IN THE COURT OF APPEAL OF BELIZE, A.D. 2008

CIVIL APPEAL NO. 9 OF 2008

BETWEEN:

SHARMAYNE SAUNDERS	**Appellant**
AND	
BELIZE TELECOMMUNICATIONS LTD. **BELIZE TELEMEDIA LIMITED**	**Respondents**

BEFORE:

The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Ms Lois Young SC (instructed by Lois Young Barrow & Co.) for the appellant.
Mr Nigel Ebanks (instructed by Barrow & Williams) for the respondents.

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15 October 2008, 27 March 2009

SOSA JA

1. On 15 October 2008 I agreed that the appeal should be dismissed and the judgment of the court below affirmed and that the respondents should have their costs, to be taxed if not agreed. I concur in the reasons for judgment of Morrison JA, which I have read in draft.

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SOSA JA

CAREY JA

2. The outcome of this suit depended on the interpretation of the contract of employment. As Muria J clearly appreciated, the construction of documents in a commercial setting must make business sense. He relied on the dictum of Lord Diplock in **Antaois Compania Naviera S.A. v Salen Rederierna A.B. [1985] A.C. 191** at 201 -

> "If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must yield to business commonsense."

The construction contended for by the appellant flouted business commonsense. No reasons were advanced by Ms Young SC to support her construction and the cases cited by her, as Morrison JA has demonstrated, did not support her case. The result was inevitable.

3. In agreement with the reasons adumbrated by Morrison JA, the appeal must be dismissed with costs.

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CAREY JA

MORRISON JA

4. At the conclusion of the hearing of this appeal on 15 October 2008, the appeal was dismissed, and the judgment of the court below affirmed, with costs to the respondents to be agreed or taxed. These are my reasons for concurring in that decision.

5. The appellant was employed to the first named respondent, Belize Telecommunications Ltd ("BTL"), from 4 April 2002 until 13 June 2006, when her services were terminated. By an amended statement of claim dated 19 March 2007 she claimed against BTL for damages for breach of her contract of employment, interest and costs. BTL counterclaimed to recover the sum of $76,392.49, representing as to $20,000.00 a grant made to the appellant for educational purposes and, as to the balance, the amount said to be outstanding on an educational loan made to the appellant. However, the counterclaim was not pursued by BTL at trial with regard to the $20,000.00 grant.

6. The second named respondent, Belize Telemedia Ltd., was added as a defendant on the application of the appellant by an order made by Muria J on 11 June 2007. Nothing now turns on this.

7. Muria J found that the appellant was entitled to recover the sum of $5,259.99, representing notice pay and pay for accrued vacation leave, on her claim and that BTL was entitled to recover $56,392.49 from the appellant on its counterclaim, together with interest at the rate of 6% per annum from the date of judgment, attorneys' costs of $3,000.00 and court fees of $15.00. The judge also ordered that the sum of $5,259.99 payable by BTL to the appellant be set off against the amounts payable by the appellant to BTL according to the terms of his judgment.

8. Muria J's judgment turned in large part, as does this appeal, on his interpretation of an "Employee Loan Agreement" dated 7 December 2004 ("the agreement") and entered into by the appellant and BTL, which documented the terms of a loan of $69,000.00 for educational purposes from BTL to the appellant. Of particular relevance are conditions (e) and (g) of the agreement, which are in the following terms:

> "e. to repay the sum borrowed through pay sheet deduction within a period to be determined by the employer"
>
> g. to have any outstanding balance, including interest on the loan, deducted in full and final satisfaction of the entire sum from any pecuniary or other benefit due the worker from the company in the event of the worker leaving the company before fulfilling all obligations pertaining to repayment under this contract."

9. At the date of termination of her employment, the appellant had not fully repaid the loan, (which she had been repaying at the rate of $100.00 per month), the balance standing at $56,392.49. Muria J's judgment on the counterclaim reflected his conclusion that condition (g), in particular, made the appellant liable to repay that amount to BTL in the circumstances.

10. This appeal is concerned only with the amounts which Muria J found the appellant liable to pay on the counterclaim and these are the grounds of appeal (as amended) filed on her behalf:

> 3.1 The learned trial Judge erred in law and misdirected himself in his interpretation of clause (g) of the

Employee Loan Agreement when he found that if the employee was terminated by the employer the entire outstanding loan balance would become due and payable.

3.2 The learned trial judge misdirected himself in failing to find that on a true interpretation of the Employee Loan Agreement, if the employee was terminated by the employer, **the Employee Loan Agreement was also terminated.**

3.3 The learned trial judge misdirected himself and failed to give any weight or any sufficient weight to the illogicality and unfairness to the employee of interpreting the Employee Loan Agreement so as to enable the employer, having agreed with the employee on repayment terms of $100.00 per month to **be made by way of salary deductions**, by terminating the employee's employment to abrogate the contract so as to render the employee liable to repay the whole balance at once.

3.4 The learned trial judge misdirected himself in awarding interest, when none was agreed to in the repayment terms.

3.5 The decision is against the weight of the evidence.

11. Ms Young SC submitted that BTL, having terminated the services of the appellant and thereby making it impossible for repayment to be made by way of salary deduction, could not now demand that the appellant should

repay the entire amount of the loan immediately. It would be inequitable, she submitted, BTL having breached an implied term of the agreement, for it to insist on performance by the appellant. Ms Young submitted that words "leaving the company" in condition (g) were to be interpreted to mean "voluntarily leaving the company", with the result that where, as in the instant case, the appellant was terminated by the company, "she would then no longer be bound to repay the sum of $56,392.49".

12. Alternatively, Ms Young submitted, if the words "leaving the company" were correctly interpreted (as Muria J had interpreted them) as apt to cover both a voluntary and an involuntary separation, then the appellant's obligation should be to continue repaying the loan at the rate of $100.00 per month which was deducted from her salary while she remained an employee.

13. On ground 3.4, Ms Young submitted that the judge had "misdirected himself in awarding interest", the agreement not having contained any provision for the payment of interest.

14. And finally on ground 3.5, Ms Young submitted that Muria J's decision was against the weight of the evidence and that, she having been terminated without cause, her prior obligation to repay at $100.00 per month "cannot be converted to an obligation to repay the entire amount in a lump sum."

15. In support of her submissions, Ms Young referred us to the cases of **Measures Brothers Limited v Measures [1910] 2 Ch. 248** and **Telegraph Despatch and Intelligence Company v McLean (1873) L.R. 8 Ch. App. 658**.

16. In response to ground 3.1, Mr Ebanks for the respondents submitted that Muria J had been correct in finding that the entire outstanding loan balance became due and payable once the appellant's employment came

to an end, by whatever reasons. He referred us to the decision of the House of Lords in **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98**, for the proposition that the court was required to consider "the common intention of the parties at the time of making the Agreement judged objectively and in the commercial context in which it was drawn up." He pointed out that the context of the loan agreement was an employment one, with the result that the judge was right to find that the intention of the parties must have been that the appellant would be required to repay the loan upon termination of her services. We were also very helpfully referred by Mr Ebanks on this point to the case of **Potter v Hurst Contracts [1992] I. L.R. 37**.

17. On grounds 3.2 and 3.3, Mr Ebanks referred us to condition (e) of the agreement and submitted that it was the fact that BTL had the facility of deducting amounts due to it from the appellant by automatic payroll deduction that enabled it to grant an unsecured loan on concessionary terms to her. Once her employment was terminated, that facility came to an end and it was accordingly submitted that "the Agreement could only function if the entire balance becomes due and payable upon the employee's services being terminated."

18. Finally on the question of interest, Mr Ebanks pointed out that the judge's award was fully in accordance with the provisions of section 167 of the Supreme Court of Judicature Act, and ought therefore not to be disturbed.

19. In **Investors Compensation Scheme Ltd. v West Bromwich Building Society** (supra), Lord Hoffman confirmed that the interpretation of a document is the ascertainment of the meaning which it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. That background (described by Lord

Wilberforce in **Reardon Smith Line Ltd v Hansen-Tangen [1976] 3 All ER 570, 575**, as the "factual matrix") includes "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (per Lord Hoffman at page 114).

20. Context is, therefore, as Mr Ebanks submitted, all important, bearing in mind that even apparently general wording in a document can have, to adopt Lord Nicholls of Birkenhead's luminous comment in **Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251, 266**, "no greater reach than this context indicates." But it is also equally important (and this is probably just another way of making the same point) that the construction of documents in a commercial setting should reflect what Lord Diplock had earlier described as "business commonsense" (in **Antaois Compania Naviera v Salen Rederierna .A.B. [1985] AC 191, 201**).

21. That Muria J was fully alive to these principles emerges clearly, in my view, from the following passage from his judgment:

> "The $56,392.49 was a loan obtained under the Employee Loan Agreement which was charged to the claimant's loan account with the defendant. The terms of the loan were set out in the Employee Loan Agreement entered into between the claimant and defendant on 7 December 2004. Under that Agreement the loan was repayable. That is the plain meaning which that document convey [sic] to a reasonable person in the position of the defendant and claimant at the time they entered into the loan agreement: **ICS Ltd -v- West Bromwich B.S.** (above). Understood in that context, clause (g) of the Agreement cannot be given the construction which

the claimant is advocating for. It would be illogical to have a loan contract which requires the sum borrowed to be repaid on the one hand, while at the same time relieving the borrower from the obligation to repay the loan in the event the said borrower is terminated from employment. Not only does it not make logical sense but also it flouts business common sense. Lord Diplock stressed the point in **Antaois Compania Naviera S.A. –v- Salen Rederierna A.B.** [1985] A.C. 191, at 201 where he said:

> **"If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must yield to business commonsense."**

Thus to give the words "leaving the company" in the sense contended for by the claimant would clearly lead to a conclusion that flouts business common sense. I therefore, with respect, accept the contention by Mr. Rodwell Williams S.C. that the plain meaning of clause (g) is that whenever the claimant leaves the employ of the defendant, whether by resignation or termination, the amount of the loan outstanding, including interest on the loan become payable and may be deducted from any monies due to the claimant from the defendant."

22. I entirely agree with and cannot improve upon the learned judge's analysis. In addition, his conclusion that the words "leaving the company" in condition (g) of the agreement include involuntary separation as well as resignation also finds support in **Potter v Hunt Contracts**, a decision of the English Employment Appeals Tribunal. In that case it was held that

the construction of the phrase "should you leave the Company" in a loan contract to refer to a voluntary as well as an involuntary departure (due to dismissal) was one which was clearly open to the first instance Industrial Tribunal.

23. Neither of the authorities to which we were referred by Ms Young can in my view compel a different construction of condition (g). **Measures Bros. v Measures** (supra) was a case in which the plaintiff company had gone into receivership in a debenture-holder's action and a compulsory winding-up order had been made against it. The receiver and manager gave notice to the defendant, who had been employed to the company as a director, that his services would no longer be required and ceased to pay his salary. The defendant then proceeded to carry on business on his own account in competition with the plaintiff company, which sought to restrain him from doing so on the basis of a covenant in restraint of trade entered into by him with the company some years before that for a period of seven years after leaving its employ he would not engage in a competing business. It was held by the Court of Appeal that the plaintiff company could not have specific performance of the covenant without itself being in a position to perform its own contractual obligation to him and that no injunction would therefore be granted to restrain him.

24. That case is, in my view, clearly distinguishable from the instant case for both of the reasons urged by Mr Ebanks. In the first place, it is a case concerned with the construction of a contract in restraint of trade, with regard to which considerations of fairness and reasonableness are almost by definition necessarily incident. And secondly, the plaintiff company in that case was itself in breach of contract and thereby disentitled to insist on performance of a reciprocal obligation from the defendant.

25. Ms Young's other authority, **Telegraph Despatch and Intelligence Company v McLean** (supra) is also, in my view, clearly distinguishable,

that also being a case in which the plaintiff was held not to be entitled to an injunction in circumstances in which the plaintiff itself was in breach of an implied term of its contract with the defendant.

26. Ms Young cited no authority in support of her alternative argument, which was that even if Muria J was correct to find that "leaving the company" covered both a voluntary and involuntary departure, there was no inconsistency in finding that the appellant's obligation was to continue to repay the loan at the rate of $100.00 per month. It is sufficient to say, I think, that neither condition (e) nor condition (g) of the loan agreement can bear this extended meaning: with regard to the former, repayment through pay sheet deduction will obviously cease to be possible on termination of employment, while in the case of the latter the provision for the outstanding balance to be "deducted in full" from any benefits due to the worker plainly implies that upon termination it is the entire obligation which becomes due.

27. Finally, on the matter of interest, section 167 of the Supreme Court of Judicature Act provides as follows:

> "Every judgment debt shall carry interest at the rate of six *per centum per annum* from the time of entering up the judgment until the same is satisfied, and such interest may be levied under a writ of execution on such judgment."

28. Muria J's order, it will be seen, is fully in keeping with the terms of the section. The only comment that might in fact be made about the order is that it was not strictly speaking necessary, since the right to interest on a judgment debt, by virtue of section 167, follows automatically from the judgment, without any specific order of the court (unlike in the case of interest up to judgment, pursuant to section 166 of the Act).

29. I therefore concluded that there was no basis to disturb the judgment of Muria J. in any way and accordingly concurred in the result of the appeal which was announced on 15 October 2008.

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MORRISON JA