Latham v Credit Suisse First Boston
[2000] SGCA 26

Case Number : CA 168/1999

Decision Date : 15 May 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Davinder Singh SC and Ajay Advani (Drew & Napier) for the appellant; Andre Yeap and Lim Wee Ming (Allen & Gledhill) for the respondents

Parties : Latham — Credit Suisse First Boston

Employment Law – Contract of service – Termination of appellant's employment – Whether dismissal carried out in bad faith

Employment Law – Contract of service – Termination – Contractual notice period – Requisite notice not given – Whether dismissal wrongful – Damages

Employment Law – Contract of service – Discretionary bonus – Wrongful dismissal – Damages – Whether damages should include award of discretionary bonus

Employment Law – Contract of service – Wrongful dismissal – Defective notice of termination – Correct measure of damages

Employment Law – Contract of service – Wrongful dismissal – Declaration – Whether declaration of appellant's wrongful dismissal necessary – s 18 Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) – O 15 r 16 Rules of Court (1997 Rev Ed)

Evidence – Admissibility of evidence – Alleged oral agreement as to guaranteed bonus – Whether oral evidence admissible – ss 93 & 94 Evidence Act (Cap 97, 1997 Rev Ed)

(delivering the grounds of judgment of the court): ***Introduction***

This appeal was brought against the decision of Chan Seng Onn JC. The judicial commissioner had refused to order that the appellant, Scott Latham (`Latham`), was entitled to claim a bonus as part of his damages for wrongful dismissal from the employ of the respondents, Credit Suisse First Boston (`CSFB`). We dismissed Latham`s appeal and now give our reasons for doing so.

Background facts

Sometime in early 1997, Neil Harvey (`Harvey`), the managing director of the Emerging Markets Group (`EMG`) Asia at CSFB, began looking for someone to fill the post of Director of Global Emerging Markets. Harvey approached a head-hunting firm, Euro Search, to help him look around for a suitable candidate. Euro Search recommended Latham to Harvey and in the process, their representative, one Vincent Lowe, sent Harvey the following email on 18 March 1997:

> *Neil*
>
> *I want to inform you of the break up of Scott`s salalry package when he was at BZW:*
>
> *Base salary USD 150,000*

Guaranteed bonus USD 350,000 (for 1996)

Housing USD 10,000/month

Car allowance Sing. 3,000/month

After negotiations took place between Latham and Harvey, Latham entered into a contract of employment with CSFB in April 1997 as the Director of Global Emerging Markets, whose function was to carry out relative value credit research in CSFB`s EMG Asia. His job included credit risk assessment and analysis of corporate, bank and sovereign entities in Asia. Latham was employed pursuant to a written contract of employment dated 26 March 1997, the salient parts of which stated:

Salary

Your starting salary will be USD150,000 per annum on a 12-month basis which will be paid to you in local currency of SGD210,795 per annum (at set conversion of US$1 [equals] S$1.4053) on a monthly basis. Salaries are reviewed on an annual basis, normally at the beginning of each calendar year and each review will be expressed in terms of US$. Your salary will then be converted to the S$ rate at the Company`s book rate at that time. The amount of your base salary will be reviewed in January 1998.

Bonus

In addition to your salary, a bonus may be paid to you at the end of each calendar year, based on Company profitability and your performance during the year. The first bonus payment for which you will be eligible for consideration will be for calendar year 1997.

...

Notice Period

Either party may terminate the employment by giving one month`s notice in writing. During probation, the notice period will be one week. However, should the reason for the Company terminating your employment be gross misconduct of any type, then no notice will be given.

The contract was signed by Latham on 7 April 1997 and backdated to 2 April 1997. Latham commenced work at about the same time.

Latham claimed however that, in addition to this written contract, the terms of his employment were also constituted by an oral contract made between him and Harvey, on behalf of CSFB, prior to his signing of the written contract. This oral contract allegedly guaranteed that Latham would receive, in addition to his salary, a bonus of US$500,000 if EMG Asia achieved its minimum target budget of US$60,000,000. Furthermore, as the bonus was dependent on profitability, Latham could expect to

get more than the guaranteed sum of US$500,000 if the profit exceeded the target budget. Latham said that Harvey had explained that this latter entitlement was subject to the condition that the agreement about the guaranteed bonus remained oral. This was because, if the bonus guarantee was in writing, Latham would not get more than what was stated, even if the profit exceeded the target budget. The minimum guaranteed bonus of US$500,000 was pleaded by Latham as an essential term in a part oral/part written employment agreement.

Some five months after Latham started working at CSFB, he was told to leave CSFB on 17 September 1997. Negotiations subsequently took place between Latham and CSFB as to how he was to be compensated for his dismissal. During the course of these negotiations, CSFB purportedly terminated Latham`s contract of employment through a letter by their solicitors dated 15 October 1997 giving him one month`s remuneration in lieu of notice. On 16 December 1997, the United States office of CSFB filed the Uniform Termination Notice for Securities Industry Registration (`U-5 form`) electronically in the United States. This form stated that Latham was discharged because `management determined that Mr Latham wasn`t performing to their expectations.`

Unhappy with what had happened, Latham commenced an action against CSFB claiming, inter alia, for:

(a) a declaration that Latham was wrongfully dismissed by CSFB on 17 September 1997;

(b) damages comprising $20,600 for the period after 17 September 1997 during which Latham was unemployed and bonus in the sum of US$2m or to be ascertained;

(c) Latham`s copy of the U-5 form; and

(d) an enquiry or account of CSFB`s EMG dealings for 1997.

Latham alleged that he had been wrongfully dismissed by CSFB as CSFB were unhappy with him for complaining about certain incidents that took place at work. First, he had discovered that some of his colleagues were unlawfully using inside information for trading activities for the benefit of CSFB and secondly, he had complained about the fact that the chief trader at CSFB, Charlie Chan (`Chan`), was engaging in the practice of deliberate mis-marking of CSFB`s trading books by grossly undervaluing the assets held in these books in order to avoid paying taxes. In any event, his dismissal was also wrongful because CSFB had not given him the requisite one month`s notice according to the written terms of the contract and there were insufficient grounds for an immediate dismissal.

The decision below

The judicial commissioner substantively dismissed Latham`s claim, although he did hold that Latham had been wrongfully dismissed on the technical ground that the requirement of one month`s notice was not given. Although CSFB ostensibly terminated Latham`s contract of employment by giving him one month`s notice in lieu of remuneration on 15 October 1997, the judicial commissioner was of the opinion that Latham`s services were in reality terminated on 17 September 1997. On that day, Latham was informed that CSFB had lost trust and confidence in him, he was escorted out of the office, his access card to the office was taken from him, and he was effectively barred from entering CSFB`s office. Moreover, the fact that the termination could be nothing but immediate was evident by the tone and language used by Harvey in relation to the matter.

On the issue of the damages to be awarded to Latham, however, the judicial commissioner felt that

the sum already paid by CSFB to Latham of one month`s remuneration was sufficient compensation for Latham`s wrongful dismissal. He did not think that he should order the further payment of one month`s salary for breach of the notice provision by CSFB. The judicial commissioner dismissed Latham`s claim both for the alleged guaranteed bonus, or for a sum to be assessed based on the contractual discretionary bonus. In his opinion, Latham`s claim for the guaranteed bonus of at least US$500,000 failed due both to the operation of ss 93 and 94 of the Evidence Act (Cap 97) as well as on the balance of probabilities. The judicial commissioner was of the view that the written employment contract dated 26 March 1997 was a very formal document encompassing all the agreed terms of employment, including that in relation to the bonus. According to this written contract, the bonus was entirely at the discretion of CSFB. As such, he felt that he could not allow Latham to tender oral evidence of the verbally guaranteed bonus to prove the existence of an oral term that directly contradicted the written terms of the contract. In the judicial commissioner`s mind, the written employment agreement was the entire agreement, where all the terms agreed to had been reduced to writing and the exceptions to the rule in ss 93 and 94 did not apply to the facts of this case.

The judicial commissioner also considered in any event that Latham had failed on a balance of probabilities to show that Harvey had promised him the oral guaranteed bonus in the terms alleged. This conclusion was reached due to:

(a) Latham`s lack of credibility, evidenced by his representations about his previous salary, particularly his continual reliance on the Euro Search figures when they did not represent a true reflection of his remuneration package, and the circumstances in which he left his previous job at BZW;

(b) the fact that Latham was not in a position to demand such a large guaranteed bonus as he had already left his previous company at the material time and had no other firm job offers;

(c) Latham`s assertion that he had never directly demanded the guaranteed bonus from Harvey;

(d) the fact that there was no clear agreement on how any potential increase in the bonus would be computed;

(f) the fact that Harvey was in no position to offer any guaranteed bonus as he had to go through several levels of approval involving more senior management than Harvey before doing so;

(g) a contemporaneous email from Harvey to Mohan Kumar (`Kumar`), the Head of Research of CSFB`s EMG in London, which stated unequivocally that Harvey had told Latham that no guaranteed bonus would be offered;

(h) the fact that neither CSFB`s hiring authorisation form nor the confirmation of employment form indicated that Latham would be receiving a guaranteed bonus;

(i) another email from Harvey to Dave Basile (`Basile`), the Director of CSFB`s EMG in London, on 28 August 1997 stating that the tentative bonus allocated to Latham was US$400,000 which did not mesh with the alleged promised bonus of US$500,000 and;

(j) Latham`s failure to bring up the matter of the guaranteed bonus to Joe Luciano (`Luciano`), the Director of CSFB`s Human Resources, when talk of his leaving CSFB first surfaced.

As for the issue of whether Latham could lay claim to a bonus pursuant to the discretionary bonus

clause in his written contract of employment, the judicial commissioner considered that the authorities generally pointed towards the position that while it may be the practice in Latham`s industry for employees to receive a bonus, in this case, the bonus culture could not be implied into the employment contract to give rise to a right on Latham`s part to demand a payment of bonus to him.

The judicial commissioner was not inclined to award any damages based on loss of opportunity arising from CSFB`s termination of Latham`s employment and what was stated on the U-5 form. What was stated on the form was not argued to be untrue or unjustifiable and Latham could well have not been performing up to expectations due to his inability to co-operate with his colleagues. As such, no general damages could be awarded to Latham on this basis.

Finally, the judicial commissioner declined to grant Latham a declaration that he had been wrongfully dismissed as he did not see any good reason nor any useful practical purpose upon which to exercise his discretion to do so.

The appeal

In the appeal, Latham raised the following issues. First, whether ss 93 and 94 of the Evidence Act should have been applied to exclude Latham`s extrinsic oral evidence of the verbal guarantee which contradicted or varied the terms of the written contract of employment; secondly, that the judicial commissioner erred in finding that Latham had failed to prove on a balance of probabilities that CSFB had agreed to pay Latham a guaranteed bonus; thirdly, whether CSFB had wrongfully deprived Latham of his bonus payment and finally, that the judicial commissioner erred in awarding Latham only one month`s wages to compensation for his wrongful termination.

Admissibility of oral terms

Section 93 of the Evidence Act provides generally that where the terms of a contract have been reduced to the form of a document, no evidence shall be given in proof of the terms of this contract, except the document itself. This encapsulation of the common law contractual parol evidence rule applies unless the secondary evidence falls under one of the exceptions found in s 94 of the Evidence Act. The relevant portion of s 94 reads:

> *When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions:*
>
> *(a) ...*
>
> *(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved; in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document`*
>
> *(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;*

The judicial commissioner was of the view that neither s 94(b) nor s 94(c) of the Evidence Act applied, such that Latham`s evidence of the oral agreement was admissible. He rejected the argument that the letter of employment was never intended to be the entire agreement between the parties and hence the verbal guarantee fell outside the statutory parol evidence rule. Although the judicial commissioner did not say so in so many words, he appeared to be saying that s 94(b) did not apply on the facts of this case. As for the issue of whether s 94(c) applied, the judicial commissioner had this to say at p 17 of his judgment:

> *32 Plaintiff`s counsel argued however that the alleged verbal guaranteed bonus was a condition precedent to the written agreement and he relied on the exception in s 94(c) of the Evidence Act. In the first place, there was no pleading that it was a condition precedent, which in its very nature must be extraneous to the contract. It was pleaded to the contrary that the entire agreement was part written and part oral, which meant that the verbal guarantee was part of the employment contract and not a condition precedent. Thus, the argument that the exception in s 94(c) applied failed in limine.*

There appeared to be some confusion in the appellant`s case as to which subsection of s 94 the judicial commissioner should have applied. However, we concluded that, regardless of whether the arguments were based on s 94(b) or s 94(c), Latham nevertheless failed in his attempt to establish that the judicial commissioner was wrong to have excluded evidence of the verbal guarantee. First, he submitted that the judicial commissioner should have considered whether the exception in s 94(c) of the Evidence Act applied to the facts of this case and should not have excluded it on the basis that Latham failed to plead the existence of any collateral contract or warranty in his statement of claim. Secondly, he argued that the oral evidence was admissible under s 94(c) as a collateral agreement which induced him to enter into the written employment contract.

Strictly speaking, the fact that Latham had only pleaded that the verbal guarantee was a term in a partly written/partly oral contract of employment prevented him from claiming that oral evidence of it was admissible either as a collateral agreement or a condition precedent. As the claim was based on the same facts laid out in the statement of claim, and the arguments were canvassed extensively by both sides during the course of the trial, it did not appear to cause much harm or prejudice to CSFB for the court to consider this matter.

It was clear that s 94(c) of the Evidence Act did not help Latham in his attempt to admit evidence of the oral guarantee allegedly given by Harvey. Latham`s counsel appeared to think that the scope of s 94(c) covers collateral contracts and warranties, when in actual fact it is clearly confined to evidence of a condition precedent to the written contract. Condition precedents and collateral contracts are different legal creatures. Collateral contracts constitute an independent contract from the written agreement. In contrast, the condition precedent to an agreement is one where the parties have agreed that the written contract does not take effect until the fulfilment of a certain condition. It has been pointed out by the editor of ***Cheshire, Fifoot and Furmston`s Law of Contract*** , Second Singapore and Malaysian edition, that the applicable exception in s 94 in relation to collateral contracts is s 94(b). A proper interpretation of s 94(c) of the Evidence Act indicates that it is only applicable to condition precedents. In our view, counsel for Latham confused the two concepts.

Under such circumstances, the arguments raised were not really relevant. It was evident that the alleged verbal guarantee was not a condition precedent and the exception in s 94(c) of the Evidence Act could not apply to admit oral evidence of the guaranteed bonus. As the judicial commissioner pointed out, the written agreement had already become binding and had been performed as to a large portion of its obligations. The oral agreement could thus not be construed as a condition precedent as the payment of the bonus would not have been paid to Latham prior to the performance of his contract of employment.

For the sake of completeness, we considered whether s 94(b) of the Evidence Act applied to the matter. In our judgment, it could not operate to admit evidence of the verbal agreement either as a collateral contract or as forming part of the terms of a part oral, part written contract. Section 94(b) only allows the admission of evidence of a collateral contract on matters which are not inconsistent with the written agreement. Where the alleged terms of the oral agreement are in addition to and therefore inconsistent with the written contract, that evidence is inadmissible: **Ng Lay Choo Marion v Lok Lai Oi** [1995] 3 SLR 221 . The position taken in the Malaysian case of **Tindok Besar Estate Sdn Bhd v Tinjar Co** [1979] 2 MLJ 229 also favours a literal interpretation of ss 93 and 94 of the Evidence Act. However, the court in **Tan Swee Hoe Co Ltd v Ali Hussain Bros** [1980] 2 MLJ 16 , a Malaysian authority cited by Latham, came to a result which was not in line with this approach as it stated that, in accordance with the English authority of **Mendelssohn v Normand Ltd** [1970] 1 QB 177, an oral promise given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement.

The position Latham urged this court to take could not be right in light of the wording of s 94 of the Evidence Act, in particular, s 94(b). This would also not be in keeping with the previous decision of this court in ***Ng Lay Choo Marion v Lok Lai Oi*** . It was pointed out correctly by the judicial commissioner that the employment agreement was a very formal document encompassing all the agreed terms of the employment including that for bonus. The words used in that particular clause also expressly indicated that the bonus was entirely discretionary. A true construction of the employment contract as a whole showed that Latham had no right to any bonus at all. CSFB was entitled to exercise its discretion to deny Latham of all of his bonus. Thus, as the alleged verbal agreement that Latham would get a guaranteed bonus was inconsistent with CSFB`s obligation to grant a bonus at their discretion, we were of the opinion that evidence of the verbal agreement should not be admitted in this case.

Factual existence of the oral guaranteed bonus

The issue concerning the verbal guarantee may be closed on the basis of the operation of ss 93 and 94 of the Evidence Act. However, we were also of the view that Latham`s contention that Harvey had verbally promised Latham a guaranteed bonus of at least US$500,000 could not be sustained as a fact on the balance of probabilities.

Latham first argued that unlike the judicial commissioner`s conclusion, he was in a position of strength during the course of the negotiations with CSFB as to the terms of his employment. Negotiations had commenced when Latham was head-hunted by CSFB in late 1996/early 1997. Latham only left BZW in February 1997 pursuant to a settlement agreement under which Latham would remain on BZW`s payroll for three months and receive a lump sum payment of US$295,000. He was also negotiating with Deutsche Bank and Koch Capital at the same time. Harvey thought highly of Latham based on several meetings with him and, furthermore, the expiry date for Harvey to hire a new senior employee in the research department was due to expire at the end of March 1997.

Secondly, Latham insisted that he was an honest and credible witness. His personal and professional integrity were evidenced by his whistle-blowing when he observed insider trading being carried out by his colleagues. Also, he had not inflated his remuneration package at BZW from US$375,000 to US$525,000 as the judicial commissioner had found. Latham never told Harvey that his remuneration package totalled US$525,000 and had instead told Harvey that his guaranteed payments, not remuneration, for 1996 were US$525,000. Furthermore, contrary to the judicial commissioner`s finding, Latham claimed that his remuneration package at BZW was US$500,000, not US$375,000, as the judicial commissioner had failed to annualise Latham`s guaranteed bonus payment. On this basis, he alleged that CSFB`s version of events was not believable as it would mean that Latham intended to move from BZW where he was earning US$500,000, to CSFB where he was only assured of making US$150,000.

As for the email dated 19 March 1997 from Harvey to Kumar in which it was stated that Harvey had told Latham that no guaranteed bonus would be offered, Latham claimed, firstly, that this email was not an accurate reflection of what was eventually agreed as there were further negotiations between the parties. Secondly, what was stated in the email about the bonus was consistent with Latham`s allegation that Harvey said that no guaranteed bonus would be written into the contract, as Harvey was merely informing Kumar of the terms that Harvey intended to incorporate into Latham`s offer letter. The email was consistent as the guaranteed bonus was not to be incorporated into the offer letter.

In relation to the judicial commissioner`s findings that Latham was not entirely honest about the circumstances under which he parted ways with BZW, Latham said that the judicial commissioner erred in his analysis of the evidence of Richard Routeledge (`Routeledge`), BZW`s Head of Human Resources. The judicial commissioner felt that Routeledge`s evidence indicated that, although Latham had not been dismissed, it was obvious that BZW no longer wished to employ him for a variety of reasons. However, Latham argued that it was he who wanted to leave BZW and not the other way round. He was not dismissed from BZW and the settlement agreement was amicable.

Latham also felt that the judicial commissioner should not have interpreted his failure to raise the issue of the guaranteed bonus when he was dismissed on 17 September 1997 or at his meeting with Luciano on 19 September 1997 as indicating that no such agreement on a guaranteed bonus could have existed. The judicial commissioner felt that given its importance, Latham would have brought up the issue as soon as the question of his leaving CSFB arose. Latham contended that the wrong inference had been drawn from his failure to bring up the issue immediately upon his dismissal. He said that the issue of the guaranteed bonus was not brought up on those occasions as the senior management at CSFB had agreed not to negotiate with Latham until they had agreed on a common position. As such, when Latham finally brought up the matter on 26 September 1997 with Luciano, this was the first opportunity which presented itself for him to do so. It was clearly not the afterthought that the judicial commissioner was of the opinion it was. In contrast, Latham said that Harvey`s evidence that he only heard about Latham`s claim to a guaranteed bonus on 21 October 1997 was unbelievable given the fact that Luciano, on his own evidence, had been informed by Latham about it on 3 October 1997 and would have mentioned it to Harvey before 21 October 1997.

Thirdly, Latham submitted that the judicial commissioner should have allocated more weight to evidence that corroborated Latham`s version of events. In particular, Latham referred to the email from Harvey to Basile on 28 August 1997 which tentatively allocated a US$400,000 bonus to Latham, with the potential for more if Harvey could obtain more funds from the head office. Latham said that if the judicial commissioner had correctly annualised this figure, the final amount would have come up to US$533,333, a figure very close to the sum of US$500,000 claimed by Latham to be the guaranteed bonus.

Additionally, Latham referred to the transcripts of two conversations; firstly, between himself and Reid Hamilton (`Hamilton`), the Managing Director of Euro Search, that took place on 27 September 1997 and secondly, between Sandra Jarvis (`Sandra`) who helped to manage the expense base and budget for CSFB, and Joyce Yap (`Joyce`), who worked in CSFB`s human resource department at the material time, that took place on 17 September 1999. He said that both conversations corroborated his allegation that Harvey had orally guaranteed him a bonus of US$500,000 or more. Accordingly, the judicial commissioner did not give sufficient weight to these two conversations.

Finally, Latham contended that CSFB`s conduct during discovery indicated that it had been trying to hide relevant evidence. Specifically, this was in relation to the release of various tape recordings and emails that CSFB had initially refused to release to Latham until it was compelled by way of a court order to do so.

It is trite law that an appellate court should be exceedingly slow to overturn the trial judge`s finding of fact as the finding depends on the credibility and veracity of witnesses whom the trial judge has the advantage of hearing first hand; **Lim Hwee Meng v Citadel Investment Pte Ltd** [1998] 3 SLR 601 and **Aircharter World Pte Ltd v Kontena Nasional Bhd** [1999] 3 SLR 1 .

That said, we were of the opinion that Latham`s contentions were untenable. First, it would clearly be overstating the position to say that Latham was negotiating from a position of strength. Whatever the settlement package he received from BZW, the fact remained that he was seeking new employment. He would no longer be in any position to receive the pay package that he used to get. This was not a case of CSFB having to make him a much better job offer with terms that were more attractive than those offered at BZW in order to persuade him to quit his job at BZW to come over to CSFB. It was therefore not as ludicrous as Latham made it out to be that he would take up the job offered by CSFB with a salary of US$150,000 per annum and a reasonable likelihood of earning a bonus of about US$500,000, even if the bonus was not guaranteed. Thus, during negotiations, Latham was in a relatively weaker position than CSFB, despite their desire to hire someone new for their EMG as soon as possible.

We also decided not to disturb the judicial commissioner`s assessment of Latham`s credibility and honesty as a witness. In relation to his previous remuneration package at BZW, Latham claimed that he never represented to Harvey that his remuneration package at BZW was US$525,000. All that he said was that his guaranteed payments for 1996 from BZW were US$525,000. However, Latham alleged that his true remuneration package at BZW, was, as the information given by Euro Search to CSFB states, US$500,000. In our view, Latham`s attempt to show that the judicial commissioner had failed to annualise the figures was not convincing. As pointed out by CSFB, this was the first time the argument had been canvassed by Latham. At any rate, a perusal of Latham`s employment contract with BZW made it very clear that there was no question of annualising any of the figures. The contract stated that BZW would pay Latham US$125,000 per annum on a 12-month basis. In respect of the bonus, it was a flat sum of US$250,000. Latham`s argument on this point was obviously misconceived and of little merit, and appeared to be no more than an attempt to justify his reliance throughout most of the trial on the figures in the Euro Search email as evidence of his remuneration package at BZW.

As for the email from Harvey to Kumar dated 19 March 1997, we did not think that there was much substance in Latham`s argument that the statements in the email to the effect that no guarantee would be offered, had to be construed as meaning only that no guarantee would be written into the offer letter. A reasonable interpretation of the email indicated clearly that no guaranteed bonus would be offered to Latham, whether in writing or not. This was evident from the fact that it was stated in

the same email that a set of performance criteria and targets for Latham would be drawn up and that if he achieved them, he would be likely to get a bonus of about US$350,000. Besides, we could not see how the fact that the eventual bonus tentatively allocated to Latham of US$400,000 by Harvey, in an email to Basile on 28 August 1997, made the earlier email from Harvey to Kumar so unbelievable and contradictory. On the contrary, we found the emails consistent and that they in fact corroborated CSFB`s position that Latham had never been promised a guaranteed bonus. Both emails indicated that any bonus Latham would ever receive was entirely at the discretion of CSFB.

Likewise, the allegation by Latham that the judicial commissioner had misinterpreted Routeledge`s evidence relating to the circumstances surrounding Latham`s departure from BZW contained little merit. Having read the relevant portion of Routeledge`s evidence, it was clear that the judicial commissioner was perfectly entitled to come to the conclusion that BZW wanted Latham to leave the organisation even if it did not dismiss him outright. There were already several complaints of some substance against Latham and Routeledge unequivocally described the atmosphere at the time of Latham`s departure as one of inevitability. He said, `By the time the discussions took place, we in BZW were fairly clear that there would not be a role for Latham going forward.` Simply because the settlement was voluntary and, in Routeledge`s words, `not unamicable` does not mean that Latham would be able to stay on at BZW for as long as he liked. It was obviously deemed to be better for all concerned that he leave. As such, Latham`s claim that it was he who wanted to leave BZW and not BZW that wanted him to leave the organisation was rather specious in the circumstances. There was clearly no reason to overturn the judicial commissioner`s finding of fact on this issue.

We now turn to Latham`s failure to bring up the question of the guaranteed bonus with Luciano on the day he was dismissed. The judicial commissioner interpreted this as indicating that his claim for the bonus was an afterthought on his part. Latham was not able to show why the judicial commissioner was plainly wrong to draw this conclusion. Latham`s reasons for not having brought the matter up before 26 September 1997 when the occasions arose were again rather spurious. He said that the matter did not come up as the management at CSFB had agreed not to negotiate with him until they came to an agreed position to take. This did not make sense. Why should this fact have inhibited Latham himself from bringing up the matter? Under the circumstances, we were of the view that the judicial commissioner`s findings should not be overturned.

We did not think that the evidence cited by Latham supported his version of events. First, Latham`s argument that Harvey`s email to Basile allocating a bonus of US$400,000 to Latham resulted in an annualised sum of about US$533,333, a figure close to the guaranteed US$500,000, was a very strained one. There was no mention in the email about annualising the figures. The more reasonable interpretation was that the figures indicated the actual amounts that Latham and the other employees of CSFB were going to get for that year.

Secondly, as far as the conversations between Latham and Reid on the one hand, and Sandra and Joyce on the other, were concerned, it was clear that the judicial commissioner was right not to place too much emphasis on these as corroborative evidence of Latham`s version of events. Latham`s conversation with Reid appeared to be an exercise by Latham to try to find evidence in support of his claim that CSFB had given him a verbal guarantee. Latham also tried to make too much out of the conversation between Sandra and Joyce when all that transpired there was that Sandra asked Joyce to check whether Latham was entitled to a guaranteed bonus as she appeared to have him down as being entitled to one. Joyce did so and came back with the answer that he was not. At any rate, this conversation did not gel with Latham`s allegation that Harvey had told him that the guaranteed bonus should not be written down and should remain verbal. If Sandra had it recorded down in her spreadsheet and had obtained this information from the hiring authorisation forms, then the agreement could not have been made in the manner alleged by Latham. All in all, this aspect of

Latham`s contentions did nothing to establish that the judicial commissioner erred in his assessment of the evidence and the findings that he drew.

Thirdly, Latham`s allegation that CSFB had deliberately tried to hide evidence until it was required to produce certain tape recordings and emails by the court was not relevant. In any event, most of the tape recordings requested for at discovery were eventually produced and did not bolster Latham`s case in any significant way.

In our judgment, the judicial commissioner`s finding that Harvey had never verbally promised Latham a guaranteed bonus of US$500,000 or more should be undisturbed. The judicial commissioner made a finding of fact that Harvey had not made any such agreement with Latham. He preferred the evidence of Harvey to Latham on this matter. Latham`s credibility was undermined by his evidence on issues such as what his salary was at his previous place of employment, BZW, the reasons for his leaving them and the job offers he was receiving at around the time he was negotiating with CSFB. Furthermore, there was contemporaneous evidence in the form of emails and the recorded details of Latham`s employment that swung the balance of probabilities towards Harvey`s version of events. The judicial commissioner felt, on the other hand, that the evidence tendered by Latham in support of his contention, was not sufficiently cogent or weighty for his side of the story to be believed. For these reasons, we did not feel that there were sufficient reasons to disagree with the judicial commissioner and left this aspect of his judgment untouched.

Existence of bad faith on CSFB`s part in dismissing Latham

Latham`s second substantive ground of appeal was that CSFB had acted in bad faith in dismissing him, thereby wrongfully depriving him of the chance to earn his bonus payment. Latham`s argument in this respect was two-pronged. On the one hand, he said that he made substantial contributions to CSFB during the course of his employment with them. In support of this allegation, he cited a list of projects that he was involved in where he helped CSFB make profits as a result of his proficient research skills. Latham also highlighted Harvey`s favourable written assessment of him in late June 1997. Furthermore, Latham was allotted a tentative bonus of US$400,000 by Harvey as late as August 1997, a mere three weeks before his dismissal.

On the other hand, Latham said that the judicial commissioner erred in finding that that he had made certain mistakes specific to the way he conducted himself at work which, while not amounting to serious misconduct, annoyed the senior management so much that they decided to terminate his employment. These specific incidents were an unapproved interview given by Latham to Bloomberg, his baseless complaints that Chan was mis-marking CSFB`s books and the fact that he had asked his friend, Joseph Chakra (`Chakra`), to delay negotiations with CSFB concerning Chakra`s potential employment with them. Latham contended that he was really dismissed from CSFB because of certain things he had done, which although correct had made him enemies at CSFB. Latham alleged that Harvey and some of his other colleagues were angry with him for pointing out to them that the intended use of some information concerning a Thai company, Srithai, by CSFB to purchase Srithai`s bonds, amounted to insider trading. This was the real reason for his being dismissed from CSFB and amounted to bad faith on the part of CSFB.

It may well be that Latham was performing reasonably well in certain areas but not in all. This did not mean that he was immune from being contractually dismissed. We noted from the outset that Latham`s termination, eventually found to be wrongful by the judicial commissioner on the technical ground that he was not given the requisite one month`s notice, was purportedly contractual. CSFB never claimed that Latham had committed some form of gross misconduct that entitled them to

terminate his employment immediately. Under the terms of the contract, both Latham and CSFB could terminate the employment contract without any reason, as long as the one month notice period was adhered to. As such, the focus here would be whether CSFB acted in bad faith by dismissing Latham because he had complained rightfully that his colleagues were engaging in insider trading as regards the Srithai issue.

CSFB likewise cited a litany of complaints made by various employees against Latham pertaining mostly, not to his work performance as such, but to the difficulties that they had dealing with his allegedly abrasive personality. CSFB also highlighted the Bloomberg incident and the Chakra incident, matters that Latham tried to refute, as reasons for not wanting Latham to remain at CSFB any longer.

First, the Bloomberg incident. Latham had given an interview to Bloomberg on 2 July 1997 on the effects of the Baht`s devaluation on corporate Thailand. CSFB were of the opinion that Latham had breached CSFB`s internal procedures by doing so. Latham on the other hand was of the opinion that he had not done anything wrong by giving the interview as he claimed to have been given the impression by one of CSFB`s Legal & Compliance officers that he was free to speak to the press. When this impression was corrected later, Latham was upset when he was sent a letter of warning, issued by Harvey on 24 July 1997 as he had thought that the management at CSFB had acknowledged that CSFB`s policy on media exposure had not been made clear to him prior to the interview. He thus did not feel that he should have been given the warning letter and was so upset that he did not turn up for work on 25 July 1997. According to Latham, Harvey subsequently apologised for issuing the warning letter and told him to take the day off on 25 July 1997.

In our view, neither Latham and CSFB were entirely blameless in terms of the outcome and aftermath of this incident. This incident was a misunderstanding stemming from a mistake on Latham`s part in giving the interview without first getting the proper clearances. It was probably true that Latham was unclear as to CSFB`s policy on media interviews, but it was also probably equally true that he, self-admittedly, did not make the proper inquiries before doing so. He could not shirk responsibility or accountability for the matter. However, CSFB could probably have handled the matter better and it appeared that Harvey acknowledged this fact in trying to diffuse the tensions arising out of the warning letter. Regardless, the fact remained that management at CSFB were entitled to take this into account when matters deteriorated and, while it was not the main factor for dismissing Latham, it must not have looked favourable in the light of the other complaints made against him.

We now turn to the Chakra incident. It appeared that CSFB were more than justified in being annoyed with Latham`s behaviour in relation to this matter. Chakra was a friend of Latham`s whom Latham had apparently recommended to CSFB in August 1997. Sometime in September 1997, Chakra was being interviewed in the United States by CSFB. On 16 September 1997, Latham telephoned Chakra. In this conversation, Latham asked Chakra about the status of his negotiations with CSFB, and upon being told that it appeared to be going well, told Chakra that there was a re-organisation taking place within CSFB. Latham then advised Chakra to delay negotiations on joining CSFB for about another week or two until the re-organisation had been sorted out. Specifically, the conversation appeared to focus on the fact that Chakra should try to be employed through one Kevin Morley, instead of Felix Robins, the Director of Human Resources with CSFB, due to the potential shifts of power that could ensue as a result of the re-organisation. From the transcript of the conversation, it appeared that Chakra was rather surprised by what Latham was telling him and agreed that it would be a good idea to postpone the scheduled appointments that he was to have with Harvey to a later date.

Latham then took it upon himself to inform Harvey that Chakra would not be continuing the interview process for the moment. What happened next was rather unclear but Harvey was clearly not happy with what Latham had done, as was evident by what he said to Andrew Ipkendanz (`Ipkendanz`),

the Global Head of CSFB`s EMG, on 18 September 1997. By then, it was apparent that Latham had managed to anger many people in CSFB, and this incident was the straw that broke the camel`s back and led directly to the decision to dismiss him. CSFB contended that Latham had engineered the series of events relating to Chakra`s negotiations with CSFB so as to protect his own position within CSFB. According to CSFB, this was motivated by Latham`s notion that by making it look that Chakra was, in a sense, under his control, the management at CSFB would feel pressurised to tell him a bit more about the re-organisation and his own role in it.

We took the view that CSFB`s complaints about this matter were not unfounded. Regardless of what Latham`s motives were, he was clearly interfering in CSFB`s hiring process by telling Chakra to delay the negotiations with CSFB. As far as CSFB were concerned, this sort of behaviour was not acceptable and was sufficient reason for them to want to terminate Latham`s contract of employment, even if it did not amount to gross misconduct on Latham`s part.

Conversely, Latham said that his dismissal was motivated by bad faith on the part of CSFB, in particular Harvey and Chan, in relation to the Srithai bonds matter. This issue arose out of a visit by Latham to Bangkok on 27 August 1997 to consider whether there were any opportunities to provide short-term financing to credit-worthy companies. During his trip, Latham came to be aware of the fact that Srithai had a plan to use short-term financing to buy back Srithai`s own bonds. Latham said that he informed his colleague, Sudip Thakor (`Thakor`), who then passed on this information to various people, including Harvey. Harvey apparently told Thakor to tell Chan, who also knew about it, to purchase Srithai`s bonds. When Thakor informed Latham what he had done, Latham told Thakor that this amounted to insider trading and expressed his protest in response to what Thakor had done. Although the bonds were eventually not purchased by CSFB, the judicial commissioner felt that the information obtained by Latham was market sensitive and should not have been divulged by Thakor to Harvey or Chan, who was CSFB`s chief trader, as it amounted to insider trading. Latham thus alleged that Harvey wanted Latham to be dismissed because he was very angry, for all the wrong reasons, about this incident. In response, CSFB contended that what Thakor, Chan and Harvey had done did not amount to insider trading.

In our view, even if Latham was right to complain and comment that the use of the information relating to the Srithai bonds buy-back by Harvey and Chan amounted to insider trading, and that Harvey was annoyed with him for this reason, it did not mean that Latham`s dismissal was motivated purely by this event. Although Latham tried to establish that this was the sole reason for his dismissal, we have already considered the fact that there were many other complaints about his attitude and the manner in which he interacted with his colleagues, the Bloomberg incident and the Chakra incident, that amounted to reasonable grounds for CSFB to decide that Latham should not be retained.

In closing, there was one more incident, namely, Latham`s complaints to Harvey and some other senior officers at CSFB that Chan was mis-marking CSFB`s books in order avoid paying taxes, that Latham claimed annoyed Chan and Harvey so much so that he was dismissed for it. In the first place, the judicial commissioner found that Latham`s accusations were unfounded. Latham himself recognised this but asserted that there was no malice in his actions. This was accepted by the judicial commissioner. Again, it would be wrong to accept Latham`s suggestion that his dismissal was motivated by Chan`s and Harvey`s anger and bad faith in relation to this matter. Clearly, his relationship with his colleagues and Harvey was not going well and, by 19 September 1997, had deteriorated to such an extent that the Chakra incident was the final straw. On an overall assessment of the events throughout the five to six months of Latham`s employment with CSFB, rather than regarding the incidents in isolation, it was apparent that Latham was not able to fit into the organisation. Thus, CSFB was entitled to decide that Latham should no longer remain in their

employ even though they might well have breached the contractual provision requiring them to give one month`s notice to him. CSFB did not act in bad faith in dismissing Latham.

Latham`s entitlement to a discretionary bonus

Latham submitted that he should have been awarded the annual bonus that he would have received from CSFB had his employment not been terminated. This claim was based on Latham`s loss of the chance to earn the bonus that he would otherwise have had as a result of his wrongful termination. He said that he was entitled to this as the loss of the prospect of earning the bonus in the event of a breach of the employment contract was clearly and squarely within the contemplation of the parties at the time the employment contract was entered into.

To bolster his claim, Latham relied on obiter dicta in **Lavarack v Woods of Colchester Ltd** [1967] 1 QB 278 and the decisions in **Commonwealth of Australia v Amann Aviation Pty Ltd** [1991] 174 CLR 64 and **Martin Steven David v Tasmanian Developments and Resources** [1999] FCA 593 to show that a plaintiff who is entitled to damages for breach of contract can claim damages for a loss of a chance that was within the contemplation of both parties at the time of contracting. Furthermore, Latham said that the cases of **Abrahams v Reiach** [1922] 1 KB 477, **Lion Nathan v CC Bottlers** [1996] 1 WLR 1438 and **Lee Paula v Robert Zehil & Co** [1983] 2 All ER 390 are authority for the proposition that while CSFB have a discretion to perform the contract in the way most beneficial to themselves, they cannot do so in an unreasonable manner.

The general principle is that damages for breach of contract are awarded as a compensation to the plaintiff for the damage, loss or injury he has suffered through that breach. He is to be placed in the same position as if the contract had been performed. It must thus be made clear from the outset that the contract of employment between CSFB and Latham provided for a bonus to be given to Latham entirely at the discretion of CSFB. The relevant clause stated that ` ***a bonus may be paid to you at the end of each calendar year, based on Company profitability and your performance during the year*** `. [Emphasis added.] The crux of the issue for this court to decide was whether Latham would have received a bonus from CSFB if the breach, ie his wrongful dismissal, had not occurred. Now, Latham`s claim was allowed on a technical ground, that is, he was not given the requisite one month`s notice before he was dismissed. If CSFB had adhered to the contract and had terminated Latham`s employment in accordance with the contractual period of notice, were they nonetheless liable to pay Latham a bonus?

We did not think so. A proper construction of the contract indicated that the decision to grant a bonus was entirely at the discretion of CSFB. Even if Latham had continued to be employed at CSFB, he would not have a legal right to claim a bonus from them, much less if his employment was terminated in accordance with the terms of the contract.

In ***Lavarack v Woods of Colchester*** , the plaintiff was employed by the defendants under a fixed term contract which stated, inter alia, that he was entitled to `such bonus (if any) as the directors ... shall from time to time determine.` The plaintiff was dismissed from his position but subsequently obtained judgment for wrongful dismissal. Sometime after the plaintiff`s dismissal, but before he obtained judgment, the defendants ended their bonus scheme for reasons which were not connected with the plaintiff`s action against them. In place of this, the defendants negotiated new arrangements with their employees which resulted in most of them receiving an increased salary. During assessment of the appropriate sum of damages to be awarded, the plaintiff made a claim for his bonus or alternatively, the accelerated salary he would have received under the revised contracts.

It was held by a majority of the English Court of Appeal that damages for wrongful dismissal did not entitle the employee to extra benefits which the contract did not oblige the employer to confer, even if the employee might have reasonably expected to receive these benefits in due course. Diplock LJ (as he then was) said the following at p 294 of the judgment:

> *The general rule as stated by Scrutton LJ in **Abrahams v Reiach (Herbert) Ltd**, that in an action for breach of contract a defendant is not liable for not doing that which he is not bound to do, has been generally accepted as correct, and in my experience at the Bar and on the Bench has been repeatedly applied in subsequent cases. The law is concerned with legal obligations only and the law of contract only with legal obligations created by mutual agreement between contractors - not with the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do. And so if the contract is broken or wrongly repudiated, the first task of the assessor of damages is to estimate as best he can what the plaintiff would have gained in money or money`s worth if the defendant had fulfilled his legal obligations and had done no more.*

Diplock LJ went on to conclude at p 297 thus:

> *In the present case, if the defendants had continued their bonus scheme, it may well be that upon the true construction of this contract of employment the plaintiff would have been entitled to be recompensed for the loss of the bonus to which he would have been likely to be legally entitled under his service agreement until its expiry. But it is unnecessary to decide this. They were under no contractual obligation to him to continue the scheme and in fact it was discontinued. His legal entitlement under the contract on which he sues would thus have been limited after March 31, 1965, to his salary of Â£4,000 per annum. ... I know of no principle upon which he can claim as damages for breach of one service agreement compensation for remuneration which might have become due under some imaginary further agreement which the defendants did not make with him but might have done if they wished. If this were right, in every action for damages for wrongful dismissal, the plaintiff would be entitled to recover not only the remuneration he would have received during the currency of his service agreement but also some additional sum for loss of the chance of its being renewed upon its expiry.*

The editor of ***Cheshire, Fifoot and Furmston*** , Second Singapore and Malaysian edition, in interpreting the majority judgments in ***Lavarack v Woods of Colchester*** added:

> *The evaluation of damage, however, must be based solely upon the legal obligations of the defendant. `A defendant is not liable in damages for not doing that which he is not bound to do.` An employee, for instance, who has been wrongfully dismissed, is admittedly entitled to recover what he would have received had his employment run its full course; but if his contractual salary is increasable by any bonus that the employer at his discretion might from time to time award, the assessment of damages must ignore undeclared bonuses, even though it is highly probable that they would have been declared had the employment been continued.*

Latham however sought to rely on Diplock LJ`s statement that the plaintiff might have been entitled

to the bonus on the true construction of the contract if the bonus scheme had not been ended. We however noted that Diplock LJ specifically said that there was no need to decide this issue. Latham also used statements in Lord Denning MR`s dissent as further support. At pp 287-288 of the judgment, the Master of the Rolls said:

> *The plaintiff has no legal right to receive a bonus every year. It was entirely in the discretion of the directors. Hence it was suggested to us that he was not entitled to receive compensation for loss of future bonuses. I cannot accept this contention. When a servant is wrongfully dismissed from his employment, he is entitled to compensation for the full amount of all the emoluments and allowances which he would have earned but for the breach of contract: see* ***Addis v Gramophone Co Ltd****; and this includes not only salary and commission to which he is entitled by law, but also bonuses which he might reasonably expect to receive from his employer. For the simple reason that by the wrongful dismissal the employer has deprived him of the chance of receiving such bonuses; and he is entitled to compensation for the loss of the chance, even though he had no legal right to receive them: ... The loss of a chance is a regular head of compensation.*

We also had to deal with the complex Australian case of ***Commonwealth of Australia v Amann Aviation Pty Ltd*** in which seven Australian High Court judges sat. Basically what happened in this case was that the respondents won a tender to provide coastal surveillance flights over the northern coast of Australia. The contract was for three years. In order to perform the contract, the respondents had to purchase a number of aeroplanes. It turned out subsequently that the respondents were not able to begin performance on the contractual date and the appellants issued a notice purporting to terminate the contract. The respondents treated the termination as a repudiation and terminated the contract. This termination was found to be wrongful as it was not in accordance with the contractual machinery for doing so.

In deciding that the respondents were entitled to recover expenses they had incurred in preparing for performance of the contract, a not inconsiderable sum of about Aus$5.5m, the majority of the High Court held that the respondents were entitled to damages referable to their wasted expenditure. Three of the judges, Mason CJ, Dawson and Deane JJ took into account the reasonable likelihood that the contract would be renewed and Brennan J added that an evaluation of the respondents` damages had to include commercial benefits and advantages not expressly stipulated, in this case the likely potential of having the contract renewed. This was because the respondents would not have made a profit within the first three year contractual period. However, the appellants were not contractually bound to renew it and the court had to get around the general principle that a defendant is not liable in damages for not doing that which he or she has not promised to do, by saying that the rule in **Hadley v Baxendale** [1854] 9 Ex 341 took precedence to this general principle. This statement was made by Mason CJ, Dawson and Brennan JJ. In other words, if the prospect of securing a renewal of the contract was within the contemplation of the parties as a probable result of the breach of the contract, it could be taken into account in assessing damages. Yet, it is notable that both Mason CJ and Dawson J accepted the principle that damages would not be awarded for not doing that which there was no legal obligation to do.

There were many difficulties with this case, not least of which was the fact that the respondents would not have made a profit during the course of the first three-year contract. Furthermore, it was interesting to note that the damages awarded were for reliance loss to compensate the respondents for the wasted expenditure they had incurred in preparing for the contract. On this issue alone, this case was not applicable directly to the facts of the present case. In any event, the ***Hadley v***

Baxendale principle that limits the damages that may be claimed to that which was within the parties` reasonable contemplation at the time of contracting should not be used to extend the potential amount of damages to circumstances in which the party at fault had no legal obligations, as was done by the court in that case. As suggested by GH Treitel in a written note on this case in (1992) 108 LQR 226, the only way to reconcile the decision to take into account the prospect of renewal of the contract with the principle that no damages should be awarded for not doing that which there was no legal obligation to do is to see this case as one involving a claim for reliance loss which has been proved. In cases involving expectation benefit, it is likely that ***Commonwealth of Australia v Amann Aviation Pty Ltd*** would not be applied. The facts before us were of the latter category and as such we did not think that ***Commonwealth of Australia v Amann Aviation*** was applicable.

For the same reason, ***Martin Steven David v Tasmanian Developments and Resources*** , which followed the reasoning in ***Commonwealth of Australia v Amann Aviation*** that the rule that no damages in contract are recoverable for loss of a benefit not the subject of legal obligation is subject to the more basic ***Hadley v Baxendale*** principle, should also not be applied to this case as it extended the ratio in ***Commonwealth of Australia v Amann Aviation*** to a situation involving expectation loss without reasons for doing so. We also did not think that Lord Denning`s dissent in ***Lavarack v Woods of Colchester*** should be applied.

We then moved on to the submissions on ***Abrahams v Reiach*** , ***Lion Nathan v CC Bottlers*** and ***Lee Paula v Zehil & Co*** . These cases concerned the principle that, while damages will be awarded on the basis that the erring party is entitled to perform the barest minimum obligations of his contract, his methods of performing these legal obligations must be those that are reasonable in the circumstances. Latham said that not only was it more than likely in his case that CSFB would have paid him a bonus at the end of 1997, but that he would have been paid, save for the unfair termination of his services. CSFB had taken unfair advantage of the termination clause to wrongfully deprive him of the chance of earning a discretionary bonus.

In ***Abrahams v Reiach*** , the defendants were publishers who undertook to publish in book form the plaintiff`s magazine articles, paying a royalty on each copy sold. The defendants reneged on this obligation. When the issue of how much damages were to be awarded was addressed, the defendants said that since the number of copies published was to be left at their discretion and they were entitled to perform the contract in the way least detrimental to themselves, damages should be calculated on the basis that they need only have published one copy of the book in order to satisfy the contract. This was not accepted by the court which held that the quantum of damages payable was to be assessed on the basis that the defendants were bound to publish such a number as was reasonable in all the circumstances.

This was likewise the case in ***Lee Paula v Robert Zehil & Co*** . The plaintiffs were dress manufacturers who appointed the defendants to be their sole distributors for a range of garments. Under the terms of the agreement the defendants undertook to purchase not less than 16,000 garments each season, but were given complete discretion on marketing and selling policy. The contract was prematurely terminated by the defendants. On the issue of the quantum of damages, the court held that where damages were required to be calculated for breach of contract in a situation where the defendant could fulfil his part of the contract by alternative methods and had a freedom of choice of which method to use, damages were to be assessed by reference to that method which was least unfavourable to the defendant. However, the contract was to be read subject to an implied term in the contract that the defendant`s freedom of choice was limited to those methods of performance which could be regarded as reasonable in all the circumstances. As such, the defendants could not purport to order the minimum number of the cheapest garments from

the plaintiffs in order to satisfy their obligations. A reasonable method of performance would be to order a minimum number of garments across different price ranges.

Finally, in ***Lion Nathan v CC Bottlers*** , the appellants agreed to sell the entire issued share capital of a soft drinks company to the respondents. It was subsequently found that the appellants were in breach of a warranty to make a proper forecast of the company`s profits. The Judicial Committee of the Privy Council held that damages were to be calculated based on the share value that a bona fide forecast would have produced, not on the highest figure in the range of reasonable forecasts. The court in this case felt that the principle that a court should assume that the vendor would have performed the contract in the way least onerous to himself only made sense when damages depended upon a prediction of how the defendant would have performed outstanding contractual obligations which gave him a choice of what to do. This was not such a case and the vendor was not entitled to choose from a range of figures which would have counted as reasonable forecasts and put forward the highest figure in the range in order to obtain the highest possible price. There was thus no basis for calculating the damages on the assumption that the vendor was contractually entitled to choose the highest figure.

In our judgment, it was clear that ***Lion Nathan v CC Bottlers*** was not applicable to the facts of the present case as this case did not involve the assessment of damages on the assumption that the erring party would choose the least onerous method of performing the contract. As for ***Abrahams v Reiach*** and ***Lee Paula v Robert Zehil & Co*** , Latham attempted to use these two authorities to bolster his claim that, while CSFB could perform the barest minimum obligations prescribed by the contract, a reasonable method of performing it would have been to award Latham his bonus. However, the difference between the present scenario and the facts in ***Abrahams v Reiach*** and ***Lee Paula v Robert Zehil & Co Ltd*** was that, in those cases, the parties in breach of contract were contractually obliged to publish the books and order the garments respectively. What was required of them was that they had to use reasonable methods when performing these obligations in the least onerous way possible. CSFB, however, were not contractually obliged to pay Latham a bonus. CSFB were not even contractually obliged to retain Latham in their employ until the bonus was paid out. It was argued in the court below that Latham`s basis for saying that he had been wrongfully terminated was that he was not given the requisite one month`s notice stipulated by the contract. The question that must be asked was whether CSFB would have awarded Latham his bonus if they had performed their legal obligations reasonably. All that CSFB were obliged to do in this case was to give him one month`s notice in the event that they decided to terminate his services. Under such circumstances, if this had been done and Latham`s employment was allowed to run the course of the extra one month up till sometime in mid-October 1997, it would be going too far to say that a reasonable method of performing the contract of employment by CSFB would involve them having to pay Latham a bonus for 1997 when there was a clear intention on the part of CSFB to terminate Latham`s employment.

In our view, it would be wrong to allow an employee in Latham`s position to lay claim to a discretionary bonus on a proper construction of his employment contract when his services were terminated even before his bonus was properly declared. In both ***Walz v Barings Services Ltd*** , a preliminary hearing before the English Industrial Tribunal, and **Bajor v Citibank International plc** (Unreported) , the plaintiffs were employed in an industry in which the employees operated within a `bonus culture` in which bonuses were very commonly and even invariably paid. However, both plaintiffs were held not to be entitled to claim the bonus as a matter of contractual obligation after being dismissed, even if they were wrongfully dismissed as in the case of ***Bajor v Citibank International plc*** . In ***Walz v Barings Services Ltd*** , this was so even though the bonus had already been announced by the respondents. It was held there that, as the bonus was totally discretionary, there was simply no obligation to pay. Announcing it did not convert the payment of the bonus into a

contractual obligation.

Latham`s situation was akin to the plaintiffs in these two cases. Unless the bonus had been expressed to be guaranteed, an employee in Latham`s position could not claim to be legally entitled to a bonus, the granting and quantum of which are entirely at the discretion of the employer. While he might have hoped for a bonus if he had indeed remained in the employ of CSFB, the fact remained that, even then, he would not have been able to claim to be entitled to a bonus as of right as it was entirely at the discretion of CSFB. According to **Alexander Proudfoot Productivity Services Co S`pore Pte Ltd v Sim Hua Ngee Alvin** [1993] 1 SLR 494 , where an action for wrongful dismissal is successful on the grounds that the notices of termination were defective, the correct measure of damages is the amount the employee would have earned under the contract for the period until which the employer could lawfully terminate. In this case, seeing as Latham should have been given one month`s notice before his termination, the judicial commissioner was correct to hold that Latham was only entitled to an additional one month`s remuneration. As CSFB had paid this sum out to him prior to the trial, we were of the view that no further award of damages should be made against CSFB.

Whether the court should have made a declaration that Latham`s dismissal was wrongful

Finally, Latham requested the court to make a declaration that his dismissal was wrongful in addition to any damages that he was entitled to. This was so that he could commence proceedings in the United States to amend the U-5 form such that it would no longer say that he had not been performing up to expectations.

The power of the court to grant a declaration is found in s 18 of the Supreme Court of Judicature Act (Cap 322) read with para 14 of the First Schedule of the Act and O 15 r 16 of the Rules of Court. This power is discretionary and where the court feels that a declaration will serve no useful purpose, no declaration will be granted.

The judicial commissioner exercised his discretion not to grant a declaration in the terms requested by Latham as Latham had not sought any relief that CSFB be compelled to amend the U-5 form. In any event, the judicial commissioner did not feel that that what was stated in the U-5 form was wrong. The termination was wrongful only because the requisite notice period of one month had not been adhered to. The judicial commissioner opined that if Latham wished to pursue remedies against CSFB in the United States, the clear finding of fact stated in the grounds of decision pertaining to the reasons for holding that he had been wrongfully dismissed would suffice. On this basis, there was no good reason or any useful practical purpose upon which the judicial commissioner felt he should exercise his discretion.

In **Vine v National Dock Labour Board** [1956] 1 QB 658, the plaintiff brought a claim for wrongful dismissal against the defendants. He sought damages as well as a declaration that his dismissal was illegal, ultra vires and invalid. The majority of the Court of Appeal held that the award of damages was sufficient to remedy the wrong done to him and that no declaration should have been granted by the lower court. Singleton LJ felt that, whenever a declaration is asked for, consideration must be given to whether this is a remedy necessary to establish the plaintiff`s rights. The learned judge said at p 673 that:

> *There is no reason, so far as I see it, why damages should not be sufficient remedy for the plaintiff in a case such as this. He has been awarded damages; he desires to keep the declaration. For what purpose? So that he can go back and say to the employers, the National Board, `I am on the pool; now please employ me`? And if they say: `You have been a great deal of trouble, we would*

> *rather not,` he may begin an action claiming damages again. ... If there is to be a declaration in this case, followed perhaps by declarations in other cases, so that a man who has been dismissed can go back and say: `Not only have I got damages but I have a declaration. Now employ me again,` and if another action is to come about because they do not employ him, it would be burdensome ... The wrong done to the plaintiff can be adequately met by payment of damages to him.*

Applying the facts of the above case by analogy, we were satisfied, like the judicial commissioner, that the one month`s remuneration in lieu of notice that was paid to Latham was sufficient compensation for being wrongfully dismissed because he had not been given the requisite notice. We noted that counsel was not able to really challenge the judicial commissioner`s reasons for exercising his discretion in such a manner and we thus declined to overturn his exercise of discretion not to grant Latham a declaration.

Conclusion

For the reasons above, we dismissed the appeal with costs.

Outcome:

Appeal dismissed.