IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2002/B-132

BETWEEN	**AUDREY BASANTA-HENRY**	**1ST PLAINTIFF**
AND	**JOSEPH SHOUCAIR**	**2ND PLAINTIFF**
AND	**HERMA McRAE**	**3RD PLAINTIFF**
AND	**SHEILA GREEN**	**4TH PLAINTIFF**
AND	**IAN WATSON**	**5TH PLAINTIFF**
AND	**NORIENE SPENCE**	**6TH PLAINTIFF**
AND	**SHEILA SHERIFF**	**7TH PLAINTIFF**
AND	**ANDRAL SHERLEY**	**8TH PLAINTIFF**
AND	**THEODORE GOLDING**	**9TH PLAINTIFF**
AND	**NORMAN MARSH**	**10TH PLAINTIFF**
AND	**NATIONAL COMMERICAL BANK JAMAICA LIMITED**	**DEFENDANT**

Lord Anthony Gifford Q.C. and Ms. S. Kong Quee, instructed by Gifford, Thompson & Bright for the Claimants and Emil George, Q.C., Conrad George, Esq. and Alayne Bennett, instructed by Hart, Muirhead, Fatta for the Defendant.

Heard on March 8-11; August 11, 17th and December 20, 2004

ANDERSON, J:

This action arises out of a dispute between the Claimants who were at all material times members of a group referred to as the "Senior Managers Group" (the "Group" or "SMG") within the defendant company, on the one hand, and the company ("NCB"), on the other. According to the witness statement of the 9th Claimant, Theodore Golding, these members of the Group, all senior employees of the defendant bank at the material time, occupied senior positions in the Bank classified as E3, E4, SM1 and SM2 in descending order of seniority. There are no material differences in the facts alleged by the claimants and the defendant and the essential issue to be determined in the case is one of law. That issue is whether in the factual circumstances largely agreed between the parties, there had arisen on or about 17th September, 2001, a binding and enforceable agreement pursuant to

which the claimants became entitled to receive, and the defendant liable to pay, certain sums to each claimant as set out in the claimants' statement of claim.

In the 1990's, NCB was one of the largest commercial banks operating in Jamaica and like other banks and financial institutions, it was then (as now) subject to the control and regulation of the Bank of Jamaica (B.O.J). Like many other financial institutions at that time, it suffered from the crisis which, it is widely now acknowledged, afflicted the financial sector in the mid to late 1990's, leading to what is often referred to, as the financial sector "collapse". On May 10, 1999, the then Chairman of the defendant bank, the Hon. Oliver F. Clarke O.J., wrote to the Governor of the Bank of Jamaica, the letter which stands at the centre of this matter. In that letter, the bank purported to give certain "undertakings" to the B.O.J. For the purposes of this action, the relevant undertaking was contained in paragraph 6 and is in the following terms:

> "Subject to 13 below, the bank will not re-negotiate upward or otherwise increase any salary or emolument package of any director and/or senior manager of the bank of the rank of senior branch manager or upwards. Furthermore, the bank will not enter into any contract or agreement or revise upwards any existing contract or agreement for the payment of any service rendered by any director and/or party connected to the bank except where such services are rendered in a professional capacity at arms length and at competitive and fair rates."

For completeness, I also set out paragraph 13, which was referenced in paragraph 6, below.

> The Bank undertakes to strengthen its team of management personnel by the enlisting of persons with appropriate expertise covering the areas of credit, finance, information technology and internal auditing.
>
> We bring to the BOJ's attention, the fact that NCB operates a staff training facility, which places emphasis on all aspects of credit. Based on our current programme, all Lending Managers will have received instruction in the Financial Analysis Management Authoring System (FAMAS) Course by 1999 June. Additionally, the Staff Training Centre will continue to run specialized credit courses utilizing the services of overseas instructors, including Mr. Keith Chetley (formerly of the Manchester Business School, now a consultant at the Chartered Institute of Bankers (UK)) and Robert Morris Associates. The latter are well known in the American banking fraternity for their Uniform Credit Analysis Programme

The issues to be determined require the court to provide answers to the following questions:

1) Was there at any time a concluded valid and enforceable agreement between the Defendant Bank and the Claimants?
2) If there was such, was there any factor that vitiated that agreement?
3) If the answer to the first question is positive, and to the second question negative, when did such agreement arise and when did it take effect?
4) Was there any action by the claimants or any of them which was in breach of any fiduciary duty owed to the defendant, and which breach gave to the defendant a right to recover damages?

First, however, it is necessary to review what was the evidence presented to the Court.

The Evidence

Much of the history of the events which form the backdrop to this action is recounted in the witness statement of the 9th Claimant, Theodore Golding, a retired Senior General Manager of the defendant company. According to that witness statement, Mr. Golding served the bank for forty (40) years, many of those in senior positions, until his retirement in March 2002. It would not be unreasonable to infer that this experience gave him a unique perspective on matters related to the bank's processes and activities. He asserts that the Senior Managers' Group ("the Group") comprised about 22 senior managers and he served as a member of the "Emoluments Review Committee" ("ERC") of the group prior to 1996, at which time that group became dormant for about 4 years. He was the Chairman of the ERC from its revival around January 2000 until the time of his retirement in March 2002. He avers further that while up to the bank's financial year ending 30th September 1996, the group benefited from increases in salaries and other benefits which were negotiated by the ERC, for the year ending September 30, 1997 all categories of staff of the bank agreed, in the words of the statement, "to forego salary increases owing to the adverse financial position of the bank".

The ERC was revived after a meeting on January 2, 2000, between members of the Group and Dunbar McFarlane, then Deputy Chairman of the Bank and Group Managing

Director, at which the Group members protested the lack of any salary increases from the financial year ended September 30, 1997. Other categories of staff represented by the Staff Association had continued to benefit from salary increases in each year. The salaries of members of the Senior Manager's Group remained frozen for the years 1997 – 98 and 1998-99. Following up on the suggestion purportedly made by Mr. McFarlane, the group submitted a claim by way of a memorandum to the Bank on January 12, 2000. No immediate response was forthcoming from the Bank. A meeting was held with the Chairman, Mr. Clarke and Mr. McFarlane on March 27th at which the Chairman allegedly advised that he could not support the claim which had been submitted. A further meeting was held on April 3, 2000 at which the chairman expressed concern at Mrs. Henry (Claimant #1) being a negotiator for the Senior Managers' Group in talks with the bank while also representing the bank in talks with the Bank of Jamaica, concerning a Performance Incentive/Variable Pay Scheme for senior employees. According to the agreed documents the Chairman at that meeting, indicated that "some consideration would be given to increasing basic pay".

According to Mr. Golding's evidence, in June 2000, members of the group became members of the Bustamante Industrial Trade Union. The defendant challenged the right of some members of the group to become members of the union. When the matter was referred to the Industrial Dispute Tribunal (IDT) the IDT ruled against the defendant that all employees in the relevant categories should be included on the list for purposes of carrying out a representational rights poll. The defendant then sought an Order for Certiorari to quash the IDT award. However, the group mindful of the need to avoid litigation and in the interests of settling the dispute, held discussions with the Bank and on the 21st June 2001 arrived at certain understandings.

As a consequence of these understandings, the defendant agreed not to pursue its action for Certiorari; the Group decided not to pursue its attempts as being represented by the BITU, and the BITU for its part, agreed not to pursue claims on behalf of the Managers in respect of emoluments for the period October 1999 to September 2001. The meeting of June 21, 2001 also agreed that the defendant would re-instate the Salaries Committee

of the Board "with a view to expediting a review of the emoluments of the Group". Mr. Golding's witness statement, interestingly, has this to say, and for reasons to which I will advert later, I consider it to be important. "Mr. McFarlane stipulated that the BITU should confirm that it would not pursue further claims pending this review, and this was done". In apparent fulfillment of its part of the understandings, the BITU sent a letter to the defendant, at the request of Mr. McFarlane, in the following terms:

> "The Bustamante Industrial Trade Union is advised by its members in the Senior Management Category comprising SM1, SM2, E3 and E4 employees, that discussions were taking place between themselves and your bank in respect of their outstanding emoluments.
>
> We are further informed that these discussions will be speedily concluded and that the BITU will be advised of the results of the talks".

In September 2001, the Group prepared and on September 14, 2001, presented to the Bank through its managing director, Mr. McFarlane, a proposal document entitled "New Scale for Executives and Senior Managers for the year 2001-2002", which, according to Mr. Golding, included a summary for the years 1999-2002: "This document sets out the proposals for increases to pay and emoluments for the years 1999 –2000, 2000-2001 and 2001-2002 which we believe would be acceptable to both sides". Mr. McFarlane advised the Group, and there seems no reason to doubt this, that the Executive Committee of the Board had been mandated to deal with the issue. The Executive Committee met on September 17, 2001 and, again according to the 9th Claimant's witness statement, after the meeting Mr. McFarlane advised him at a meeting in his office, that the Executive Committee had approved the proposed salary increases "subject to the approval of the Bank of Jamaica". This statement is confirmed by the Minutes of the Meeting of the Executive committee of Monday September 17, 2001, document 202 of the Agreed Bundle of Documents. I shall set out in some detail the relevant paragraphs of those minutes. After listing the names of those present at the meeting the minutes are headed "Review of Emoluments - Senior Managers/ Executives". They contain the following.

> "The Committee discussed Management's recommendations for a review of the emoluments of the Senior Management. These recommendations were made against the background of the agreement reached with the managers and endorsed by the Bustamante Industrial Trade Union to negotiate settlement without the

involvement of the union for the period up to September 30, 2001. It was hoped that agreement would be reached to extend the latter date to September 30, 2002.

The committee approved the following, subject to the approval of the Bank of Jamaica. Salaries of SM2, SM1, E4 and E3 to be increased as follows":

Year commencing October 1, 1999	10% p.a.
Year commencing October 1, 2000	10% p.a.
Year commencing October 1, 2001	10% p.a. (average)

Plus one-off merit awards for existing E 4 and E 3 Managers in the aggregate (i.e. not each) of $1.5M (total cost). It was noted that SM2 and SM1 Managers had received merit awards up to year 2000.

Exclusive Share Incentive Scheme

The Committee agreed that this benefit which was last paid in year 2000, be rolled into the salaries with effect from 2000 October 1, at an annual cost to the Bank of $10M. This sum is to be apportioned and applied to the salaries of the Senior Managers, (including the Deputy Chairman) on 2001 October 1, after the salary adjustments for the 2001/2002 year in the case of incumbents, but paid in a lump sum to the managers who left the employment during the 2000/2001 year".

Between September 2001 and January 2002 further discussions took place between the Group on the one hand, and the Bank, on the other, represented variously by the Deputy Chairman, Mr. McFarlane, the Chairman, Mr. Clarke and later, Acting Chairman, Hon. Noel Hylton, O. J. In a meeting on January 22, 2002, Mr. McFarlane had advised the participants that the defendant had sought the approval of the Bank of Jamaica for the increases which had been agreed subject to its approval. The matter had been 'referred by the Bank of Jamaica to the Minister of Finance and Planning'. The Minister, for his part, had indicated that he could not support a 10% increase as proposed but would support a 4% increase. I should note, en passant, that there is no evidence to indicate that the matter had been referred to the Minister pursuant to any statutory or regulatory obligation to do so. Rather, there was some evidence that the bank was, and continued to be, considerably dependent upon the support of the Financial Sector Adjustment Company Limited (FINSAC), the agency which government had set up to assist in the rescue of troubled financial sector companies, and ultimately, such support was in effect borne by Jamaican taxpayers. The Acting Chairman, Mr. Hylton, had continued to make further

representations to the Minister on behalf of the Group. It is at this point in his witness statement that Mr. Golding mentions: "Mr. McFarlane also said there was a possibility that the Bank would be released from its undertaking, and the Bank was awaiting the outcome of discussions between the Chairman and the Minister of Finance or the lifting of the undertaking, whichever came first".

The Final Chapter? The Release from the Undertaking

It is a matter of record that on March 22, 2002, the Bank of Jamaica purported to release the defendant from its undertaking. The claimants contend that the release of this undertaking *fulfilled the condition precedent* for the coming into effect of an agreement with the defendant, in that the need for approval now lapsed. A point that should also be noted is that the only evidence in this case came from the witness statements of the claimants, as the defendant called no witnesses.

Submissions for Claimants

Lord Gifford, Q.C., claimants' counsel, submits that agreement had been arrived at by virtue of the offer from the Group to the bank, that being contained in the proposal submitted by the Group to Mr. McFarlane on behalf of the Executive Committee on the 14th September 2001. It is contended that the offer was accepted by the Executive Committee as confirmed by the minutes of the meeting of that committee and conveyed to the Group through its representatives, Golding and Smith-Sears. It was further submitted that consideration was provided by the mutual promises of the bank and the Group respectively, not to pursue the action for certiorari and not to pursue the right to membership of the B.I.T.U.

Leaving aside the issue of intention to create legal relations, asserted by claimants' counsel and denied by counsel for the defendant, the issue to be decided was what was the effect of the phrase, "subject to the approval of the Bank of Jamaica". With regard to this term, Lord Gifford in his closing submissions has this to say:

> It is common for binding contracts to be made, the *performance of which* is subject to the occurrence of some event. In particular, as here, contracts are often made which are subject to some outside party's approval. Such contracts are binding when made, but the parties are not bound to perform them unless and until the condition is fulfilled or the need for it lapses". (My emphasis)

Counsel cited **Halsbury's Laws of England, 4th Edition Reissue, Volume 9(1) paragraph 670** as support for the Claimants' case that:

1. There was a legally binding agreement subject to a condition precedent for BOJ approval;
2. There was an implied term that the condition would lapse if the undertaking lapsed.

In these circumstances he asserted, the agreement became effective when the undertaking lapsed on 22nd March 2002, so that performance by the defendant was required. The relevant section of Halsbury's is in the following terms.

> Whether a condition is precedent to contract or to performance is essentially a question of whether the parties have or have not completed the process of reaching agreement. Thus, the fact that the parties contemplate the execution of a formal contract is some evidence that they do not intend to be bound by it until it is signed, but there is nothing to prevent them from indicating that they intend to enter into a binding provisional contract.

I note with interest that Ken Lewison, Q.C. in his book 'The Interpretation of Contracts" (Sweet & Maxwell, 2004), {for bringing this book to my attention, I am indebted to my brother Bryan Sykes J. (Ag)} expresses much the same thought as that in Halsbury's cited above, in the following way.

> "In modern law, the expression "condition precedent" should be restricted to cases where non-fulfillment of the condition prevents the formation of a binding contract *or* suspends its operation".

Counsel submitted that the parties had clearly "completed the process of reaching agreement". Further, he claimed, it was an implied term of the agreement so purportedly arrived at, that if the undertaking lapsed or the bank was discharged from obligations thereunder, the need for approval of the BOJ would also lapse. Claimants' counsel purports to find support for his submission that such a condition was to be "logically implied", in the minutes of the board meeting of December 20, 2001, in which it was noted "that if the BOJ undertaking had been released, there would have been no need to refer the matter to the BOJ", as well as Mr. McFarlane's statement that they were

awaiting the outcome of discussions being undertaken by the Chairman with the Minister of Finance or the lifting of the voluntary undertaking by the BOJ, whichever came first".

Submissions for Defendant

On the other hand, counsel for the defendant, Emil George, Q.C., submitted that in light of the voluntary undertaking given by the bank to the Bank of Jamaica, it was impossible either to enter into negotiations, which could lead to the increase of salaries of the Senior Managers group or, *a fortiori*, to agree to increases. It was submitted that the parties did not arrive at a consensus ad idem; that there was no consideration and therefore no contract capable of enforcement. Alternatively, it was submitted that even if there was an agreement as suggested by the minutes of the meeting of September 17, 2001 that agreement came to an end when the Minister of Finance communicated his "decision not to approve" the proposed 10% per annum increase and suggested instead that he would be supportive of an increase not exceeding 4% per annum. Counsel for the defence goes on to allege that the claimants rejected this offer from the Minister, although it is not clear from the only evidence available that any such rejection took place.

Defendant's counsel also pointed to the letter dated September 17, 2001 from Chairman Clarke to the BOJ in which he denies that the bank had either "sought or obtained the approval of the claimants". Defendant's counsel's submission protests that claimants' counsel has unfairly accused the chairman of lying when he said this. There is no evidence, he says, that the chairman was aware of any basis for assuming that the senior managers were amenable to any proposals. However, there is considerable evidence that the Executive Committee was the actual or ostensible agent of the Board and that committee acted through Dunbar McFarlane. According to the evidence, Mr. McFarlane knew and therefore the chairman, as a member of the committee, ought to be taken to have known of what was taking place between the claimants and the bank. Counsel for the defendant proffered that, although the claimants suggested that Mr. McFarlane as the agent for the defendant entered into a binding agreement with them, the fact that Mr. McFarlane did not himself give evidence, any assumption as to his state of mind must necessarily be conjecture. It was undoubtedly open to the defendant to call Mr.

McFarlane as a witness to deny the claimants' suggestion. But in the absence of his testimony, it is clearly open to the court to make what use it can of any evidence it can, which supports a particular interpretation of what he may have said.

I note in particular the submission by counsel for the defendant, in light of the terms of the aforementioned letter sent by the bank's Chairman to the BOJ, that it categorically refutes the existence of legal relations between the parties. The letter should be taken as evidence of the lack of any such intention. With respect, I decline the view that determination of this issue is assisted by the opinion of the chairman of the bank. Rather, it is peculiarly an issue which this Court must decide. It will be recalled that September 17, 2001 was the day on which, at the meeting between the Senior Manager's Group and Mr. McFarlane acting on behalf of Executive Committee of the board, McFarlane conveyed the information of the agreement of the Executive Committee subject only to the approval of the Bank of Jamaica. The chairman's letter in its' penultimate paragraph states:

> "We have not yet sought or received any indication of the acceptance of the managers concerned but this will be pursued diligently on receipt of your approval".

Of considerable interest is the fact that it set out in paragraph 1, 2 & 3 precisely the terms which had purportedly been agreed to according to the information conveyed to the September 17, meeting by Mr. McFarlane. There was also evidence that the chairman himself was willing to support an 8% increase. (*See Price Waterhouse letter referred to below*) Defendant's counsel's written submissions also say that there was no basis upon which Mr. Clarke could have assumed that the claimants were "bound to accept /approve the proposals and it would have been grossly wrong for him to do so". This submission also seems to be at variance with the evidence, since the only "proposal" was that presented to the Executive Committee by and on behalf of the Claimants.

Additional Defence Submissions

I might mention here two other submissions made by the defendant's counsel. Firstly, there is a submission that the ERC of the Senior Manager's Group "had no legal basis on

which to negotiate on behalf of the members of the Group", as they did not constitute a bargaining unit. Secondly, that in any event, "even collective agreements lawfully entered into and properly signed by the parties are merely binding in honour only". It would seem to me that the defendant is denying the possible applicability of the law of agency in matters of contract negotiations and at the same time, calling in aid the principle of collective agreements being binding in honour only. In this regard, I accept the uncontroverted evidence of Mr. Golding that the bank at all material times treated with him and the other managers as being the representatives negotiating for the Group, both before the crisis of the 1990s and after the revival of the ERC in 2000. Indeed, that was part of the complaint of the Chairman in relation to Mrs. Henry. She was on the bank's team in talks with the Bank of Jamaica and also party to the Group's negotiations with the bank. I have already expressed my opinion on the Executive Committee of the Board being either the actual or the ostensible agent of the defendant.

The Effect of the Minister's "Decision".

It is necessary to refer to one other submission by defendant's counsel to the effect that the defendant treated the Minister's "decision" as "disentitling them from making an offer of a 10% increase in salary per annum to the claimants". But there is a total absence of any evidence of any statutory authority on the part of the Minister to give instructions to a publicly owned company, (the bank) in relation to any commercial/industrial relations matter, one not determined to be of a regulatory nature. This seems to give rise to two consequences: first, it would appear that the Minister has no *locus standi* in the issue. Secondly, it would mean that if indeed there were a contract, it would not be vitiated by illegality as suggested by the defendant. There was another intriguing but perhaps equally indefensible submission from defendant's counsel. It was suggested that "The Ministers *proposal* had the effect of relaxing the undertaking. Any attempt to resurrect the contract cannot *bring back the contract like Lazarus*". (My emphasis) This seems on the surface to concede the existence of a prior contract. If so, I merely restate my views as to the role, if any, that the Minister had in all of this. It will also be apparent that I reject the suggestion in the submission inherent in the statement – "If a matter is subject to someone's approval, if the person who is to approve it says "No", it is

submitted that that is the end of the contract", since no contract was ever subject to the Minister's approval, nor was there one in which he had any *locus standi.*

It should be noted that while the Bank of Jamaica Act in Part VA dealing with "Supervision and Examination of Banks and Specified Financial Institutions" gives the Minister the right to make regulations, there is nothing there which gives to the Minister the right to independently exercise any of the regulatory or supervisory functions given to the BOJ under the Act. Nor is the Minister empowered to give specific directions to the BOJ in matters relating to its supervisory role. Indeed, section 41 of the Act is in the following terms.

> The Minister may from time to time after consultation with the Governor give to the Bank in writing *such directions of a general nature* as appear to the Minister to be necessary in the public interest including without prejudice to the generality of the foregoing provisions directions to review the state of credit in any sector of the economy and either to make recommendations for improving the supply of credit or to take steps to foster the provision of credit to that sector of the economy. (My emphasis).

In **JAMAICA ASSOCIATION OF LOCAL GOVERNMENT OFFICERS & NATIONAL WORKERS' UNION v THE ATTORNEY GENERAL OF JAMAICA**, Suit No: 38 and 56 of 1994 (Consolidated) the Full Court (Cooke J, as he then was) held that where an agency, in that case the Industrial Disputes Tribunal, (IDT) was to arrive at a decision by the exercise its own discretion, it could not defer to the decision even of the Cabinet. Thus, in that case, where the IDT had concluded that "Cabinet's final approval constituted a policy decision which is not subject to modification by the Tribunal", it erred in law. By parity of reasoning, it seems to me that it was not open to the BOJ, either to delegate to the Minister its right to approve an agreement between the defendant and the claimants, or to accept that the Minister had the right to determine the level of increases which could be allowed by the BOJ.

What, if anything, is the effect of the Undertaking?

Defendant's counsel submitted forcefully that the bank could not have intended to enter into legal relations in light of the undertaking given to the Bank of Jamaica. From the

tenor of the agreed documents, it appears that it was common ground among all parties that the undertaking to the Bank of Jamaica was a "voluntary undertaking". Thus, it should be noted that the defendant itself frequently referred to the undertaking as being voluntary. For example, Mr. Clarke's letter of September 17, 2001, the letter from Christopher Lowe by then Managing Director of the defendant dated November 29, 2001; the minute of a meeting between Senior Manager and Executives held on January 22, 2002 all referred to the undertaking as voluntary. It would seem to be inconsistent to argue that the undertaking was voluntary and at the same time conclude that any agreement was void for illegality because of it, an alternative submission by defendant's counsel.

In their written submissions, Counsel for the bank, although also characterizing it as "voluntary" in the submissions, nevertheless stated that the undertaking was given "in response to a requirement from the Supervisor of Banks pursuant to section 25 (1) (a) of the Banking Act". The terms of the relevant section are set out below:

> "Where the supervisor believes that any of the conditions specified in paragraph 1, 2, 3 and 4 of Part A of the Second Schedule exists in relation to a bank, the supervisor may unless directed otherwise by the Minister
>
> a) require the bank to give an undertaking signed by the majority of the members of the Banks' board to take such corrective actions as my be agreed between the bank and the Supervisor."

Having carefully reviewed it, I have formed the view that there is nothing in the undertaking, which requires a conclusion that it was other than a voluntary undertaking. There is also no evidence that it was signed by a majority as the regulator could demand under the statute. Nor, indeed, is there evidence that any other members of the board apart from the Chairman did sign. Thirdly, any undertaking pursuant to the sub-section under reference would specifically require the bank to take positive "corrective actions". This undertaking, in its relevant part, merely required the defendant to refrain from taking certain action. Claimants' counsel, in response to the defendant's counsel's submission as to the prohibitory effect to be given to the undertaking makes the observations that I adverted to above, and concluded with the following:

> "The penultimate paragraph of the letter acknowledges that the undertaking will immediately determine '*in the* event *that the Minister and/or the Supervisor should issue written directions to the Bank or take*

> *any similar action under the Banking Act.* ' In other words, if there were to be any formal action under the Banking Act, the letter of undertaking would be superseded".

While the last sentence of the submission is an interesting suggestion, it is not at all clear to me that such formal action would have led to the undertaking being "superseded", nor is there any logical reason why this should be so.

Was the Bank of Jamaica aware of the negotiations?

Claimants urge the court to the view, not only that there were negotiations between the parties, but that even the BOJ knew of them. There is considerable evidence that all parties, including the supervisor, were aware of discussions taking place between the bank and Senior Managers group on the issue of salaries. In this regard I find it highly instructive that when the Bank of Jamaica's approval was sought to the level of increases purportedly agreed by September 2001, there was not even a hint of objection that "no negotiations ought to have taken place". Rather, it suggested that BOJ would defer to the Minister in relation to that level of increase. But it is not clear what the legal basis for that deference was. I have come to the view therefore, that the voluntary undertaking given by the Bank could not by its terms change what might otherwise be a valid and enforceable agreement into one, which is void for illegality. The letter of June 30, 2000 from the Bank of Jamaica to the defendant is in my view clear evidence that the Bank of Jamaica was aware that negotiations were taking place between the bank and the Senior Managers; but even more telling perhaps is the fact that Mr. Clarke, in a meeting held on the 3rd day of April, 2000, clearly expressed his discomfort at Mrs. Henry being a negotiator for the Senior Managers' group in talks with the bank while, at the same time, also representing the bank in its talk with the Bank of Jamaica concerning a performance incentive/variable pay scheme for Senior employees.

What is more is that at that very meeting the minutes state that the chairman himself had indicated that some consideration would be given to "increasing basic pay". It is difficult to contemplate how the level of increase would have been determined without some negotiation. There is also evidence in a letter from Price Waterhouse Coopers dated May 2, 2000 and addressed to Denise Price-Hoo, Director Financial Institutions, Supervisory