COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMERCIAL DIVISION
2015/COM/lab/FP 00003

BETWEEN

EDMUND JOHNSON

Plaintiff

AND

STATOIL SOUTH RIDING POINT LLC

Defendant

BEFORE:	The Honourable Mrs Justice Estelle G Gray Evans
APPEARANCES:	Mr Obie Ferguson for the plaintiff
	Mr Robert K Adams and Mr Edward Marshall for the defendant
Hearing dates:	2017: 6 February; 11 April; 7 December
Closing Submissions:	2017: 29 June(Plaintiff)
	2017: 21 July(Defendant)

JUDGMENT

Gray Evans J.

1. This is an unfortunate case. The plaintiff, Edmund Johnson, was employed by Freeport Harbour Company Limited earning an annual salary of $148,000.00. The defendant, Statoil South Riding Point LLC, advertised for a Berthing Master and the plaintiff applied for and was offered the position, with a start date of 1 April 2014. Thereafter he tendered his resignation from Freeport Harbour Company Limited. However, prior to the plaintiff taking up the said employment, the defendant withdrew its offer and the plaintiff now brings this action claim breach of contract and damages.

2. The plaintiff is a citizen of the Commonwealth of The Bahamas and works as a Marine Pilot in the Island of Grand Bahama. The defendant is a company incorporated and existing under the laws of the said Commonwealth of The Bahamas and therein carrying on business.

3. The plaintiff, on 16 April 2015, commenced this action by a specially indorsed writ of summons in which he alleges that the defendant, by letter dated 24 February 2014, agreed to employ him in the post of Berthing Master on certain terms, including, an annual salary of $108,000.00, transportation and a starting date of 1 April 2014; that by letter dated 25 April 2014, informed the plaintiff that it had withdrawn its offer letter of employment for the position of Berthing Master, and in breach of the said agreement the defendant, has refused and still refuses to employ him, as a result of which he has suffered loss and damage, for which he claims damages, interest and costs.

4. The plaintiff particularized his damages as follows:

Special Damage

Loss of salary calculated at $108,000.00 per annum from April 1, 2014 to the date of filing and continuing.....	$108,000.00
Accrued vacation pay (3 weeks per year)	6,128.35
Medical insurance assessed @ $675.00 per month and continuing	8,100.00
Transportation provided by Company (assessed @ $400.00 per week plus insurance) and continuing	20,458.08
Total notice pay, accrued vacation, transportation & insurance	$142,686.43

5. In its defence filed 26 May 2015, the defendant admits that it made an offer to employ the plaintiff on various terms and conditions, which included, inter alia, salary at $108,000.00 per annum, transportation and a starting date of 1 April 2014. However, the defendant avers that the said offer was also conditional and contingent upon the defendant's conduct of background checks in relation to the plaintiff before he commenced work with the defendant.

6. The defendant admits further that by letter dated 25 April 2014 it informed the plaintiff that its conditional offer of employment for the position of Berthing Master was withdrawn. However, the defendant denies the plaintiff's allegations of breach of contract and claim for damages.

7. Instead the defendant avers that having made the conditional offer of employment to the plaintiff, and having conducted its background checks and reviewing certain information it obtained in relation to the plaintiff, the defendant decided it no longer wished to engage the plaintiff as an employee. The defendant avers further that prior to receiving the conditional offer of employment the plaintiff failed to fully disclose to the defendant his relationship with the Bahamas Maritime Pilots Association (BMPA) and that after making the conditional offer of employment to the plaintiff, the defendant received information that the plaintiff was lobbying for the BMPA to assume control of

pilotage services in Grand Bahama, which position the defendant contends conflicted with its business and commercial interests in continuing to provide pilotage services. Hence, the defendant's decision to withdraw its conditional offer of employment.

8. The issues for determination as identified by the parties are as follows:

1) Did the plaintiff's acceptance of the defendant's conditional offer to employ him on the terms and conditions stated in the offer constitute a valid and legally binding contract?

2) If so, whether the defendant had a legal and contractual right to rescind or withdraw the conditional offer made to the plaintiff?

3) Did the defendant's subsequent failure to employ the plaintiff constitute a breach of contract?

4) If the contract was breached to what is the plaintiff entitled by way of damages for breach of contract?

9. Evidence at the trial came from the plaintiff on his own behalf and from Ms Madge Morrison, Mr Scott Steiger, and Mr Dominique Nixon, on behalf of the defendant.

10. The plaintiff's evidence as set out in his witness statement filed 3 February 2016 is that in January 2014, he submitted an application for employment in response to the defendant's advertisement in the Freeport News for a Berthing Master. He was subsequently invited by Ms Madge Morrison, the defendant's Human Resources Administrator, for an interview. That interview was conducted by Ms Morrison and Mr Makarios Rolle, the defendant's Marine Manager, on 5 February 2014.

11. The plaintiff said he received an offer of employment, with a start date of 1 April 2014, from the defendant by way of an email dated 24 February 2014, in which he was asked to respond by 28 February 2014. He said he accepted the offer which included, inter alia, a salary of $108,000.00 and transportation. He also tendered his resignation from his then employer, Freeport Harbour Company Limited, with whom he had been employed for some 16 years and that, at the time, he was earning an annual salary of $148,000.00.

12. The plaintiff's evidence is thatin the weeks leading up to his start date of 1 April 2014, he, Ms Morrison and Mr Rolle corresponded via email regarding insurance enrolment, his bank account information, uniform, and safety shoes, etc. He said it was also around that time that BMPA members employed at Freeport Harbour Company Limited and Buckeye submitted their resignations from those companies and he, along with a few of those members, travelled to New Providence to discuss the reasons for their resignation with the press.

13. According to the plaintiff, late in the evening of 31 March, 2014 he was "unofficially" advised by Ms Morrison that his start date was being pushed back, stemming from what he called "a mistake made during an interview by Mr Wendell Jones", who, he says, mistakenly referred to him as a director of the BMPA. The plaintiff said he explained to Ms Morrison at the time that he was a member of the BMPA, as he had disclosed during his aforesaid interview, but that he was not a director. He said that on 5 April 2014 he had another telephone conversation with Ms Morrison and again explained to her that Mr Jones had been mistaken when he referred to the plaintiff as a "director" of the BMPA.

14. The plaintiff said that after not hearing anything from the defendant for two weeks, on 15 April 2014, he sent the following email to Ms Morrison:

> "I hope that you are well.
>
> I was working for FHC for more than fifteen years when I received a job offer from your company. I decided to take your offer and I tendered my notice of resignation to come

and join your company. Now it seems as if everything is on hold. Can you give me some clarification as to what is going on please?"

15. He said that shortly thereafter, Ms Morrison advised him that she was waiting for "feedback from upper management" and on 30 April 2014 he received a letter dated 25 April 2014 from the defendant advising him of the withdrawal of its offer of employment for the reason that he had not "fully disclosed" his business relationship with the BMPA during the aforesaid interview.

16. The plaintiff said thaton 4 July 2014 he saw that the defendant was again advertising for the position of Berthing Master, and he sent an email to Ms Morrison asking for the defendant to reconsider him for the position. He said he also pointed out in that email that he had resigned his position at FHC because he had accepted a Berthing Master position with the defendant and that he also reiterated that Mr Jones was incorrect when he referred to him as a "director" of the BMPA.

17. The plaintiff said thaton 18 August 2014 Ms Morrison sent him an email containing an "amendment to the letter dated 25 April 2014", in which the defendant stated that its offer had been withdrawn because the plaintiff did not advise the defendant of his "business relationship" and also because he did not declare that he was the owner of Freeport Pilotage Company (FPC).

18. The plaintiff admits that he is the owner of FPC. However, he says that that company has been inactive since 1997, and, therefore, he does not see how his ownership thereof would be relevant to him being employed by the defendant.

19. Under cross-examination the plaintiff said that at no time during his interview for the position of Berthing Master with Mr Rolle and Ms Morrison did the name of FPC come up because Mr Rolle, as co-founder and former co-owner of FPC, was fully aware of what was going on with that company. However, the plaintiff admitted that at the date of the interview, Mr Rolle was no longer an owner of FPC, having previously divested himself of his shares therein sometime in 2013. Included amongst the defendant's documentary evidence isa copy of a resolution passed by the directors of FPC on 30 May 2013 which authorized the transfer of Mr Rolle's shares in the company to the plaintiff and his wife.

20. The plaintiff disagreed with counsel for the defendant's suggestion that he had said "no" when he was asked during the aforesaid interview whether he had an interest in any companies. His evidence is that he was never asked that question.

21. The plaintiff admitted that, in addition to being a member of the BMPA, he was, as owner of FPC, also involved in discussions with the BMPA about the possibility of the BMPA using FPC as the vehicle for the BMPA to engage in piloting services in Grand Bahama. However, he denied that they were "in negotiations" and insisted they were merely "in discussions".

22. The plaintiff agreed with counsel for the defendant that the reason he was having the discussions with BMPA was because they were considering doing business together. He said that the objective of the discussions was for him to divest himself of FPC so he could go and work for the defendant. However, he disagreed with counsel for the defendant's suggestion that the purpose of the discussions was for FPC to enter into a business relationship with the BMPA.

23. The plaintiff said he understood the phrase "this offer is also contingent on successful background checks" to mean that the offer was presented to him subject to, or on the condition that, the defendant's background checks in relation to himself were successful. He said he also understood that to mean that if the background checks were unsatisfactory, the defendant could take back the offer.

24. The plaintiff accepted counsel for the defendant's suggestion that the defendant did not say it withdrew the offer because he was a member of the BMPA, but said that he assumed that is what they meant. He agreed with counsel for the defendant that nowhere in his explanation to the defendant did he make the positive statement that he did not have a business relationship with the BMPA but said he tried to clear up any misunderstanding regarding his relationship with the BMPA as a result of media

coverage, because when he spoke to Ms Morrison she specifically mentioned Wendell Jones, who had erroneously referred to him as a director of the BMPA; that that was the issue he tried to clear up with Ms Morrison. He said he did not understand being a member to be equated with having a business relationship.

25. On re-examination the plaintiff said that neither Ms Morrison nor anyone else from the defendant company disclose to him the findings of their investigation.

26. On a question by the court the plaintiff said he was not asked about his holdings and or memberships during the interview.

27. On further cross-examination by Mr Adams, the plaintiff denied having been asked specifically by Mr Rolle in the presence of Ms Morrison whether he had any interest in any companies. He said that he was only asked if he was a member of the BMPA, and he had responded by telling them "yes, all of the pilots were members of the BMPA".

28. Ms Morrison's evidence is that onor about 15 January 2014 the defendant placed an advertisement in the local newspapers inviting applications to be submitted to fill the position of a Berthing Master; that on or about the same date, the plaintiff forwarded an email to her and attached his resume for the defendant's consideration.

29. That on 5 February 2014, she along with Mr Makarios Rolle, the defendant's Marine Activities Leader, interviewed the plaintiff. She said that during that interview, the plaintiff informed them that he was a member of the BMPA; that Mr Rolle also asked the plaintiff whether he was affiliated with any company in The Bahamas and the plaintiff responded that he was not. She said that approximately two weeks after the interview, by letter dated 24February 2014, the defendant made a conditional offer of employment to the plaintiff; that the offer was made contingent upon the outcome of the defendant's background checks in relation to the plaintiff being satisfactory before the plaintiff commenced work; that on 28 February 2014, the plaintiff signed the said letter containing the conditional offer of employment. She said that she had several exchanges with the plaintiff regarding his commencement date, which was deferred pending the outcome of the background checks being reviewed by the defendant's senior management. She said she was eventually informed by Mr Scott Steiger, the defendant's Leader, People & Leadership, that information had come to light that the plaintiff was the majority shareholder, officer and director of FPC, a company which the BMPA intended to use to provide pilotage services in Grand Bahama.

30. Ms Morrison said that in his earlier interview, the plaintiff had not informed them that he was affiliated with FPC. She said that pursuant to Mr Steiger's instructions, on 25 April 2014 she wrote to the plaintiff, informing him that the defendant had decided to withdraw its offer of employment because the plaintiff had failed to disclose fully during his interview the nature and scope of his business relationship with the BMPA.

31. Under cross examination Ms Morrison said that based on his answers during the aforesaid interview and the plaintiff's experience, the defendant decided to offer the plaintiff a job. She said that she eventually heard from Mr Mark Hardy, her manager, who indicated to her that the offer had to be withdrawn because the plaintiff did not disclose his business relationship with the BMPA. She said Mr Hardy did not explain to her what that business relationship was and that she did not discover a business relationship between the plaintiff and the BMPA when she did her investigation.

32. According to Mrs Morrison, the decision to make the offer of employment to the plaintiff was not hers, but management's. Likewise the decision to rescind or withdraw the same. She said she merely signed the respective letters.

33. Ms Morrison said she did not know if anyone called the plaintiff to ask him about the report they heard on Mr Jones' show. She said that she signed the letter of offer before her investigation and the

information that she obtained once she completed her part of the background check was passed on to management.

34. Mr Steiger's evidence is that the defendant's offer of employment was made contingent upon the outcome of its background checks in relation to the plaintiff being satisfactory. He said that on or around 24 March 2014, it was brought to his attention that the plaintiff appeared as a guest on a talk show program hosted by Mr Wendell Jones called "The Platform", in which the plaintiff was reportedly introduced as a director or officer of the BMPA, an Association of marine pilots, which, at the time, was lobbying The Bahamas Government for legislation to enable them to operate as independent contractors and to give them exclusive control over the provision of pilotage services on Grand Bahama.

35. Mr Steiger said that it was also brought to his attention that during a news report of a press conference broadcasted on ZNS, the Managing Director of the BMPA, Mr Erin Ferguson, made a statement that the BMPA intended to collaborate with a company known as "Freeport Pilotage Company Limited" to provide their marine pilotage services in Grand Bahama. Further, that on or about 1 April 2014, the defendant's attorneys conducted a corporate search of FPC and discovered that the plaintiff was the President, Treasurer and Director, as well as the majority shareholder of that company.

36. According to Mr Steiger, the intention of FPC to provide exclusive and independent pilotage services in Grand Bahama conflicted with the defendant's commercial interests as the defendant wished to continue to provide pilotage services through its own qualified employees; and due to that conflict in particular, the defendant decided on 25 April 2014 to withdraw the offer of employment made to the plaintiff.

37. Mr Steiger said that while the defendant had disclosed during the aforesaid interview that he was a member of the BMPA, he had not fully disclosed his business relationship with the BMPA, in that he had failed to disclose that, at the time of the interview, he was also an officer, director and majority shareholder of FPC; and more importantly that the BMPA and FPC were going into the business of providing pilotage services, which, he says, would be in competition with the defendant.

38. Further, Mr Steiger said that while the corporate search of FPC also revealed that Mr Makarios Rolle had been an officer, director and shareholder of that company, he had, since 30 May 2013, relinquished his shares therein and on 14 February 2014 had resigned as officer and director thereof. Thus, he says, at the time the BMPA and FPC decided to compete with the defendant for the provision of pilotage services, Mr Rolle had already divested himself of his interest in FPC.

39. Under cross examination, Mr Steiger said that he was informed that the plaintiff appeared as a guest on Wendell Jones show and that he was referred to as the directing officer. However, Mr Steiger could not say that anyone from the defendant company made contact with the plaintiff after they got hold of the footage

40. He said that the reason the defendant would not have called the plaintiff and raise the issue with him was because the defendant simply viewed his relationship with FPC as a conflict of interest and, therefore, decided to withdraw the offer. He said he viewed the conflict of interest as: the plaintiff was part of the BMPA and he is the primary shareholder and owner of FPC.

41. Mr Steiger said that the reason for the defendant's withdrawal of the offer of employment was not the plaintiff's membership in the BMPA, but rather it was because of his interest in FPC, a company that was looking to compete directly with the defendant.

42. Mr Dominique Nixon, produced a recording of a news report broadcasted on ZNS TV 13 of a press conference led by Mr Erin Ferguson, the managing director of BMPA, on 1 March 2014, an assignment which he said he shot and recorded.

43. The following is an excerpt from the transcription of that clip:

"Erin Ferguson: The Freeport Harbour Company will receive notice that resignations of pilots are forthcoming. We gave reasonable notice of all contracts. The pilots have also informed that we have morphed with the Maritime Pilots Association and a fully licensed company in Freeport, the FPC. We do not intend to suspend any members.

News Reporter: Managing director of the Maritime Pilots Association, Erin Ferguson, says that they had exhausted all measures over the company of what they are calling poor safety standards at the Freeport Harbour.

Erin Ferguson: The pilots are being overworked. The pilots are not being given the proper amount of rest. There is not a proper rotation system and all of these are things that we are advocating for. There is no mandatory pilotage and anchorage and so you would see this week there was an incident in anchorage and in October, there were two incidents in one week.

News Reporter: As soon as the resignations take effect, all of the piloting services can be completed through the Freeport Pilotage Company.

Erin Ferguson: We are prepared to provide the services that we are providing today on a more efficient basis..."

44. It is common ground that by letter dated 24 February 2014, the defendant made an offer to employ the plaintiff in the position of Berthing Master with a starting date of 1 April 2014. That offer was said to be "contingent on successful background checks". It is also common ground that Ms Morrison advised the plaintiff that the defendant needed to have his answer no later than Friday, 28 February 2014, and that on that date the plaintiff advised Ms Morrison of his acceptance of the defendant's offer. The plaintiff also notified Ms Morrison via email that he would give his then employer, Freeport Harbour Company, notice of his intention to resign from that company.

45. Thereafter arrangements were made for the plaintiff to have a pre-employment physical examination done by a physician, apparently selected by the defendant; and he was asked to provide other items and information in preparation to commence his employment with the defendant.

46. However, on the eve of his starting date of 1 April 2014 the plaintiff was advised "unofficially" by Ms Morrison that his starting date was being "pushed back" and by letter dated 25 April 2014, he was advised that the defendant's offer was being withdrawn for the reason that the defendant had discovered that the plaintiff did not fully disclose his business relationship with the BMPA during his interview and or prior to the offer of employment being made by the defendant.

47. The defendant's case, as I understand it, is that subsequent to the plaintiff's acceptance of the aforesaid conditional offer, the defendant, in or about March 2014, received information that led the defendant to believe that the plaintiff had a business relationship with the BMPA. In that regard, the defendant also discovered that the plaintiff was the majority shareholder, officer and director of FPC, a company which the BMPA was seeking to use to provide pilotage services in Grand Bahama.Further, that while the plaintiff had, during the aforesaid interview, disclosed his membership in the BMPA, he did not disclose his beneficial interest in, or position as officer and director of, FPC, nor did he disclose his "business relationship" with the BMPA; that in relation to his interest in FPC, one of its interviewers, Mr Rolle, had specifically asked the plaintiff whether he "was affiliated with any company in The Bahamas" and he had responded in the negative.

48. As evidence of the alleged "business relationship", the defendant relies on an excerpt from a recording of the aforesaid news broadcast which shows that on 1 March 2014, Mr Erin Ferguson, the then spokesperson for the BMPA, at a press conference stated, inter alia, "the Freeport Harbour

Company will receive notice that resignations of pilots are forthcoming...the pilots have also informed that we have morphed with the Maritime Pilots Association and a fully licensed company in Freeport, the Freeport Pilotage Company." It was also stated by the reporter in that broadcast that "as soon as the resignations take effect, all of the piloting services can be completed through the Freeport Pilotage Company."

49. The defendant says that having discovered from the aforesaid news report that the BMPA intended to use FPC to compete directly with the defendant's business of providing marine pilotage services in Grand Bahama, and having discovered the plaintiff's interest in FPC as aforesaid, it decided it no longer wished to engage the plaintiff as an employee; hence its decision and subsequent withdrawal of its conditional offer to employ the plaintiff.

50. The plaintiff denies that he has a business relationship with the BMPA and while he admits that he does have an interest in FPC as aforesaid, which he also admits he did not disclose during the aforesaid interview, he denies that he was asked specifically by Mr Rolle whether he was affiliated with any company in The Bahamas, to which he had responded "no".

51. In that regard, I note that although Ms Morrison at paragraph 5 of her witness statement stated that "Mr Rolle had asked the plaintiff whether he was affiliated with any company in The Bahamas" and that "the plaintiff responded that he was not affiliated with a company", on one occasion during cross-examination Ms Morrison said that she was not able to recall the questions that the plaintiff was asked during that interview.

52. Further, while Ms Morrison "confirmed" on re-examination that her statement at paragraph 5 aforesaid was true, when this court asked her whether, in light of the plaintiff's response and Mr Rolle's knowledge of the plaintiff's said interest, he had not pressed the plaintiff about his interest in FPC, Mrs Morrison said: "No ma'am. I really don't recall him asking. I really don't recall." I accept Ms Morrison's evidence that she "really" did not recall.

53. Moreover, it seems to me that if Mr Rolle had, in fact, asked the plaintiff the aforesaid question, and the plaintiff had responded as Ms Morrison said, Mr Rolle would no doubt have either asked the plaintiff specifically about his interest in FPC or bring such information to the attention of his superiors, so that the defendant would have been in possession of that information prior to the offer being made as well as prior to the aforesaid news broadcast.

54. In the circumstances, I accept the plaintiff's evidence that he was never asked the question by Mr Rolle.

55. However, as I said, the plaintiff also admits that he did not disclose his interest in FPC during the aforesaid interview. According to the plaintiff, while he is the majority shareholder, an officer and director of FPC, at the time of his interview, that company had been dormant for more than 20 years. Indeed, included amongst the plaintiff's bundle of documents is a letter from FPC to the Grand Bahama Port Authority (GBPA), dated 6 June 2011, which was signed by Captain Makarios Rolle, as Secretary of FPC, and in which he advised the GBPA that FPC "remains dormant at this time;" and that it was expected that the company "may remain dormant throughout the 2011 fee period". He also advised that should the company be activated "at any time", the GBPA would be notified immediately. There is no evidence that the GBPA was thereafter notified of the company's activation.

56. I, therefore, accept the plaintiff's evidence that at the time of the aforesaid interview and offer of employment by the defendant, FPC was dormant.

57. However, the plaintiff also admits that he had had discussions with the BMPA about that association using FPC as a vehicle to engage in piloting services in Grand Bahama and while it is unclear whether those discussions had begun prior to the plaintiff's interview, in response to counsel for the defendant's question as to whether the association was in discussion with him about using FPC to

provide piloting services because he had a license to provide such services, the plaintiff said "possibly, but I was leaving the company to go and work for Stat Oil."

58. The plaintiff also said that he knew that if he went to work for the defendant he could not remain the owner of FPC if the BMPA intended to use that company.

59. As indicated, the defendant's offer of employment to the plaintiff was said to be "contingent on successful background checks" and I accept the submission of counsel for the defendant that that contingency created a condition precedent.

60. It is said that conditions precedent are contingent conditions. In other words, unless and until the condition is satisfied, no contract comes into existence, or liability under a contract is suspended. See The Interpretation of Contracts, second edition, paragraph 14-08; or, as stated by the learned editors of Chitty on Contract, 28th Ed. Volume 1, at paragraph 12-028:

> "The parties may enter into an immediate binding contract, but subject to a condition, which suspends all or some of the obligations of one or both parties' fulfillment of the condition. These conditions precedent are, however, normally contingent and not promissory and in such a case neither party will be liable to the other if the condition is not fulfilled."

61. Indeed, that was the position applied by the House of Lords in the case of Total Gas Marketing Ltd v Arco British and other [1998] All ER (D) 227 in which Lord Slynn of Hadley stated on page 7 of the judgment as follows:

> "It is clear that the word condition may be used in a number of different senses. As Lord Reid said in Wickman Machine Tool Sales Ltd. v. L. Schuler A.G. [1974] A.C. 235, 250H:
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> > "In the ordinary use of the English language 'condition' has many meanings, some of which have nothing to do with agreements. In connection with an agreement it may mean a precondition: something which must happen or be done before the agreement can take effect. Or it may mean some state of affairs which must continue to exist if the agreement is to remain in force. The legal meaning on which Schuler relies is, I think, one which would not occur to a layman; a condition in that sense is not something which has an automatic effect. It is a term the breach of which by one party gives to the other an option either to terminate the contract or to let the contract proceed and, if he so desires, sue for damages for the breach. "
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> In this context Your Lordships have been referred to the discussion in Chitty on Contracts, 27 ed., (1994) chapter 12, pp. 570-573 as to the difference between promissory conditions and contingent conditions. Mr. Pollock Q. C. relies in particular on the passage in paragraphs to 12-025 where breach of a promissory condition by one party, which gives the other party the opportunity to treat himself as discharged from further performance of the contract:
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> > "must be carefully distinguished from that of a 'contingent' condition, i.e. a provision that on the happening of some uncertain event an obligation shall come into force, or that an obligation shall not come into force until such an event happens. In this latter case, the non-fulfillment of the condition gives no right of action for breach; it simply suspends the obligations of one or both parties. "
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> In paragraph 12-026 it is said, as an example of a condition precedent that:
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> > "the parties may enter into an immediate binding contract, but subject to a condition, which suspends all or some of the obligations of one or both parties pending fulfillment of the condition.

On the other hand at paragraph 12-028:

> "The obligations of one or both parties may be made subject to a condition that it is to be immediately binding, but if certain facts are ascertained to exist or upon which the occurrence or non-occurrence of some further event, then either the contract is to cease to bind or one or both parties are to have the right to avoid the contract or bring it to an end."

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 an agreement is of fundamental importance then the result either of a failure to perform it (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. Wickman Machine Tool Sales Ltd. v. L. Schuler A. G.[1974] A.C. 235, 262G per Lord Wilberforce. To adapt the words of Maugham J. in In re Sandwell Park Colliery Company: Field v. The Company[1929] 1 Ch. 277, 282 "the very existence of the mutual obligations is dependent on the performance of the condition." For completeness I would substitute "performance or fulfillment of the condition" for "performance of the condition."

62. Counsel for the defendant submits that because the defendant's offer to employ the plaintiff was contingent upon "successful background checks", which was a condition precedent to the creation of an enforceable and legally binding contract, the plaintiff's acceptance of the defendant's conditional offer did not have the effect of creating an enforceable and legally binding contract out of which a claim for breach of contract could arise in circumstances where, as is alleged in this case, the condition was not satisfied.

63. In that regard, the evidence is that the plaintiff appeared on a talk show hosted by Mr Wendell Jones and he was referred to by Mr Jones, erroneously the plaintiff contends, as a director of the BMPA. Apparently the defendant became aware of that news report and it appears, certainly from the plaintiff's evidence, that the defendant formed the view that he was a director of the BMPA and, therefore, he had a business relationship with that association.

64. When the plaintiff found out from Ms Morrison that the report that he was a director of the BMPA was causing some concern for the defendant, he sought to allay those concerns by confirming to the defendant, through Ms Morrison, that while he was a member of the BMPA, he was not a director; and that Mr Jones had incorrectly referred to him as such.

65. However, as I understand the defendant's case, as evident from its 25 April 2014 letter withdrawing the aforesaid offer, the offer was not withdrawn because the plaintiff may have been a director of the BMPA, but rather because their further investigation, following receipt of that, albeit erroneous information, revealed that the plaintiff was the owner and an officer and director of the Freeport Pilotage Company which was to be used by the BMPA to provide pilotage services in Grand Bahama, which information had not been disclosed by the plaintiff during the aforesaid interview, or subsequently, and which the defendant contends conflicted with its business and commercial interests in continuing to provide pilotage services in Grand Bahama through its own employees.

66. The defendant determined that that information rendered its background checks of the plaintiff unsuccessful, and that it no longer wished to engage the plaintiff as its Berthing Master.

67. There is no dispute that the defendant made a subjective determination as to the unsuccessfulness of its background checks. The evidence is that having been made aware of the aforesaid information, the defendant did not contact the plaintiff for an explanation or to find out his side

of the matter; and when provided with somewhat of an explanation by the plaintiff, the defendant refused to reconsider his employment.

68. Regrettably for the plaintiff, it appears to be clear from the authorities cited that the determination of whether or not the said background checks were successful is, indeed, a subjective one. See Wishart v National Association of Citizens Advice Bereaux Ltd (NACAB Ltd) [1990] IRLR 393, CA.

69. In my judgment, then, once the defendant determined that its background checks of the plaintiff were unsuccessful, the condition precedent or contingency to the creation of a valid and legally binding contract was not satisfied. Therefore, again in my judgment, the defendant's conditional offer never became unconditional.

70. So, if the offer of employment was contingent on successful background checks, and if, the defendant determined that the plaintiff's background checks were not successful, the test of such determination being a subjective one, what then? Could the defendant rescind or withdraw its conditional offer which had been accepted by the plaintiff without being liable for breach of contract?

71. The defendant contends that it could and, in support of that contention, relies on the case of Wishartsupra, a case in which one Mr Wishart was offered a position of employment by NACABLtd subject to the receipt of "satisfactory written references." The references received by NACABLtd were determined by NACABLtd not to be satisfactory and NACABLtd withdrew its offer of employment. Wishart sought interlocutory injunctions restraining NACABLtd from hiring someone else to the post and requiring them to hire him. The judge took the view that a conditional offer of employment had been made and accepted by Wishart and that there was a triable issue as to whether the condition was satisfied. He, therefore, granted the injunction but stayed the order pending appeal.

72. On appeal, the English Court of Appeal held, inter alia, that the judge had erred in regarding the plaintiff's case that an effective contract of employment had been entered into as a strong one. Further, that the judge had misdirected himself in exercising his discretion to grant interlocutory injunctions requiring the defendants to employ the plaintiff in circumstances in which the defendants withdrew their offer of employment because they were not satisfied with the references they obtained. The court allowed the appeal and discharged the injunctions.

73. In Wishart, the defendants maintained that they made an offer which never became unconditional and hence never became capable of acceptance unless and until satisfactory references were furnished, and that meant satisfactory to the defendants. That, alternatively, if there was a concluded bargain it was subject to a suspensive condition which would discharge it if the references were not satisfactory; that on either view since the defendants were not satisfied with the references and since it is not suggested that they acted otherwise than in good faith the plaintiff has never had an enforceable contract of employment.

74. In response, the plaintiff contended that the subjective approach to his rights was incorrect. In his submission, it was not enough for the defendants to feel dissatisfaction; the facts must be such that a reasonable person, in their position, with this particular post to fill, would not regard the references as a satisfactory basis on which to appoint the plaintiff. The plaintiff contended further that the defendants, finding the references unsatisfactory, should either have investigated further, both with the referees and the plaintiff himself, and reconsidered the matter in the light of what they learned; or, if they chose not to make this investigation, they should have taken the plaintiff on the references as they stood.

75. While no final determination on the matter could be made, since it was an interlocutory hearing to do with injunctions, Mustill, LJ, made it clear that his provisional view was to agree with the position taken by NACABLtd, that is, that the employers had made an offer which never became unconditional because of the failure by Wishart to provide satisfactory references. Alternatively, that if there was a

concluded bargain it was subject to a suspensive condition (that is the provision of satisfactory references) which would discharge it if the references were not satisfactory.

76. The court in the Wishart case also expressed the view, albeit obiter, that where an offer of employment is conditional upon "satisfactory" references being furnished, that is likely to have a subjective meaning of "satisfactory" to the defendants.

77. Similarly, counsel for the defendant argues that the test to be applied in determining whether the condition upon which the defendant's offer in this case was made had been satisfied or not, is an entirely 'subjective' one for the defendant as the prospective employer.

78. In that regard, counsel points out that the defendant's offer was made contingent on a successful background check into the plaintiff's antecedents. In his submission, there is no material distinction between the nature of the pre-condition considered by the Court of Appeal in Wishart's case and the condition in the defendant's offer in this case because, he argues, both are 'subjectively' determined.

79. Consequently, counsel submits, whether a background check is 'successful' or a reference provided to an employer is 'satisfactory', are both subjective in nature.

80. In this case, the defendant having conducted its background checks determined that the results thereof were not satisfactory, so withdrew its offer, without, it appears, giving the plaintiff an opportunity to defend or refute, or having heard the plaintiff's explanation, was not satisfied that it wished to have him in their employ.

81. Counsel for the plaintiff argues that the defendant ought to have made its findings available to the plaintiff prior to withdrawing the offer.

82. A similar argument was advanced in the case of Wishart. The Mr Wishart, the plaintiff in that case, contended that the defendants' subjective approach to his rights was incorrect; that it was not enough for the defendants to feel dissatisfaction, but the facts must be such that a reasonable person, in their position, with this particular post to fill, would not regard the references as a satisfactory basis on which to appoint the plaintiff. Furthermore, that, if the references appeared ambiguous or incomplete, as the defendants evidently found them to be, they should either have investigated further, both with the referees and the plaintiff himself, and reconsidered the matter in the light of what they learned; or, if they chose not to make this investigation, they should have taken the plaintiff on the references as they stood.

83. However, Mustill, L.J., at paragraph 14 of the judgment, opined as follows:

> "14. I confess to feeling little doubt that on this short point of construction the defendants are right. It is true that *Diggle v Odstone Motors* [1915] 84 LJKB 2165 may be distinguishable on the ground that the dispute concerned not the making of a contract, but the meaning of a provision which entitled the employers to terminate: a provision, moreover, which expressly stipulated that the satisfaction was to be that of the employers. I also accept that *Astra Trust v Adams* [1969] 1 Lloyd's Rep 81 and other cases concerned with expressions such as "subject to satisfactory survey" and the like are not conclusive, since they merely illustrate that "satisfactory" can have a subjective connotation and do not go so far as to establish that such words must always have that connotation. Nevertheless, my own strong inclination is to give the words of the defendants' letter a subjective meaning here, since I believe that the natural reading of a communication, the purpose of which is to tell the prospective employee that part of the decision on whether he is firmly offered the post has yet to be made, is that the employer is reserving the right to make up his own mind when the references have been received and studied. Undeniably, it is possible for an employer to make an offer conditional on

something to be objectively determined (for example, the passing of a medical examination) but I find it very hard to see that the defendants' letter falls into this category."

84. Counsel for the defendant also submits that the defendant has adduced no credible evidence of a business relationship between the plaintiff and the BMPA or between the BMPA and FPC that created a conflict of interest.

85. In other words, the plaintiff contends that there is no credible evidence that the condition had not been fulfilled. Therefore, counsel for the plaintiff says, the defendant ought not to be allowed to withdraw the offer as, in his submission, to do so amounts to a breach of the plaintiff's contract of employment entitling him to damages.

86. There are no doubt cases, as pointed out by Mustill, L.J. in the Wishart case, when a condition precedent may be objectively determined, as for example, in a case where an employment offer may be conditional upon the prospective employee passing pre-employment drugs tests. However, unfortunately for the plaintiff, in my judgment, this is not one of those cases.

87. Moreover, in response to counsel for the defendant's question as to whether the BMPA was in discussions with him about using FPC to provide piloting services because he had a license to provide such services, the plaintiff said "possibly, but I was leaving the company to go and work for Stat Oil." The plaintiff also said that he knew that if he went to work for the defendant he could not remain the owner of FPC if the BMPA intended to use FPC.

88. Clearly, in my judgment, those responses by the plaintiff suggest that he recognized the possibility of his ownership of FPCcreating a conflict of interest with the defendant, particularly at a time when it appears that BMPA was considering using that company's as a vehicle to provide pilotage services in Grand Bahama, and, I do not find that it was unreasonable for the plaintiff to have decided, in the circumstances, that the plaintiff, as the majority shareholder, officer and director of a company which, from media reports, was about to go into competition with the defendant for the provision of marine pilotage services in Grand Bahama, was not a good fit for its company.

89. The defendant's evidence, which I accept, is that when it withdrew its conditional offer to employ the plaintiff, it did so solely on the basis that one of the conditions necessary for the defendant to employ the plaintiff had not been met; and I agree with counsel for the defendant that it is reasonable that the plaintiff's failure to disclose his ownership interest in FPC at a time when FPC was actively involved in negotiations (or discussions, according to the plaintiff) with the BMPA to be used to provide pilotage services in Grand Bahama would result in an unsuccessful background check. And, as pointed out by counsel, it is not contended by the plaintiff, nor is there any evidence, that the defendant was motivated by bad faith.

90. It is, however, contended on behalf of the plaintiff that at the time the defendant's offer was made, the defendant knew that the plaintiff was the owner, as well as an officer and director of FPC, because one of the persons who interviewed the plaintiff, Mr Rolle, was a former member, officer and director of FPC. Consequently, counsel for the plaintiff argues, the defendant was fixed with that knowledge at the time the offer was made and accepted by the plaintiff. However, even if that were the case, there is no evidence that at the time, the apparent "business relationship" between the plaintiff and BMPA by virtue of the plaintiff's ownership of FPC and the BMPA's intention to use FPC as aforesaid had been disclosed by the plaintiff or discovered by the defendant.

91. As I have found that there was no valid and legally binding contract of employment between the plaintiff and the defendant out of which a claim for breach of contract could arise in circumstances where, as is alleged in this case, the condition was not satisfied, in my judgment, the defendant had a legal and contractual right to rescind or withdraw the conditional offer made to the plaintiff on or about

24 February 2014, on the ground that the condition precedent had not been fulfilled, that is, the defendant's background check of the plaintiff was not successful.

92. Consequently, the defendant's failure to employ the plaintiff did not, in my judgment, constitute a breach of contract for which the plaintiff would be entitled to damages.

93. In the result, the plaintiff's claim is dismissed with costs to be paid by the plaintiff to the defendant, to be taxed, if not agreed.

DELIVERED this 7th day of December A.D. 2017

Estelle G. Gray Evans
Justice