Hilary Term
[2017] UKPC 2
Privy Council Appeal No 0109 of 2014

JUDGMENT

Nazir Ali (Appellant) *v* Petroleum Company of Trinidad and Tobago (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Neuberger
Lord Kerr
Lord Clarke
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

13 February 2017

Heard on 11 October 2016

Appellant
Jonathan Cohen QC
Ashley Cukier
(Instructed by Sheridans)

Respondent
Jonathan Crystal

(Instructed by Charles Russell Speechlys LLP)

LORD HUGHES: (with whom Lord Neuberger, Lord Clarke and Lord Carnwath agree)

1. The appellant Mr Ali was employed by the respondent company (and its predecessors) from 1978. In 1989 he received a scholarship from the company to study for a degree at Louisiana State University. His fees for the course were met outright by the company. In addition, the company made him a monthly allowance of TT$ 3500 to help him continue to meet his commitments in Trinidad. The allowance, unlike the fees, was made in the form of a repayable loan. But, by the letter offering it, "Repayment of this loan will be waived if you return and work for the company for a period of five years". Subsequently there was a further loan of US$5000 for furniture, but this second loan was repayable without qualification and nothing now turns upon it. What remains in issue between the parties is whether the living allowance loan falls to be repaid when it has turned out that Mr Ali did not serve a further five years with the company after his return because he took voluntary redundancy.

2. After obtaining his degree, Mr Ali returned to the company with effect from 30 May 1994. A little under 18 months later, at the beginning of October 1995, he was one of a number of employees who received from the company notice that he was invited to consider taking redundancy under an extra-statutory scheme. In due course he elected to do so, and qualified for the payment of some TT$237,737 under the scheme. He took employment elsewhere. However, doing so meant that he had not served five years with the company after return from Louisiana. The company sought repayment of the loan, and set off the sum due against the redundancy scheme lump sum. When other debts owed by Mr Ali were also taken into account, the net result was that he received nothing in his hand. He claimed the redundancy money without deduction for the living allowance loan and other offsets. The judge ruled against him, as did the Court of Appeal in brief terms. His further appeal to the Board is limited to the issue whether the living allowance loan was, in the circumstances which had arisen, repayable by him or not.

The facts in more detail and the judge's findings

3. The respondent company was, when Mr Ali joined it in 1978, known as Trinidad-Tesoro. He was then about 29 years of age and had previously worked for Amoco. Soon afterwards the company changed hands and became the Trinidad and Tobago Petroleum Company ("Trintopec"). It was that company which employed him when the scholarship offer was made and accepted in 1989. Whilst he was in Louisiana the company underwent a further merger with another enterprise called Trintoc and became the Petroleum Company of Trinidad and Tobago ("Petrotrin"). Mr Ali's employment was continuous through these various restructuring exercises, but it was well known

that they resulted in the manpower needs of the company reducing. There had been previous voluntary redundancy schemes in both Trintopec in 1989 and Trintoc in 1990. According to the evidence of Mr Derrick, the industrial relations manager, which was accepted by the judge, these schemes were well known, as was the fact that no-one had been made redundant who had not volunteered to be.

4. Mr Ali had returned to the company in May 1994. He was disappointed in his hope to receive promotion as a result of his degree. On 27 November 1994 he wrote a long letter to his Divisional Manager protesting at this lack of promotion and other personal disappointments such as his separation from his wife. He did not conceal the fact that he felt that he had been let down by the company. He sought reassurance in particular because of what he termed the then "level of uncertainty" in the company and its "impending re-structure".

5. In early October 1995 the further restructuring resulted in the launch of a fresh voluntary redundancy scheme. A standard letter was sent to Mr Ali informing him that he, (a toolpusher in drilling operations) was included in the "target population which the company is seeking to reduce in its efforts to achieve viability through streamlining and a more direct focus on core business." Recipients were "invited to apply to participate" in the scheme, with the company reserving the right to refuse an application. An information booklet describing the scheme was attached. It began by saying that the company had inherited from its two predecessors "an extremely difficult set of financial circumstances" which made it necessary to manage costs. Elsewhere it stated that invitations to participate in the scheme would be sent only to those who had a minimum of five years' service and "whose jobs have become redundant as determined by the company". The total number of employees to whom this invitation was sent was not in evidence, but it was clearly fairly substantial, and it included Mr Derrick, then a senior toolpusher, who elected not to apply and remained in service. Employees receiving the letter were invited to consider the booklet carefully, to consult their managers, and to sign the letter if they wished to take advantage of the scheme. Mr Ali did sign it. The evidence was that no one who did not volunteer was made redundant, as had been the case with the previous schemes. The judge heard oral evidence at the trial. He did not accept Mr Ali's evidence that he was unaware, when he volunteered for this scheme, that his loan would have to be repaid. He found that he knew quite well that he was free either to apply or not to apply, and that he also knew that on the previous occasions no one who did not volunteer had been made redundant. The relevant part of the judge's conclusions is at para 34:

> "The decision to terminate was a decision made at the option of the plaintiff, not the defendant, when he decided to apply under the Plan. 1t was the plaintiff's option to go or not. Indeed, Mr Derrick's evidence was that only those persons who accepted the invitation to apply were retrenched. The plaintiff also conceded under cross-examination that he was free to apply or not to. In my

> judgment, by voluntarily applying for and accepting voluntary separation, the plaintiff rejected the option of continued work for five years and was fully aware of the condition of waiver when he did so. The plaintiff's argument may have been a more realistic one if the plaintiff had refused to apply and the company had then chosen to send him home, or if the company had given him no choice at all."

The issues of law

6. As the case has now very cogently been argued for Mr Ali by Mr Jonathan Cohen QC the issues of law resolve into two:

(a) is there to be implied into the contract under which Mr Ali accepted the loan a term restricting the company in its freedom to terminate his employment or to demand repayment, and if so what are its terms?

(b) if yes, have the events which occurred triggered the operation of that term so that the obligation to repay no longer stands?

An implied term?

7. It is not necessary here to rehearse the extensive learning on when the court may properly imply a term into a contract, for it has only recently authoritatively been re-stated by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742. It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.

8. The essential implication for which Mr Ali contends is founded upon the fact that the agreement expressly made was for repayment to be waived if he worked for five years after return. Thus he stood to gain a significant benefit by five years further service. But the condition for achieving that benefit could only be accomplished with the co-operation of the company. He could not provide five years further service unless the company permitted him to work if he wished to do so. And this was always obvious, at the time of the making of the agreement. Such a situation is a common occasion for the necessary implication of a term into a contract in order to make it work. A general statement of this kind of situation of necessity was conveniently provided by Cockburn CJ in *Stirling v Maitland and Boyd* (1864) 5 Best & Smith 840, in terms which were subsequently repeated by Lord Atkin in *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 at 717, albeit that in *Stirling* itself the issue did not relate to the implication of a term but rather to whether an express term for continued appointment of an agent had been broken. Cockburn CJ said this, at p 852:

> "I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative."

An example of such implication is *Mackay v Dick* (1881) 6 App Cas 251. An agreement for the sale of a clay cutting machine made the sale dependent on the machine passing a test of capacity at the purchaser's railway cutting. The purchaser refused to allow the machine to be brought to the cutting and to be put to the test, on the grounds that it had not performed well in different circumstances elsewhere. The House of Lords upheld the decision of the First Division of the Court of Session that the contract meant that if the purchaser refused by his own default to permit the stipulated test to take place, he was as bound to buy the machine as if it had taken it and passed. There are many other examples of such implied terms in cases where the co-operation of one party to a contract is essential to the performance by the other of his obligations: see the cases listed in *Chitty on Contracts* 32nd ed (2015) at paras 14-014 - 14-015 and 24-033.

9. Whilst the principle is well understood, the content of any term to be implied must be tailored to the necessity of the particular case. Before the courts below Mr Ali contended for alternative implied terms. The first was a term requiring the company to allow him to work for five years if he wished to do so. The second was a term that repayment of the loan would be waived if his employment was terminated at the initiative of the company other than for reasons of dishonesty.

10. The first of those terms cannot meet the test of necessity precisely because it goes further than could be necessary to achieve the objective of the contract for which

Mr Ali contended. There could be no necessity for an obligation to keep his job open to him if that objective could be achieved by the lesser means of requiring the waiver of the loan not only on completion of five years but also if the company prevented him from serving out the five years. There might be many reasons why it might not be necessary, or indeed reasonable, to require the company to keep on an employee, for example if there was no longer any sensible place for him in the business.

11. The second of the proposed terms was, as was realistically conceded before the Board, too narrowly expressed in excepting only dismissal for dishonesty. It could not be said to be necessary to make the contract work that the company should be disabled from terminating the employment of someone in the position of Mr Ali if he had committed any repudiatory breach of his contract, justifying dismissal. That would not ensure that the company did not take advantage of its own lack of co-operation but, conversely, would enable the employee to take advantage of his. There might also be circumstances in which the company could not avoid terminating the employment. Subject, however, to that qualification, an implied term of the second proposed kind is indeed necessary to make the contract for the loan and its repayment terms work. It was a necessary implication of the agreement to waive repayment if Mr Ali completed five further years of service that the company would do nothing of its own initiative to prevent him from providing such service, justified dismissal for repudiatory breach and compulsion excepted, and that if it did, a similar waiver would operate. Otherwise, the company could at any time negate its agreement to waive repayment on five years' service by preventing Mr Ali from completing that period and the contract would not work. Thus expressed, the implied term is the minimum necessary to make the contract workable. There is no question of the company being potentially liable in damages for its breach; it would simply, in the event of it preventing Mr Ali without cause from serving out his five years, come under an obligation to waive repayment. The key to the implied term is that it is triggered if the company prevents the employee from completing the five years of service (other than for repudiatory breach or where it operated under compulsion).

12. For the company, Mr Crystal rather faintly urged that such a term would be inconsistent with the express terms of the contract. It was said that the contract contained an express term that Mr Ali was entitled to waiver of repayment only if he served out five years. So it did, but there is no such inconsistency. The proposed implied term is necessary not to contradict what the contract says about waiver but to give effect to what it says about it. It is to ensure that the contract works as stated. Without it, the company's obligation to waive repayment would be capable of immediately being made nugatory. The term is necessarily complementary to the contract, not inconsistent with it.

13. Lord Kerr's initial formulation of the implied term (at his para 29), expresses it in a similar way: repayment would be waived if Mr Ali became *unable* to complete his five years as a result of the employer's actions. His further refinement, however, (at his

paras 30 and 31) goes significantly further in suggesting that the term was that repayment would be waived once Mr Ali was told that he might be a member of a group targeted for redundancy and not given a guarantee that he would not be selected. That further refinement does not meet the test of obviousness or business necessity, because the less extensive term analysed above, and proposed at Lord Kerr's para 29, is equally likely if not more likely to have been the response of the parties if the question had been raised at the time the loan was made. Indeed, on this formulation, the term would have required the company to waive repayment so soon as the redundancy circular was sent to Mr Ali, and whether he opted to apply for the redundancy package or not; that does not seem possibly to meet the test for implication of a term.

Was waiver triggered?

14. The above conclusion as to the implied term does not, however, by itself entitle Mr Ali to waiver of repayment. There is no need in this case to investigate whether or when genuine redundancy may leave an employer no choice but to terminate an employee's contract, because on the judge's findings it is clear that this company could have kept Mr Ali on, and indeed would have done so if he had wished. Nor, for the same reasons, is it necessary to go into the questions which may call for analysis on other facts if it is argued that an employer was compelled to dispense with the employee's services, for example by changes in regulatory law, or the intervention of a controlling company or liquidator. The question which arises is whether, given Mr Ali's volunteering to opt for the redundancy scheme, it can be said that the company has, on its own initiative and without repudiatory breach or compulsion, prevented him from serving out the five years.

15. Mr Cohen's careful (and seductive) argument that it has done so runs thus:

a) redundancy involves termination of employment;

b) it is well established in employment law that the acceptance of voluntary redundancy does not mean that there is not such termination, indeed ordinarily a dismissal;

c) therefore Mr Ali was dismissed;

d) dismissal involves preventing him from serving out his five years.

16. The classic statement of the employment law position in relation to entitlement to redundancy payments is found the judgment of Griffiths J in *Burton, Allton &*

Johnson Ltd v Peck [1975] ICR 193. The industrial tribunal had found that Mr Peck was entitled to a redundancy payment under the Redundancy Payments Act 1965. Under that Act, which introduced for the first time a statutory scheme of redundancy payments, such became payable to an employee who was dismissed by reason of redundancy, and by section 3(1) an employee was dismissed if and only if his contract was terminated by the employer. There was a statutory presumption that a dismissal was by reason of redundancy unless it was proved to have been for some other reason. Mr Peck, who had been off sick for a long time, was told by the employers that he would be made redundant if legally possible. He did not object; indeed was very willing. A little later he raised his position with his new manager. He was, so the majority of the tribunal found, told that there was nothing for him and that he was to be made redundant, and was sent home without work or pay and thus dismissed. On appeal, Griffiths J held that there was no basis for revisiting that finding of fact. The employers nevertheless contended that he had not been dismissed, because the parting of the ways was consensual. Griffiths J dealt with that contention in terms which have often been repeated and which recognised the reality of industrial relations and of schemes for redundancy payments, whether statutory or otherwise. He said this, at 198:

> "It must be appreciated that it is to be hoped that in the large majority of cases where a man is made redundant, it will be effected after discussions and where both parties are in agreement that that is the best course to take. In any large organisation one expects to find that there are consultations between management and unions to thrash out the whole redundancy situation, that the employees are then brought into the discussions and that the first to be made redundant are those who volunteer for it. One also hopes that before they are made redundant very serious attempts will have been made to have other employment ready for them. But the fact that all that is done [does] not prevent the dismissal, when it comes, being a dismissal within the terms of section 3(1)(a) of the Act of 1965."

17. It is plainly right that in many industrial situations, and especially in the better managed organisations, a redundancy will often be preceded by discussions with employees likely to be affected. It is also likely that, in situations of multiple rather than individual redundancy, either collective or individual negotiations will take place as to the selection of those who are to be let go. It is perfectly proper, indeed desirable, that those employees who are prepared to be selected, with whatever degree of willingness, should be encouraged to say so. The termination of the contract of employment which then ensues nevertheless takes place via a dismissal, and that dismissal is plainly "by reason of redundancy" whether the employee is enthusiastic or reluctant about his selection. Accordingly, such an employee qualifies for a redundancy payment. As in *Burton, Allton v Peck*, the contention that there is no dismissal but only a consensual parting of the ways is doomed to failure.

18. It does not, however, follow, that in every case of dismissal for redundancy the employer can be said to have "prevented" the employee from continuing to work for him so as to trigger the implied term of co-operation which must be read into the contract in the present case. Sometimes he will indeed do so. If, for example, the employee is told that ten redundancies are needed, and that it is proposed to select the ten most recent arrivals, of whom he is one, the fact that he accepts the near-inevitable and "volunteers" will not alter the reality that the employer has left him little or no choice. Subject to any possible argument that redundancy was unavoidable and the selection in some way compelled (for example by a collective agreement), such an employer has indeed prevented the employee from continuing to be employed. If there were an implied term for co-operation of the kind which there was in the present case, it would, in such a situation, be triggered. Conversely, if it became known that ten redundancies were being considered, and an employee who would not otherwise have been likely to be selected came forward to volunteer to leave, it could not be said that his continued employment had been prevented by the employer. In between these extremes, it is not enough to trigger such an implied term that the employers were willing to let the employee go if they were also willing to keep him; in such a state of mind they cannot be said to be preventing him from continuing his service.

19. It is true that in the present case the initial invitation to Mr Ali to consider applying for redundancy attached the information booklet which contained the general statement that the invitation to apply was being sent to those whose jobs "have become redundant as determined by the company". If that had meant, or even, perhaps, foreseeably had been understood to mean, that Mr Ali had no choice but to accept an inevitable dismissal, it might be possible to contend that the company had prevented him from completing his five years. If it had, for the reasons set out above, his subsequently accepting the inevitable would not alter this. But the judge's findings of fact, reached after hearing oral evidence and hearing Mr Ali examined and cross-examined, do not allow this conclusion. Mr Ali was not presented with a fait accompli which he could do nothing to resist. He knew that he had a free choice whether to apply or not for the redundancy package. He knew, on the basis of the previous practice of the company, that there was a good chance that if he declined to do so he would not be selected. He elected not even to ask whether he would be selected if he did not apply. He chose to opt for the package, no doubt because he had good prospects of another job, to which he then moved, because he had become disillusioned with his prospects with the company, and because the package was financially attractive. He would not, in fact, have been made redundant if he had not volunteered. To describe this process as preventing him from continuing his employment is simply not possible.

20. It follows that Mr Cohen's tempting argument summarised at para 14 above, whilst it can be accepted as to (a), (b) and (c), falls down at (d) on the facts of this case. The courts below did not have the advantage of his arguments, and this is not precisely how they analysed the case. To the extent that they did not confront the issue of whether a term was to be implied or not, or treated that as no more than a matter of intention, the Board respectfully takes a different view. But the substance of the decision in both

courts was that Mr Ali's claim failed because he had voluntarily left his employment. That went directly to the heart of the matter and in that they were quite right.

21. In those circumstances this appeal must be dismissed. Costs ought to follow the event unless either party lodges within 28 days of the delivery of this judgment written submissions seeking any other order; if such submissions are made the other party must respond in writing within a further 28 days.

LORD KERR: (dissenting)

22. The opportunity to study abroad must have been an enticing one for Mr Ali. To have his university fees paid for and to receive a monthly living allowance while he acquired a valuable further qualification had to be an inviting prospect. But it must also have been believed to be a distinct advantage for his employer. To have their employee acquire further qualifications which could then be deployed in the service of the company carried obvious rewards for the Petroleum Company. It would have a more capable employee, better able to carry out the work which the company undertook. The agreement which Mr Ali made with the respondent was therefore obviously for the benefit of both.

23. Not unreasonably, the company wanted to ensure that it was able to capitalise on its investment. Equally reasonably, Mr Ali would not have wanted to incur expenditure from his own resources for a project that would not have been feasible unless his employer gave him the opportunity. A condition that the allowance for living expenses would not be repayable if Mr Ali worked for the company for five years after his return was attractive to both. The underpinning of that arrangement must have been, however, that both sides would have been able and willing to fulfil the condition. Mr Ali would have clearly understood that he would have had to repay the loan if he decided not to continue working for the respondent. But the Petroleum Company would surely also have understood that if they made it impossible for Mr Ali to meet the requirement, they could not hold him to his obligation to repay.

24. It is important to focus on the terms of the notice which the company gave Mr Ali and other employees in October 1995. He was told that he was part of a "target population" that the company had in mind for redundancy. What was he to do? He would surely not have been minded to accept a proposal which had - at least - the appearance of inevitability. True it may be that no-one, who had not wished to be, had been made redundant in the past but this could hardly be a guarantee of the security of the appellant's employment in the long term. There had been, after all, two rounds of redundancy in 1989 and 1990 and the information imparted in October 1995 did not come with an assurance that those who did not want to be, would not be made redundant.

25. The appellant's reaction to the offer of redundancy is, in a sense, secondary to the main issue. This is whether there should be implied into the agreement about his degree studies a term that, in the event of his being unable, as a consequence of voluntary redundancy, to complete five years' further employment, he would not be required to repay the sum advanced for living allowance. But the appellant's decision to accept voluntary redundancy is certainly not irrelevant to that critical issue. It is quite clear that he did not expect to have to repay the loan in relation to his living allowance. That circumstance would have to be taken into account by the informed and reasonable bystander.

26. As Lord Hughes has said (in para 7), the test for the implication of a contractual term has recently been authoritatively restated in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742. That case reiterated the well-established principle that a term will be implied if it is necessary to give efficacy to a contract (or, as Lord Hughes pithily puts it, to make the contract work) or that its obvious good sense is such that, if it had been mooted at the time that the agreement was reached, both parties would have said, "yes, of course, that goes without saying". Lord Hughes suggests that both circumstances are underpinned by the notion that the implied term is necessary. That, I believe, depends on how one views the breadth of the concept of necessity. Strictly speaking, if one is driven to the conclusion that the parties, confronted by the question "what if", would instantly and unanimously respond with an identical answer, this is not so much a question of what is needed to make the contract work but more an instance of something that is irresistibly obvious.

27. The contract between the parties can, at least in a purely technical sense, "work" if the appellant is required to repay (or, more accurately, give credit for) the living allowances. An agreement which expressly stipulated that these would be repayable in the event that the employer found itself obliged to dispense with the employee's services within the five-year period would be a workable one, albeit not a conspicuously fair one. Of course, the fact that such an explicit proviso was not included in the agreement is, in itself, a consideration to be taken into account in deciding whether the term should be implied. For, as Bowen LJ observed in the well-known passage from *The Moorcock* (1889) 14 PD 64, 68 a term will be implied where "the law is raising an implication from *the presumed intention of the parties* with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have." (emphasis supplied). So, the fact that the employers in this instance did not conceive it necessary to include such a term must be taken as, at least, some indication of their likely reaction had they been asked what was to happen about the living allowances in the event that a redundancy situation affecting the appellant's continued employment arose before he was able to complete the further five years' employment.

28. The notion of obviousness, as opposed to the need for workability, as a basis for implying a contractual term emerges clearly from the observations of MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2KB 206, 227 where he said that,

"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying … if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"

29. Payment of the appellant's living allowances while he undertook his studies in America was, self-evidently, a significant matter for him. He had to separate from his family. To face the prospect of not only leaving his home but also having to meet those expenses himself would surely have operated as a considerable disincentive. If one envisages an officious bystander posing the question to the parties at the time that the agreement was reached (which, of course, is the critical moment at which a determination must be made as to whether a term is to be implied), "what is to happen if you cannot fulfil the requirement to work for five years", what would have been their response? It is not difficult to imagine that both would have instantly said, the living allowances will not be repayable. The agreement was, after all, premised on a mutual benefit for employee and employer materialising. Mr Ali would get an extra qualification and his employer would have the advantage of a more capable employee. The prospect that he might have to repay the living allowances would have been an obvious deterrent for Mr Ali. It is, to my mind, inconceivable that the employer would have said that the living allowances would have to be repaid if, *as a result of its actions*, Mr Ali found himself unable to fulfil the condition.

30. Of course, this is not a case of the employer forcing Mr Ali to forsake his employment. The question to be put by the supposed officious bystander must be reformulated to become. "what if, before he has the chance to complete his five years' further employment, Mr Ali is told that he is part of a targeted group for redundancy, and that there is no guarantee that, if he does not accept it, he will not be made redundant, and, in those circumstances, he decides that he should opt for redundancy, will he be required to repay his living allowance?" It is now known, of course, that he would not have been subject to involuntary redundancy, but to allow that consideration to enter the equation involves, in my opinion, introducing an inadmissible retrospective dimension to the question. The only legitimate way of deciding what the response of the parties would have been at the time of making the agreement is to address the question on the basis that, at the time the agreement was reached, Mr Ali was told that he might be a member of a targeted group for redundancy and that there was no guarantee that, if he did not opt for it, he would not have been made redundant nevertheless.

31. Framed in that way, it seems to me that the response of the parties - indeed the only reasonable response - would have been, "of course, he will not be required to repay the living allowance". If it had been otherwise, Mr Ali would not have left his family to go to Louisiana and his employers would have realised that they could not possibly have expected him to agree to such a hazardous prospect.

32. I would therefore allow the appeal and decide that a term should be implied into the agreement that Mr Ali is not required to repay the living allowance payments.