In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 212

BETWEEN:

JEFFREY LINCOHN MACLEOD

Plaintiff

- and -

BERMUDA MEDICAL SPECIALITIES GROUP LTD.

Defendant

JUDGMENT

Contract of employment, Renunciation, Repudiation,

Conduct of the defendant, Delay in start of the contract

Date of Hearing: **9, 14 March 2023**
Date of Judgment: **15 June 2023**

Appearances: **Paul Harshaw, Canterbury Law Limited, for Plaintiff**

Sam Stevens and Marcus Symonds, Carey Olsen Bermuda Limited, for Defendant

JUDGMENT of Mussenden J

Introduction

1. The Plaintiff Dr. MacLeod is a physician who was recruited from outside Bermuda for employment in Bermuda with the Defendant.

2. The Defendant Bermuda Medical Specialties Group Ltd. ("**BMSG**") is a Bermuda incorporated company. It was incorporated on 22 February 2017. Mr. Marico Thomas is the Chief Executive Officer of BMSG. Dr. Arlene Basden is the Medical Director of BMSG.

Background and Pleadings

The Writ and Statement of Claim

3. Dr. MacLeod caused a Generally Indorsed Writ of Summons to be issued on 12 July 2021 and a Statement of Claim was filed on the same date.

4. The basis of Dr. MacLeod's claim is that in or about January 2019 Dr. MacLeod entered into negotiations with Mr. Thomas to take up employment as Chief Operating Officer ("**COO**") and Physician with BMSG (the "**Negotiations**"). The Negotiations resulted in a contract dated 3 May 2019 (the "**Agreement**"), the material terms being: (i) Dr. MacLeod as an employee would be employed as COO and Physician; (ii) the Agreement was for a fixed term of three years; (iii) the annual gross salary would increase each year, commencing at $250,0000 per annum and finishing at $300,000 per annum; and (iv) the normal place of employment was to be BMSG's clinic and/or satellite facilities or other location as assigned.

5. The Agreement contained four express conditions precedent (the "**Four ECPs**") that Dr. MacLeod: (i) maintain an unrestricted license to practice medicine in Bermuda; (ii) be and remain insurable for malpractice liability in accordance with the requirements of BMSG and its insurer; (iii) maintain certification by such "credentialing agencies" as reasonably

required; and (iv) hold a valid work permit issued by the Bermuda Department of Immigration (the "**DOI**").

6. Dr. MacLeod claimed that he satisfied each of the Four ECPs on or before 15 August 2019 and it was agreed between the parties that Dr. MacLeod's employment would commence on 23 September 2019.

7. Dr. MacLeod ended his employment in Europe on 31 August 2019, shipped some belongings to Bermuda, disposed of other belongings and then he and his wife went on vacation to Mexico commencing on 4 September 2019. He made BMSG aware of these matters. It was admitted that by 4 September 2019 he was registered with the Bermuda Medical Council and had been issued a work permit allowing him to commence employment with BMSG.

8. It was admitted that thereafter Mr. Thomas informed Dr. MacLeod via several Skype calls of difficulties being experienced by BMSG, largely as a result of issues caused by the Bermuda Government. Mr. Thomas on 6 September 2019 first wanted to defer the commencement of employment for an unspecified period of time, likely three to six months which Dr. MacLeod explained he could not do but could consider a slow start for a few weeks. Then on 9 September 2019 Mr. Thomas informed him that as the Urgent Care Centre (the "**UCC**") opening had been delayed as a result of Bermuda Government issues, he did not have the financial resources to pay him. Thus, Mr. Thomas informed him that he should not come to Bermuda.

9. There was further communication between the parties. In any event on 26 September 2019 Dr. MacLeod and his wife entered Bermuda as tourists and arranged to stay in holiday accommodation. Hurricane Humberto had delayed the original arrival date of 19 September 2019.

10. Dr. MacLeod claimed that: (i) had the Agreement been complied with he would have earned the sum of $820,000; (ii) in mitigating his loss, he took up employment with North Shore Medical and Aesthetics Centre ("**NSM**") on 11 November 2019 where he earned $266,929.17 for the period 11 November 2019 to 31 January 2021, an average of

$16,683.06 per month; (iii) Extending that average monthly earnings would produce income of $600,590.25, $199,409.75 less than he would have earned had the Agreement been complied with; and (iv) he had not been reimbursed with the sum of $2,500.00 in respect of his first month's accommodation as provided for in the Agreement.

Relief Sought

11. Thus Dr. MacLeod sought:
    a. Loss of income in the amount of $199,904.75; and
    b. Expenses incurred in the sum of $2,500.00.

The Defence

12. BMSG filed a Defence dated 10 September 2021. It generally denied the claims including as follows:
    a. The Agreement was to come into effect on the "**Effective Date**" as defined as the date on which Dr. MacLeod was issued with a work permit and when he physically commenced work.
    b. The Agreement provided that BMSG could terminate Dr. MacLeod's employment on six months' notice and the employment was subject to a six month probationary period beginning on the Effective Date during which time either party would be entitled to terminate the Agreement for any reason without notice (the "**Probationary Period**").
    c. BMSG's clinic was their UCC which was still under construction when the Agreement was entered into.
    d. The Agreement contained an express condition that Dr. MacLeod physically commence work, which he did not do.
    e. The Agreement Clause 7 (set out below) provided for Dr. MacLeod (i) to undergo and pass a drugs test in compliance with BMSG's Drug and Alcohol policy (the "**Drugs Test**"), which he did not fulfill; and (ii) obtain a certificate certifying his fitness for employment (the "**Fitness Test**") (together the "**Two Further ECPs**").
    f. The UCC was a new venture with no income stream, and no physical space from which to deliver urgent care and GP related services to patients.

g. Mr. Thomas explained to Dr. MacLeod in an email of 12 September 2019 that he should not enter Bermuda with the expectation of being able to work for BMSG, and that the issues with the UCC remained unresolved and it could take three to six months to do so. Thus, Mr. Thomas repeated his request that Dr. MacLeod postpone the intended commencement of his employment and indicated that attempts were being made to amend the terms of his Bermuda work permit to account for the anticipated delay in the intended commencement of his employment.

h. Mr. Thomas denied that he ever suggested to Dr. MacLeod that he wished to terminate the Agreement. He further denied that his statement not to enter Bermuda with an expectation to work for BMSG amounted to a renunciation or anticipatory breach and that Dr. MacLeod accepted any such renunciation or anticipatory breach. BMSG still wanted to employ Dr. MacLeod on the terms of the Agreement which is why it never took any steps with the DOI to cancel the work permit.

i. The Agreement never came into effect because all the conditions precedent were not fulfilled, in particular Dr. MacLeod did not satisfy the Two Further ECPs, namely physically commence work and he did not undergo and pass the Drugs Test.

j. If the Agreement did come into effect and Mr. Thomas' words or conducted amounted to a renunciation or anticipatory breach then Dr. MacLeod has not suffered any recoverable loss because BMSG had the contractual right to terminate him on the first day of his employment for any reason without notice under the terms of his probation.

The Reply

13. Dr. MacLeod replied to the Defence as follows:

a. There was a term implied in the Agreement that BMSG would do nothing that would have the effect of preventing the Plaintiff from complying with any and all conditions precedent.

b. Denied that BMSG's clinic is the UCC located at 5 Reid Street, Hamilton; and

c. Denied that Dr. MacLeod had been specifically hired by BMSG to work in the UCC.

The Trial - Evidence

14. The trial took place with evidence given by witnesses for the Plaintiff and Defendant.

15. For the Plaintiff's case, Dr. MacLeod gave evidence. I found Dr. MacLeod to be a credible witness who gave his evidence in a professional and straightforward manner.

16. For the Defendant's case, Mr. Marico Thomas and Dr. Basden gave evidence and I also found them to be credible witnesses.

Evidence not in dispute

17. There was evidence that generally was not in dispute in line with parts set out in the Statement of Claim on the Negotiations, the Agreement, the Four ECPs and that they were satisfied on or before the 15 August 2019, the holiday trip to Mexico before coming to Bermuda, registration with the Bermuda Medical Council and the issuance of a work permit by the DOI.

18. Relevant terms of the Agreement are as set out below.

> ***"2. Period and Place of Employment***
> *2.1 Employment under the terms of this Agreement shall begin upon the issuance of a work permit for the Employee by the Department of Immigration of the Government of Bermuda and upon the Employee physically commencing work ("the Effective date"). The Employment Agreement shall be in effect for period of three (3) years ("Term") from the Effective date. The Employee's employment may be terminated by the Employee giving the Company six months written notice, and by the Company giving the employee six months written notice, and shall in any event expire 3 years from the effective date of the Term.*
> *2.2 The Employee's employment is subject to a six (6) month Probationary Period beginning on the Effective date. During the probationary period, either party may terminate this contract of employment for any reason and without notice. Thereafter, the Medical Director will evaluate the Employee's performance on an annual basis.*
> *2.3 The normal place of employment shall be BMSG clinic and any satellite facilities or other location as assigned.*
> *2.4 As conditions precedent to employment or continued employment, the Employee shall:*

(i) maintain an unrestricted license to practice medicine in Bermuda;
(ii) be and remain insurable for malpractice liability in accordance with the requirements of BMSG and Insurers;
(iii) maintain certification by such credentialing agencies as shall be reasonably required by BMSG save that BMSG shall have the option to require the Employee to perform work on its behalf that he or she is lawfully able to perform;
(iv) hold a valid work permit issued by the Bermuda Department of Immigration.

5.5 Arrival Accommodation
BMSG will make arrangements for the initial accommodations of the Employee and dependents for up to 30 days after relocating to Bermuda for employment. BMSG agrees to pay up to $2,500 for accommodations on the behalf of the Employee. The Employee is expected to secure long-term accommodations and provisions during the 30 day period. In the event that the Employee does not secure long-term accommodations within 30 days, further accommodation fees will solely be the responsibility of the Employee.

7. Health Tests as Preconditions to Employment
This offer of employment by BMSG and the Employee's continued employment by BMSG is subject to:
(a) The Employee undergoing and passing drug tests in compliance with BMSG's pre-employment Drug Policy and the Drug and Alcohol Policy; and compliance with random drug testing during employment.
(b) The Employee undergoing the necessary tests and obtaining a Certificate certifying the Employee's fitness for employment. As part of BMSG's wellness program all Employees are required to undergo annual physical exams with the Physician of his/her choice and must present evidence of such.

10. Termination
10.1 This agreement shall be terminated on the happening of any one of the following events:
[…]
(xi) On Notice: BMSG may, at any time after the commencement of the employment, give six (6) months notice of termination or payment in lieu of notice at its discretion."

19. There was a series of emails and correspondence between the parties as follows:

a. The conversation between Dr. MacLeod and Mr. Thomas on 6 September 2019. Mr. Thomas explained the difficulties he was facing and requested a delayed/deferred start date. Dr. MacLeod explained that he could not defer the start.

b. Dr. MacLeod's email to Mr. Thomas dated 7 September 2019. Dr. MacLeod explained a delayed start was problematic; he could do a slow start; accommodation is the main issue; he could use the time to investigate other opportunities for

BMSG; he was still looking forward to what they could do together and how he could contribute to BMSG's success.

c. The conversation between Dr. MacLeod and Mr. Thomas on 9 September 2019. Mr. Thomas explained the difficulties that he was facing and advised Dr. MacLeod that he should not enter Bermuda expecting to work for BMSG, hoping that at some stage in the future they could proceed.

d. Dr. MacLeod's email to Mr. Thomas dated 10 September 2019. Dr. MacLeod explained the circumstances of moving to Bermuda and requested clarification if the Agreement was being terminated or the start date being delayed or whether there were other options and raised the issue of compensation.

e. Dr. MacLeod's email to Mr. Thomas dated 11 September 2019. Dr. MacLeod explained that as he had not heard back from Mr. Thomas, he assumed that they were progressing with the Agreement until he heard otherwise with any changes in writing. It was too late for him to change his plans.

f. Mr. Thomas' email to Dr. MacLeod dated 13 September 2019. Mr. Thomas explained the difficulties with the Bermuda Government and the deferred opening of the UCC which would take three to six months to resolve, hoping it would be closer to three months. He asked Dr. MacLeod to defer, and said steps were being taken to amend the work permit and that Dr. MacLeod should not enter Bermuda with the expectation of being able to work at BMSG.

g. Dr. MacLeod's email to Mr. Thomas dated 13 September 2019. Dr. MacLeod explained in a lengthy email that: (i) he understood the point about entering Bermuda; (ii) the implication of working for BMSG in the future amused him; (iii) he was screwed over, had nowhere to go and had no income; (iv) they had a signed contract under Bermuda law, he would seek advice on it; (v) his trust in Mr. Thomas was completely destroyed, future employment with MBSG would require some major bridge-building and any financial difficulties with BMSG should have been shared with him beforehand; (vi) it might partially restore his faith in Mr. Thomas if he wanted to meet, to apologise in person, and explain the circumstances behind the decision to lead him on and then terminate him at the worst moment; and (vii)

he was still arriving on 19 September to stay in holiday accommodation for three weeks to take stock and plan his next moves, his contact details remained the same.

h. Mr. Thomas' email to Dr. MacLeod dated 14 September 2019. Mr. Thomas explained that he understood Dr. MacLeod's frustration in what was an unfortunate situation, his best advice remained that he should not land but he looked forward to meeting him if he did and requested his accommodation address so that they could meet and discuss the matters further.

Evidence in dispute

20. There was a main area of evidence that was in dispute as set out below.

21. Where was the intended place of employment – There was much argument about whether Dr. MacLeod was employed to work for BMSG or specifically to work in the UCC. It is clear that Clause 2.3 of the Agreement states that the normal place of employment '*shall be BMSG clinic and any satellite facilities or other location as assigned*'. There is no specific mention in the Agreement of the UCC or that Dr. MacLeod was specifically employed to work there.

22. I have considered the evidence of the witnesses. Dr. MacLeod states in his evidence in chief [at para 11] that over a course of three interviews with Mr. Thomas and Dr. Basden they discussed their vision, bringing new specialist services to Bermuda, and setting up a GP practice. In turn Dr. MacLeod explained what he could offer and give advice on their business model. Notably, on cross-examination Dr. MacLeod agreed that in his email to Mr. Thomas and Dr. Basden dated 19 April 2019 he stated "*Also, if you need any help or advice, I am very experienced in Urgent Care here (it is an important part of our contract) and could discuss your plans for June*." Likewise, he agreed that in his email to them dated 4 May 2019 he stated "*Hope all is well and that the Urgent care plans are progressing.*"

23. Mr. Thomas in his evidence maintains that Dr. MacLeod's recruitment was conditional upon the opening of the UCC although he concedes that there is no mention of the UCC in the Agreement. In my view, clearly there were discussions between the parties about the

UCC before the Agreement was executed. However, despite the discussions I am bound by the terms of the Agreement. Thus, I find that Dr. MacLeod was employed to work for BMSG as set out in the Agreement and not specifically for the UCC.

The Issues

24. There are several main issues in this case, namely:
    a. Whether a contract was formed;
    b. Whether, if a contract was formed, there was a breach; and
    c. Whether there was any loss suffered by Dr. MacLeod.

25. I will deal with those issues in turn noting that my assessment was not focused on credibility of the witnesses as much as it was focused on the sufficiency and reliability of the documentary evidence.

Issue 1 – Whether a contract was formed

The Law

26. *Halbury's Laws of England*, vol 22 at para 322 provides the following summary of conditions precedent:

> *"A contractual promise by one party (A) may be either unconditional or conditional. A conditional promise is one where the liability to perform the promise depends upon some thing or event; that is to say, it is one of the terms of the contract that the liability of the party shall only arise, or shall cease, on the happening of some future event, which may or may not happen, or on one of the parties doing or abstaining from doing some act. A promise is not conditional merely because the time for performance is postponed, or because it is only to be performed on the happening of a certain future event (as, for instance, on the death of one of the parties); to constitute a condition there must be contingency as well as futurity. The major categories of conditional promises are: (1) conditions precedent to the formation of the contract; and (2) conditions suspensive of performance. In the former category, no contract comes into existence until the contingency occurs; whereas, in the latter there is a contract but the obligations of one or both of the parties are suspended.*
>
> *Where the liability to perform only arises on the happening of the contingency or the performance of the condition, the condition is called a condition precedent [...]*

More commonly, performance of a promise is subject to a condition precedent, in which case neither party may waive the condition unless it is exclusively for his benefit. Such conditions precedent to performance may amount to: (a) a purely contingent condition; or (b) a promissory condition. Where the performance of A's promise is subject to a contingent condition precedent, A is not liable to perform his promise unless that condition occurs, but B does not promise that the condition will occur [...], but he may come under a more limited obligation. Where the performance of A's promise is subject to a promissory condition, B promises that the condition will occur; A is not liable to perform his promise unless B fulfils his promise; and non-fulfilment of the condition will also lead to B's liability in damages. Not every promise by B will amount to a condition precedent to performance by A *The fact that the parties name a particular term a 'condition' or a 'condition precedent' is persuasive, but not conclusive."*

27. In *Total Gas Marketing Limited v Arco British Limited and others* [1998] 2 Lloyd's Re 209, Lord Slynn of the House of Lords [at page 8] said the following with respect to the common factor between promissory and contingent conditions in a contract:

"I agree with Mr. Pollock that [it] is important to keep promissory and contingent conditions separate, but in my opinion there is a common factor. If the provision in the agreement is of fundamental importance then the result either of the failure to perform (if it is promissory) or of the event not happening or the act not being done (if it is a contingent condition or a condition precedent or a condition subsequent) may be that the contract either never comes into being or terminates. That may be so whether the parties expressly say so or not."

28. In the same paragraph, Lord Slynn quoted from the judgment of Maugham J in *Re Sandwell Park Colliery Company* [1929] 1 Ch. 277, 282 where it was stated that "*the very existence of the mutual obligations is dependent on the performance of the condition*."

29. In *Wickman Machine Tool Sales Ltd v L. Schuler A.G.* [1972] 1 WLR 840, the English Court of Appeal was concerned with the meaning and effect of the word "condition" in a contractual provision that read "*It shall be a condition of this agreement that* ...". In the leading judgment, Lord Denning held that the word "*condition*" had acquired more than one meaning in contracts, and that where the meaning in a particular case was ambiguous, it was the task of the court to decide which meaning the parties had intended to apply. He suggested that one meaning of the word "condition" (which he labelled the "proper meaning") was "s*omething demanded or required as a prerequisite to the granting or performance of something else*". Applying the "*proper meaning*" of the word condition to

the facts, Lord Denning stated that the question to be asked was "*Was this requirement … 'a condition of the agreement' in the sense, that it was a prerequisite to the very existence of the agreement? So that if it was not fulfilled there was no agreement at all?"* He ultimately held that the word "*condition*" should be given what he called its "*common meaning*", being "*a provision, a stipulation*" and that the phrase in question was merely a term of the contract.

30. In the dissenting judgment, Stephenson LJ stated:

> *"To my mind the natural and ordinary meaning of making something a condition of an agreement is that it is made something on which the agreement depends. If the condition is not performed the agreement goes. If the condition is one to be fulfilled before the agreement comes into force, it is what lawyers have called a condition precedent (or a contingent or casual condition), that is, a condition of the agreement's coming into force; and if it is not performed there is no agreement. If the condition is to be performed after the agreement has come into force, it is what lawyers have called a condition subsequent, or a condition inherent (or a promissory condition), that is, a condition of the agreement's continuing; and if it is not performed the agreement comes to an end. In a sense all conditions are precedent, some to an agreement beginning, others to it continuing...*
>
> *In other words there is, generally speaking, in the word condition as used in the phrase "condition of this agreement" the notion more clearly brought out in the word "precondition." And this understanding of the word seems to me to be confirmed by the definitions which appear in the Oxford English Dictionary, where the word "prerequisite" recurs."*

Plaintiff's Submissions

31. Mr. Harshaw argued that a contract was formed and the Four ECPs were fulfilled. Further, in respect of the failure to take and pass the Drugs Test, that was a matter that was wholly in the control of BMSG alone. He stressed that Mr. Thomas telling Dr. MacLeod that he should not arrive in Bermuda expecting to work for BMSG rendered compliance with those conditions nugatory.

Defendant's Submissions

32. Mr. Stevens submitted that pursuant to Clause 7 of the Agreement, BMSG's offer to Dr. MacLeod was expressly stated to be subject to the contingent condition that Dr. MacLeod undergo and pass the Drugs Test. However, after arriving in Bermuda, Dr. MacLeod made no contact with BMSG and did not seek to fulfill this contingent condition. Thus, in the absence of a contract Dr. MacLeod did not have a viable cause of action on contract. Further, Mr. Stevens submitted that there was no implied term as asserted by Mr. MacLeod, but even if there was one, BMSG did nothing to prevent Dr. MacLeod from fulfilling the contingent condition.

Analysis

33. In my view, I find that a contract was not formed for several reasons. First, there is no issue that the Four ECPs were fulfilled.

34. Second, I find that the Drugs Test was a condition precedent. It is without dispute that it was not fulfilled. Mr. Harshaw argued that once Mr. Thomas told Dr. MacLeod he should not arrive in Bermuda expecting to work that the Drugs Test was nugatory. However, I disagree with that contention. For reasons more fully explained below, Mr. Thomas was asking to delay the start of Dr. MacLeod's employment. Clause 7 of the Agreement was entitled '*Health tests as preconditions to Employment*' and then stated at Clause 7a "*This offer of employment by BMSG and the employee's continued employment by BMSG is subject to [the Drugs Test]*.' In applying the principles of *Wickman Machine Tool Sales Ltd* I find that the proper meaning of Clause 7 and the Drugs Test was that it was a prerequisite for the very existence of the Agreement. Further, on cross-examination, Dr. MacLeod conceded that he knew the offer of employment was conditional on complying with Clause 7a.

35. Third, in applying the principles set out in *Total Gas Marketing Limited*, I find that the Drugs Test was of fundamental importance to the Agreement. If, prior to commencing

employment, Dr. MacLeod failed to take the Drugs Test or took the Drugs Test but did not pass it, then the Agreement would not come into being. Similarly, once employed, if he failed a Drugs Test then the Agreement would be terminated.

36. Fourth, in my view, it was incumbent upon Dr. MacLeod to take steps to fulfill the requirement of the Drugs Test. Instead of doing that, Dr. MacLeod had decided to embark on finding alternate employment having obtained permission from the DOI to seek employment in Bermuda. Further, Dr. MacLeod lost faith in Mr. Thomas telling him in the email dated 13 September 2019 that "*The implication, however, that I might be available and – more importantly – want to work for you at some point in the future bemuses me*" and "*From my perspective I would say that any trust in you is completely destroyed, so if this surprises you and you are still hoping to employ my skillset at some stage in the future you have some major bridge-building to do.*" Thus, it is compelling that Dr. MacLeod decided on his own not to seek to take the Drugs Test although he was clearly getting on with other tasks that he chose to do in Bermuda. On cross-examination Dr. MacLeod stated that once he landed in Bermuda he had no intention of working for BMSG as there was major loss of faith. In my view, BMSG did nothing to prevent Dr. MacLeod from fulfilling the condition. I disagree with Mr. Harshaw that BMSG were in control of whether Dr. MacLeod took and passed the Drugs Test. In my view, Dr. MacLeod was in sole control of undertaking the Drugs Test himself.

37. In light of the reasons set out above, I am not satisfied that a contract was formed.

Issue 2 – Whether there was a repudiatory Breach

38. In the event that a contract was formed, I have now considered whether there was a repudiatory breach of the contract.

The Law on Renunciation

39. Chitty on Contracts (34th Edition) [27-048 – 27-051] as follows:

"[27-048] *A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect. The renunciation may occur before or at the time fixed for performance. An absolute refusal by one party to perform his side of the contract will entitle the other party to terminate further performance of the contract, as will also a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive. Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The renunciation is then evidenced by conduct. Also the party in default:*

> *"... may intend in fact to fulfil (the contract) but may be determined to do so only in a manner substantially inconsistent with his obligations,"*

or may refuse to perform the contract unless the other party complies with certain conditions not required by its terms. In such a case, there is little difficulty in holding that the contract has been renounced. Nevertheless, not every intimation of an intention not to perform or of an inability to perform some part of a contract will amount to a renunciation. Even a deliberate breach, actual or threatened, will not necessarily entitle the innocent party to terminate further performance of the contract, since it may sometimes be that such a breach can appropriately be sanctioned in damages. If the contract is entire and indivisible, that is to say, if it is expressly or impliedly agreed that the obligation of one party is dependent or conditional upon complete performance by the other, then a refusal to perform or declaration of inability to perform any part of the agreement will normally entitle the party in default to treat himself as discharged from further liability. But in any other case:

> *"It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his side of the contract."*

[27-049] If one party evinces an intention not to perform or declares his inability to perform some but not all of his obligations under the contract, then the right of the other party to treat himself as discharged depends on whether the non-performance of those obligations will amount to a breach of a condition of the contract or deprive him of substantially the whole benefit which it was the intention of the parties that he should obtain from the obligations of the parties under the contract then remaining unperformed words or conduct which do not amount to a renunciation were not justified a discharge."

[27-051] "... The test that is applied by the courts can, however, be set out in straightforward terms: it is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. It is the application of this test to the facts of individual cases

which has proved to be less than straightforward. All of the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker. Thus, in an appropriate case, a court may have regard to the motive of the contract breaker where it reflects something of which the innocent party was, or a reasonable person in his position would have been, aware..."[emphasis added per Moulder J]

The Law on Anticipatory Breach

40. Chitty on Contracts, at [27-070], defines an anticipatory breach of contract as follows:

> *"If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part, this constitutes an "anticipatory breach" of the contract and entitles the other party to take one of two courses. He may "accept" the renunciation, treat it as discharging him from further performance, and sue for damages forthwith, or he may wait till the time for performance arrives and then sue. "*

The Law on the principle that a party to a contract is not permitted to take advantage of his own wrong as against the other party

41. In the case of *Alghussein Establishment v Eton College* [1988] 1 WLR 587 at page 591 Lord Jauncey of Tullichettle set out a number of illustrations of the principle as follows:

> *"In the New Zealand Shipping case in the Court of Appeal [1917] 2 K.B. 717, Viscount Reading C.J. said, at pp. 723–724:*
>
> > *"Unless the language of the contract constrains the Court to hold otherwise, the law of England never permits a party to take advantage of his own default or wrong. In Malins v. Freeman (1838) 4 Bing. N.C. 395, 399 Coltman J. said: 'It is so contrary to justice that a party should avoid his own contract by his own wrong, that unless constrained, we should not adopt a construction favourable to such a purpose.' That appears to me to be the true underlying principle of the cases in which the word 'void' has been construed as if it meant voidable. Unless there are clear words to the contrary, a clause making a contract void must be read subject to the condition that the party who is seeking to set up the invalidity is not himself in default."*

And Scrutton L.J. said, at p. 724:

> *"… I think that clause 12 and all other clauses are to be read subject to an overriding condition or proviso that the party shall not take advantage of his own wrong, and therefore is estopped from alleging invalidity of which his own breach of contract is the cause."*

On appeal to this House, Lord Finlay L.C. said [1919] A.C. 1, 8:

> *"Questions of this sort have often arisen in case of provisions that a lease should be void on non-payment of rent or non-performance of covenants by the lessee. It has always been held that the lessee could not take advantage of his own act or default to avoid the lease, and the expression generally employed has been that such proviso makes the lease voidable by the lessor, or void at the option of the lessor. The decisions on the point are uniform, and are really illustrations of the very old principle laid down by Lord Coke (Co. Litt. 206b) that a man shall not be allowed to take advantage of a condition which he himself brought about."*

The speech of Lord Atkinson contained the following passage, at p. 9:

> *"It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard …. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract.*
>
> *"The application to contracts such as these of the principle that a man shall not be permitted to take advantage of his own wrong thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulation that the contract shall be void on the happening of the named event. To deprive him of that option would be but to effectuate the purpose of the blameable party. When this option is left to the blameless party, it is said that the contract is voidable, but that is only another way of saying that the blameable party cannot himself have the contract made void, cannot force the other party to do so, and cannot deprive the latter of his right to do so. Of course, the parties may expressly or impliedly stipulate that the*

contract shall be voidable at the option of either party to it. I am not dealing with such a case as that."

In the Privy Council case of Quesnel Forks Gold Mining Co. Ltd. v. Ward [1920] A.C. 222 the Board had to consider a provision in a mining lease for forfeiture in the event of the lessee ceasing for two years to carry on mining operations. In giving the advice of the Board Lord Buckmaster said, at p. 227:

"If the covenant does not effect this, then, although the word used is 'void,' the meaning is 'void at the option of the lessor,' or in other words 'voidable.' Their Lordships have no hesitation in saying that that is the true meaning of the covenant. Substantial obligations are imposed upon the lessee under the terms of the lease; and it would not be consistent with the ordinary rules of construction applicable to such a document to hold that these obligations could be completely avoided by the lessee omitting to perform any work. It is of course possible so to frame a lease that this must be the effect, and it would result that the term was then a term which ended on the happening of a condition solely in the power of a lessee. This, however, is not the language used in the lease."

He later referred to the New Zealand Shipping case [1919] A.C. 1 as authority for well known rules of construction. Finally in Cheall v. Association of Professional Executive Clerical and Computer Staff [1983] 2 A.C. 180 Lord Diplock referring to the New Zealand Shipping case said, at pp. 188–189:

"In the course of the speeches, which are not entirely consistent with one another, reference was made by all their Lordships to the well known rule of construction that, except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end, i.e. as terminating any further primary obligations on his part then remaining unperformed. This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration, is often expressed in broad language as: 'A man cannot be permitted to take advantage of his own wrong.'"

Plaintiff's Submissions

42. Mr. Harshaw submitted that, in relation to Mr. Thomas' instruction to Dr. MacLeod that he should not enter Bermuda expecting to work for BMSG, it was a renunciation of the Agreement. He argued that Mr. Thomas evinced an intention not to employ Dr. MacLeod in accordance with the terms of the Agreement or to defer his employment to some unspecified date in the future. Thus, it breached the Agreement in a fundamental way which cannot be construed differently.

43. Mr. Harshaw submitted that there was a longstanding principle of law that a party to a contract is not permitted to take advantage of his own wrong as against the other party. The principle is a presumption which exists and applies in this case. He relied on the case of *Alghussein Establishment v Eton College* as set out above.

Defendant's Submissions

44. Mr. Stevens submitted that BMSG did not renounce or commit an anticipatory breach of the Agreement. He pointed to Dr. MacLeod's reliance solely on one sentence in Mr. Thomas' email to Dr. MacLeod dated 13 September 2019, where Mr. Thomas stated that Dr. MacLeod "*should not enter Bermuda with the expectation of being able to work at BMSG.*" He argued that relying on that sentence alone is to ignore the balance of the email and the surrounding context.

45. The crux of Mr. Stevens argument was that there was no evidence that Mr. Thomas ever indicated to Dr. MacLeod that BMSG no longer wished to employ him under the terms of the Agreement. Mr. Thomas had asked Dr. MacLeod to defer the commencement of his employment to a later date. He stressed that the Agreement did not contain a contractually agreed start date for Dr. MacLeod's employment. He noted that Mr. Thomas and Dr. MacLeod had 'targeted' a start date of 23 September 2019 before planning permission for the UCC was rejected. Thus, BMSG was not tied to that date and in any event, Dr.

MacLeod did not arrive in Bermuda until after 23 September 2019 because of Hurricane Humberto.

46. Mr. Stevens submitted that BMSG's conduct after it requested Dr. MacLeod defer the commencement of his employment was entirely inconsistent with any intention not to perform or be bound by the terms of the Agreement, because: (a) BMSG took no steps to cancel Dr. MacLeod's work permit at any time, having the impression that it still held a valid work permit for Dr. MacLeod when they learned that he obtained alternative employment; and (b) if BMSG really decided it did not want to employ Dr. MacLeod at all, it could have allowed him to start work and then exercised its contractual right under Clause 2.2 of the Agreement to terminate the contract immediately without notice and for any reason during Dr. MacLeod's probationary period.

Analysis

47. In my view, BMSG did not renounce the contract for several reasons. First, I have given significant consideration to the communication as set out above for the period 6 – 14 September 2019. In my view, the evidence shows that Mr. Thomas asked Dr. MacLeod to delay the start of the employment for three to six months but hopefully closer to three months. In my view, Mr. Thomas did not communicate to Dr. MacLeod that the employment was never going to commence. On cross-examination Dr. MacLeod agreed that Mr. Thomas did not say that he was not going to employ him and that the language used by Mr. Thomas in the emails was for Dr. MacLeod to delay or defer his start. Also on cross-examination, Dr. MacLeod agreed that when he asked Mr. Thomas whether it was a delay or a termination, Mr. Thomas replied on 13 September 2019 that it was to defer, not termination. Thus, I find that Mr. Thomas only spoke about a delayed start.

48. Second, Mr. Harshaw argued that a defined period of delay was necessary and that there should have been an agreed date when the delayed employment was actually due to start. I disagree. The Agreement did not set out a start date. In my view, just as the parties had held discussions to arrive at a start date of 23 September 2019, it was not unreasonable to

have further discussions, notwithstanding the reasons, to amend the actual start date. In my view, a delay of three to six months out of a contract for thirty-six months was not unreasonable. Further, there is no evidence to suggest that the contract was ever going to be less than the term of thirty-six months set out in the Agreement. In any event, to Mr. Harshaw's point of the delay being for an undetermined point, Mr. Thomas had made it clear that BMSG was experiencing problems that he hoped would be resolved in six months, but closer to three months. Thus, the new start would be by 23 March 2020 but closer to 23 December 2019. On that basis, there was an indication to Dr. MacLeod of when the employment was due to commence.

49. Third, I have considered the conduct of Mr. Thomas in respect of the Agreement. The evidence shows that BMSG took no steps whatsoever to cancel the work permit for Dr. MacLeod; rather the emails show that Mr. Thomas communicated to Dr. MacLeod that he would take steps to have the work permit amended with a new start date. The evidence of Mr. Thomas was that he and Dr. Basden were keen to hire Dr. MacLeod and they needed him. Further, he was greatly surprised to learn in November 2019 that Dr. MacLeod had taken a job at NSM. Dr. Basden's evidence was that she was surprised as well and objected to the new work permit. I have given thorough consideration to the conduct of the Defendant in respect of the timescale and effort required to recruit Dr. MacLeod. The Negotiations started in January 2019 leading to the Agreement of 3 May 2019 and an anticipated start date of 23 September 2019 - a period of nine months. I have also considered the efforts of Mr. Thomas to resolve the planning issues which the evidence shows were resolved on 16 September 2019 by a decision of a Government Minister albeit there was more work to be completed on the UCC by contractors to get it operational. Thus, in my view, the conduct of Mr. Thomas at all material times is consistent with the continued desire to employ Dr. MacLeod, albeit delayed by a period of time. I accept Mr. Thomas' evidence that he was disappointed to have to start the recruitment process again which could take several months.

50. Fourth, I have considered the above two reasons in light of the extracts from *Chitty on Contracts*. In my view, with reference to paragraph 27-048, I am not satisfied that the

words of Mr. Thomas evinced an intention not to perform the Agreement or expressly declared that he was or would be unable to perform his obligations in some essential respect. I do not consider Mr. Thomas' request to delay the start by six months but closer to three months to meet this test. To that point, a start delay of six months but possibly three months is not a failure in an essential respect to a contract of thirty-six months which would only start at the first day of actual employment. I rely on the principle set out in the extract from *Chitty on Contracts* in paragraph 27-048, in that the Agreement was not one that was entire and indivisible, in other words, the start date could be delayed and the contract still fully performed. I also rely on *Chitty on Contracts* at paragraph 27-048 to assess the test and reach my conclusion that the actions of Mr. Thomas are not such as to lead a reasonable person to conclude that he no longer intended to be bound by the Agreement. It is more likely that the reasonable person would conclude, in all the circumstances, that a delay of three to six months for a contract of thirty-six months was not an indication that the contract was never going to be performed. Further, in respect of paragraph 27-048, in my view there was no absolute refusal by Mr. Thomas to perform his side of the contract.

51. Fifth, I am satisfied that once Dr. MacLeod arrived in Bermuda, Mr. Thomas took various steps to reach him by calling for him several times for further discussions about the Agreement. Also, I accept Mr. Thomas' evidence that on arriving in Bermuda, Dr. MacLeod made no attempt to contact him and Mr. Thomas did not know where he was accommodated. Additionally, the evidence of Dr. MacLeod, as set out above, was that he had lost faith in BMSG and no longer trusted Mr. Thomas to have a conversation with him. On cross-examination, Dr. MacLeod stated that once he had landed in Bermuda, he had no intention to work for BMSG and he stated that he did not respond to Mr. Thomas' skype message of 26 September 2019 where he asked to meet. Also, Dr. MacLeod agreed that he did not tell Mr. Thomas that he was looking for other work as he did not need Mr. Thomas' permission. In my view, the conduct of Mr. Thomas was not consistent with the conduct of an employer who was not prepared to fulfill the employment contract. On the contrary, Mr. Thomas was making efforts to perform the contract, albeit it on a delayed basis.

52. Sixth, I have considered the circumstances of this case in respect of the fact that Dr. MacLeod was recruited from outside Bermuda. He had a home base in England, he was employed in Europe but was winding down his affairs there, he disposed of some possessions, he shipped other possessions to Bermuda and then he and his wife travelled to Mexico for a vacation before then travelling to Bermuda. These circumstances might well evince a level of sympathy for Dr. MacLeod by an observer, however, I am obliged to set sympathy aside and focus on the legal issues in the case. On that basis, it matters not whether Dr. MacLeod was recruited from Europe or he was already working in Bermuda. In my view, Dr. MacLeod was concerned with and focused on his efforts to leave Europe to come to Bermuda and then the difficulties associated with a delayed start. As stated above, having lost faith in Mr. Thomas and no longer having an intention to work for him, he made the decision that was best for him, namely to look for other employment in Bermuda. To that point, once he arrived in Bermuda, he did not have and he intentionally avoided any communication with Mr. Thomas. Had he had such communication, he may have learned that the issues with the UCC were resolved as of 16 September 2019 and efforts were being made to get the contractors back on site, meaning a delay closer to three months was not unreasonable. In my view, I am not satisfied that Mr. Thomas can be held responsible for Dr. MacLeod's course of conduct.

53. Seventh, in respect of the above reasons, I have considered the test as set out in *Chitty on Contracts* at paragraph 27-051. In my view, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party Dr. MacLeod, Mr. Thomas as the contract breaker has not clearly shown an intention to abandon and altogether refuse to perform the Agreement.

54. Eighth, Mr. Harshaw placed great reliance on the principle in the case of *Alghussein Establishment* citing *New Zealand Shipping* that a party to a contract is not permitted to take advantage of his own wrong as against the other party. He submitted that it is a presumption, not hard and fast rule, but that it applies in this case. In essence Mr. Thomas should not be permitted to take advantage where he sought to delay the start date. In *New Zealand Shipping*, as cited by Lord Diplock in *Cheall*, the principle is clarified where it

states '*it is presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end …*'. In my view, Mr. Thomas' primary obligation was the performance of the Agreement once it started. The start date was not an express term of the Agreement but was subject to discussion or negotiation. Thus, to that point, Mr. Thomas was not in breach of the presumption.

55. In light of the reasons set out above, I am not satisfied that Dr. MacLeod has proved that Mr. Thomas renounced the contract. Thus it follows, that in reference to *Chitty on Contracts* at paragraph 27-070, in all the circumstances where I have found that a reasonable person would not conclude that Mr. Thomas did not intend to fulfil the Agreement, it was not open to Dr. MacLeod to take the position of accepting it as a renunciation, treating it as discharging himself from further performance and seeking damages.

Issue 3 – Whether there was any loss suffered by Dr. MacLeod.

56. In light of my findings as set out above, I dismiss the application for loss of income, expenses, interest and other relief as prayed for in the Statement of Claim.

Conclusion

57. In summary I have found firstly that there was no contract formed. Further, I have found that if a contract was indeed formed, then Mr. Thomas did not renounce the contract. On that basis, I dismiss the application for loss of income, expenses, interest and other relief as prayed for in the Statement of Claim.

58. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Defendant against the Plaintiff on a standard basis to be taxed by the Registrar if not agreed.

Dated 15 June 2023

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT