring equal treatment promotes fairness and justice within the workplace*."[29] In the result, the Judge determined that the termination clause found in other LO's, *"…ought to be equally applied into the plaintiff's LO that the employment could be terminated with notice*."[30] She concluded that, "*…the defendant has the right to terminate a contract even if it is a fixed term contract."*[31]

Payment in lieu of notice

28. Having noted the termination of the Appellant's employment by the Respondent's letter, dated 6 November 2021, was accompanied by payment of, *"…the plaintiff's entire salary in November 2021 and also one month's salary with entitlement of one-way return of a flight to Singapore*"[32], the Judge said that she was satisfied that, in the absence of notice, the payment, *"…of one month's salary in lieu of notice was in fact reasonable*."[33]

Conclusion

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[24] *Reigate v Union Manufacturing Company (Ramsbottom) Company* [1918] 1 KB 592 at 605
[25] *Phiong Khon v Chong Chai Fah* [1970] 2 MLJ 114.
[26] Judgment, paragraph 107.
[27] *Phong Khon v Chonh Chai Fah*, page 116 G-H.
[28] Judgment, paragraph 107.
[29] Judgment, paragraph 108.
[30] Judgment, paragraphs 108 and 111.
[31] Judgment, paragraph 116.
[32] Judgment, paragraph 113.
[33] Judgment, paragraph 117.

29. In dismissing the Appellant's claim, the Judge said that, "*Although the plaintiff did not do anything wrong, I find that the defendant company had right to terminate the plaintiff without cause and that reasonable notice had been given to the plaintiff.*"[34]

Appellant's submissions

30. In the Petition of Appeal, the Appellant invited this Court to reverse the judgment and find in favour of the Appellant on multiple grounds. In the Appellant's written submissions the twelve separate heads of appeal were summarised as being that the Judge had erred:

(a) in ruling that the Respondent had lawfully terminated the Appellant's contract of employment;
(b) failing to find that the Respondent had breached the contract of employment;
(c) having found that there was sufficient proof that the Appellant's employment was terminated without proper cause, ruling that the Respondent had the right to terminate the Appellant's employment without cause;
(d) ruling that the Respondent has a right to terminate the Appellant's contract of employment, notwithstanding it was a fixed term;
(e) ruling that, in paying the equivalent of one month's salary to the Appellant, the Respondent had made sufficient payment in lieu of notice.

Lawfully terminated the contract of employment?

31. Of the Judge's conclusion that the Respondent had lawfully terminated the Appellant's contract of employment, it was submitted that the Judge had erred in accepting that there was to be implied in the written contract of employment a term that the Respondent had the right of termination on written notice by having regard to other contracts of employment of the Respondent with other employees and to determine that those provisions were to be implied in the Appellant's contract of employment. Further, the Judge erred in finding that the requisite period of notice was four weeks, in lieu of which payment of the Appellant's salary for that period was sufficient. In so finding, the Judge had erred in her application of the established principles that, in construing the written contractual terms, necessity not reasonableness was required to imply a term. The Judge was wrong to invoke the proviso of subsection (f) of section 92 of the Evidence Act and to have had regard to the contracts of employment of other employees of the Respondent.

32. It was contended that the Appellant's written contract of employment was for a fixed period of five years and was silent on the right of termination. There was no dispute that the Respondent prepared the Letter of Offer. It was the Appellant's oral evidence that he drew the attention of Nur Hasmin to the incomplete sentence in the text of the Letter of Offer and had been told that there was nothing on notice of termination, but more on termination for any misconduct, neglect, CBT and disciplinary action.[35]

33. Further, it was submitted that the Judge erred in accepting that the Court should have regard to the Respondent's practice in applying '*standard and uniform*' employment contracts.[36] The letters of offer of other employees of the Respondent were not "*standard*". They depended on the job scope of the employee.

34. It was submitted that the fact of the incomplete text in the letter of offer was a patent defect, obvious on reading the document, not a latent defect the ambiguity of which only arose on

[34] Judgment, paragraph 119.
[35] ROA, page 72.
[36] Judgment, paragraph 107.

application of the facts. Section 93 of the Evidence Act provides that, *"...where a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.*"

Respondent's submissions

35. The Respondent submitted that the Appellant was wrong to contend the Appellant's contract of employment was "*silent*" on the right of termination. The incomplete text in the Letter of Offer clearly concerned the right of the Respondent to dismiss the Appellant for misconduct. That much had been suggested in cross examination of Bintang Anak Siangin.[37] The Appellant's evidence was that he was aware of the incomplete text and that it concerned the Respondent's right to terminate the Appellant's employment.

36. The Judge was correct to determine that, *"...implied terms may be invoked to give force to the intent of the contract*"[38] and to do so by having regard to the Respondent's, *"...practice in applying standard and uniform employment contracts*."[39] The contracts of employment adduced into evidence through Bintang Anak Siangin related to both before and after the employment of the Appellant and showed that the Respondent used standard and uniform employment contracts for its employees. The Judge had accepted that there were differences in those contracts, but noted that Bintang Anak Siangin testified that those were accounted for by the personal circumstances of employees, and that certain employment terms remain constant across contracts.[40] The Judge had accepted her evidence.[41]

37. In consequence, it was contended that the incomplete text was not a patent defect but constituted a latent defect or ambiguity given that its meaning could be understood, although the text was obviously missing words. Accordingly, the Appellant's reliance on section 93 of the Evidence Act was misguided.

38. The Respondent submitted that the Judge was correct to determine that a termination provision was to be implied in the Appellant's written employment contract: first, the incomplete text indicated that was the intention; secondly, it was reasonable and necessary to imply the term, because contracts always contain termination terms.

39. At common law, a termination term will be implied in every employment contract where the term is not provided for, unless the parties agree to vary or exclude. Relying on the judgment of the Privy Council in *Reda & Anor v Flag Limited*, it was asserted that, *"... a contract which contains no express provision for its determination is generally (though not invariably) subject to an implied term that it is determinable by reasonable notice.*"[42] Accordingly, the Judge was correct to hold that the Respondent had a right to terminate the Appellant's employment by notice.

40. Whether or not it was true the Appellant's contract of employment was terminated by the Respondent on a false claim of redundancy was immaterial, given that the Judge found that the Respondent had a right to terminate the Appellant's contract.[43]

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[37] ROA, page 92.
[38] Judgment, paragraph 106.
[39] Judgment, paragraph 107.
[40] Judgment, paragraph 55.
[41] Judgment, paragraph 61.
[42] *Reda & Another v Flag Ltd* [2002] UKPC 38, at paragraph 57.
[43] *Gregory Dominic Hodges v JPH Sendirian Berhad* (Civil Suit No. 140 of 2017): Chong J at page 12.

41, Given that the Judge found that the Respondent had given "*proper notice*" of the termination of the Appellant's employment that termination was lawful. Accordingly, the Respondent invited the Court to dismiss the Appellant's appeal.

A consideration of the submissions

42. The Respondent's reliance on *Reda* in support of the Judge's determination to imply a term into the Appellant's contract of employment to provide for termination on notice is misguided. In the judgment of the Privy Council, Lord Millet said: [44]

> "*The true rule, which is not confined to contracts of employment but applies to contracts generally, is that a contract which contains no express provision for its determination is generally (though not invariably) subject to an implied term that is determinable by reasonable notice: see Chitty on Contracts (28th edn) 13-025. The implication is made as a matter of law as a necessary incident of a class of contract which would otherwise be incapable of being determined at all. Most contracts of employment are of indefinite duration and accordingly determinable by reasonable notice in the absence of express provision to the contrary.* ***Lefebvre v HOJ Industries Ltd*** *was such a contract. But there is no need for the law to imply such a requirement in a case where the contract is for a fixed term." [Italics added.]*

43. Of course, the Appellant's contract of employment was for a fixed term, namely five years. It was not a contract of indefinite duration. So, there was no need to imply a term that it was determinable by reasonable notice.

44. There is no doubt that the Letter of Offer which forms the basis of the Appellant's contract of employment was badly drafted. The author was the Respondent. Clearly, the sentence in the penultimate paragraph, which read, *"... are found guilty of criminal breach of trust, insobriety, and, misconduct persistent neglect of duty or absenting yourself without leave*." was incomplete. On its face, the reference to "*yourself*" in the final item in the list of impermissible behaviours, suggested strongly that the provision was one that applied to the Appellant. It begged the question, but left unanswered, of the way in which, how or to what effect it applied to the Appellant.

45. In those circumstances, the Respondent had a choice: to seek to persuade the Court to imply a term in the contract, either as a matter of law or factual necessity, to provide for termination of the Appellant's employment on notice; or, to apply for rectification. In the latter application, the rule excluding parole evidence does not apply. The Respondent is required to prove that the contract based on the Letter of Offer did not accord with the true intentions of the parties at the time of its execution, but that the proposed form, including provision for termination of employment on notice, did accord with their intention. However, as the Respondent confirmed at the hearing, no such application to the Court was made.

46. In that context, it is apparent from the different text of the letters of termination of the contracts of employment sent to the Appellant and his two fellow employees, whose employment was terminated at about the same time, that the Respondent was aware of the differences in their written employment contracts. The Respondent's two letters, dated 25 November 2021, terminating the employment respectively of *Hj. Z, Youssery and Longchik Bin Yaakoob* stated simply: [45]

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[44] *Reda & Another v Flag Ltd* [2002] UKPC 38, at paragraph 57.

[45] CBD, pages 92-93.

"…your employment with VidDacom(B) Sdn. Bhd. shall be terminated. Your notice of termination (one month) will be effective 1 December 2021 (Wednesday). Your employment with VidDacom (B) Sdn. Bhd. will end as of 30 December 2021."

47. By contrast, in the Respondent's letter to the Appellant, dated 6 November 2021, whilst the Appellant was told that the termination of his employment was, " *…effective immediately as of today 6 November 2021 (Saturday)*", it was stated that redundancy was the basis of the termination of his employment contract, for which he would receive, *"…redundancy pay for the amount of one month salary*". Notwithstanding the immediate termination of his employment, the Appellant was told that he was required to perform certain handover duties and that his salary would be paid until the end of the month.[46]

The issue

48. The issue that arises is, given that there was no express termination of employment term in the written contract of employment with the Appellant, nevertheless is that term to be implied?

The Law

49. The Judge summarised the law accurately and succinctly as to the approach to be taken by the Court. She noted that in his judgment in *Liverpool City Council v Irwin,* dealing with terms to be implied as a matter of law, Lord Wilberforce stated that the test was, *"…such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test, in other words, of necessity.*"[47]

50. Of the circumstances in which a term is not to be implied in a contract, the Judge referred to the statement in the judgment of Lord Edmund Davies in which, having referred to the judgment of Scrutton LJ, in Reigate he said, "*the touchstone is always necessity and not merely reasonableness*." The Judge quoted *in extenso* the passage in the judgment of Scrutton LJ in which he identified the principles to be applied with regard to terms to be implied as a matter of fact:[48]

> "*The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, "What will happen in such a case," they would both have replied, "Of course, so-and-so will happen; we did not trouble to say that, it is to clear." Unless the Court can come to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."*

51. The Supreme Court of the United Kingdom in *Marks & Spencer v BNP Paribas Securities Services Trust Co, (Jersey) Ltd* [49]affirmed the "*necessity*" test, stating that it is not enough to show that the term is a reasonable one for it to be implied into the contract. Whilst reasonableness is a necessary requirement it was not sufficient of itself to lead to the implication of a term in a contract.

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[46] CBD, page 6.
[47] *Liverpool City Council v Irwin & Anor* [1977] AC 239, at pages 254F.
[48] Judgment, paragraph 105.
[49] *Marks & Spencer v BNP Paribas Securities Services Trust Co, (Jersey) Ltd,* [2015] UKSC 72; [2016] AC 742, at paragraph 23.

52. Lord Hughes, giving the Judgment of the Privy Council in *Nazir Ali v Petroleum Company of Trinidad and Tobago*, having referred to the Judgments of the Supreme Court in *Marks & Spencer v BNP Paribas,* summarised the circumstances in which a Court may properly imply a term into a contract:[50]

> "*It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this may be if (i) it is so obvious that it goes without saying (and the parties, although they do not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh of course") and/or (ii) is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion*."

The application of the law to the facts

53. In applying the law to the facts, the Judge said that she accepted the Respondent's submission that not only should she have regard to, the *"...defendant's practice in applying standard and uniform employment contracts*"[51], but also that *"...the terms of previous contracts ought to be implied into the terms of the Appellant's contract of employment*."[52] In doing so, the Judge prayed -in-aid s. 92 (1) (f) of the Evidence Act. In particular, she determined that the provision in the Respondent's contract of employment with other employees, which provided for termination of employment with notice, was to be implied in the Appellant's contract of employment.[53]

54. With respect, the Judge's reliance on section 92 of the Evidence Act was misplaced. It applies to, *"...such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document*". The Appellant's employment contract was not required to be reduced to the form of a document.

55. The Federal Court in *Phion Khon* reached a similar conclusion in response to the reliance on section 94 of the Sarawak Ordinance, Cap, 54, which is in the same terms as section 92 of the Evidence Act. Of the agreement between the parties, the Court said:

> *"First, I would observe that as far as I know the present agreement is not one required by law to be reduced to the form of a document. Secondly, where the document does not constitute a contract between the parties, oral evidence is not excluded. Therefore there was nothing to prevent the learned Judge from hearing extrinsic evidence."*

Standard and uniform employment contracts

56. Nevertheless, in construing the Appellant's contract, the Judge was entitled to have regard to all the surrounding circumstances. The Judge said that she had regard to what she said was the Respondent's practice, *"...in applying standard and uniform employment contracts*." With respect, there was no evidence that justified the description, "*standard and uniform*" of the

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[50] *Nazir Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2; [2017] ICR 53, at paragraph 7.
[51] Judgment, paragraph 107.
[52] Judgment, paragraph 108
[53] Judgment, paragraph 111.

Respondent's employment contracts adduced in evidence. There was evidence of two employment contracts in relation to two foreign employees that were dated more than four years apart. They were discrete personal contracts, one of four pages and the other seven pages, not standard and uniform contracts. The contract of Longchik provided that after confirmation of employment, he was required to, "*Submit one (1) months' notice to terminate employment or forfeit one (1) month salary in lieu of notice*." By contrast, the contract of Nur Hassim contained no such provision. The contract of Longchik stipulated a fixed term of three years, whereas the contract of Nur Hassim did not stipulate any fixed term. On the other hand, they did contain the text of the termination of employment clause to which reference was made earlier. However, they also contained the following statement at the conclusion of each of the contracts of employment:

> "*THE SALARY AND CONDITIONS OF SERVICE AS SET OUT HERIN ARE CONFIDENTIAL AND SHOULD NOT BE DISCUSSED WITH OTHER MEMBERS OF STAFF OR OUTSIDERS*."

57. For his part, in re-examination the Appellant answered in the negative the question as to whether or not at the beginning of his contract he had been shown the Respondent's standard terms of contracts for its employees.[54]

58. In determining to have regard to the terms in the employment contracts of two other employees in construing the Appellant's employment contract and in finding that there was an implied term which provided for termination of employment on notice, the Judge did so notwithstanding that there was no evidence of the Appellant's knowledge of even the existence of such terms in the contracts of employment of others. It was the Appellant's evidence that he had not been shown any such terms of contracts of employment. Further, as noted earlier, the Respondent required the two employees whose contracts were adduced in evidence and relied upon by the Judge to maintain confidentiality about the terms of their respective contracts of employment.

59. Having acknowledged that there were words missing in the incomplete sentence in his contract of employment that preceded the list of misconduct, in his evidence the Appellant accepted that was a provision which was intended to allow for premature termination of employment for the specific misconduct stipulated in the sentence.[55]

60. In re-examination, for the first time the Appellant testified of a conversation with the General Manager, Hassim, and his Personal Assistant, after he had received the Letter of Offer, in which he raised the fact that there were obviously some words missing in the text of the letter. He testified, "But from what I was told, there was nothing on the notice of termination but more on termination of any misconduct, neglect, CBT and disciplinary action. So my contract was fixed term without notice of termination unless it was done during probation."[56] .

61. That evidence was not referred to in the Appellant's closing written submissions nor by the Judge in her Judgment.

62. With respect, we are satisfied that, in construing the Appellant's contract of employment, it was impermissible for the Judge to have regard to and to rely on the terms stipulated in the employment contracts of two other employees, of which on the evidence the Appellant had no knowledge or notice whatsoever. Further and in any event, a term as implied by the Judge that the Respondent had the right to terminate the Appellant's contract of employment without

[54] ROA, page 73,
[55] ROA, page 59.
[56] ROA, page 76.

cause was not justified as a matter of law and wholly failed to meet the necessity test for the implication of terms in fact. It is to be remembered that this was a fixed term contract. In consequence, the Judge erred in finding that there was an implied term in the Appellant's employment contract which provided for termination of employment on notice.

63. Having regard to the text of the Appellant's Letter of Offer, and had the issue arisen for decision, it was permissible to determine that there was an implied term that the Respondent had a right of termination of the Appellant's employment for the misconduct there described. As noted earlier, the Appellant did not dispute such a term being implied. But, that implied term was irrelevant to the circumstances in which the Respondent terminated the Appellant's contract of employment.

Conclusion,

64. In the result, we are satisfied that the Judge erred in finding that the Respondent had the right to terminate the Appellant's contract of employment without cause. It follows that in terminating the Appellant's employment by its letter dated 6 November 2021, the Respondent was in breach of the Appellant's contract of employment.

Orders

65. Accordingly, we allow the appeal and set aside the Judge's order dismissing the Appellant's claim and her subsequent order of costs of $49,935 against the Appellant, dated 25 May 2024. We allow the Appellant's claim for loss and damages for the wrongful termination of his contract of employment and order that the Respondent pays the Appellant $180,000, with interest at 6% from the date of the order. Also, we order that the Respondent pay the Appellant's costs below and of the appeal, to be taxed on the standard basis if not agreed.

STEVEN CHONG, C.J.

LUNN, J.A.

SIR PETER GROSS, J.A.

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