IN THE COURT OF APPEAL OF BELIZE, A.D. 2011

CIVIL APPEAL NO 39 OF 2010

SOCIAL SECURITY BOARD	**Appellant**
AND	
IDA HERRERA dba BELMOPAN CLEANING AND SANITATION SERVICES	**Respondent**

BEFORE:

The Hon. Mr Justice Sosa	**-**	**President**
The Hon. Mr Justice Morrison	**-**	**Justice of Appeal**
The Hon. Mr Justice Alleyne	**-**	**Justice of Appeal**

Darrell Bradley for the appellant
Dr Elson Kaseke for the respondent

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10 June 2011, 22 May 2012

SOSA P

[1] I concur in the reasons for judgment and orders proposed in the judgment of Morrison JA, which I have been privileged to read in draft. It needs to be added, in view of the lengthy delay in the delivery of this judgment, that, with his usual diligence and keen sense of duty, my learned brother passed me what was then his final draft judgment (but to which paras [43] and [44] have since had to be added), which I read and concurred in with all possible promptness, as long ago as the

October 2011 sitting of the Court. Most regrettably, however, delays (caused primarily by factors outside not only his control but also mine) subsequently crept in.

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SOSA P

MORRISON JA

Introduction

[2] The appellant is a statutory body incorporated under the provisions of the Social Security Act and the respondent is engaged in the business of providing cleaning and janitorial services.

[3] By a written agreement made on 1 July 2009 ('the contract') the respondent agreed to provide cleaning and janitorial services at the appellant's head office in Belmopan, on the terms and conditions set out in the contract. By written notice dated 4 February 2010, the appellant purported to terminate the contract, pursuant to clause 19 thereof ('clause 19'), with effect from 8 February 2010. In lieu of the one month notice period stipulated for by clause 19, the appellant paid the respondent the sum of $5,883.37.

[4] Dissatisfied with this outcome, the respondent sued the appellant for damages for breach of contract. The appellant filed a defence denying that it had breached the contract and asserting that, in any event, it could not be in breach of contract because, under clause 19, it was entitled to terminate it, without cause, upon the giving of 30 days notice in writing to the respondent.

[5] Immediately following the filing of its defence, the appellant applied to the court for summary judgment against the respondent, pursuant to rule 15.2 of the Supreme Court (Civil Procedure) Rules ('the CPR') or, alternatively, an order striking out the respondent's claim, pursuant to rule 26.3(1) (b) and (c) of the CPR. In a decision given orally on 23 September 2010 and subsequently reduced to writing in a judgment dated 18 November 2010, Hafiz J dismissed both limbs of this application. This is the appellant's appeal from that decision and the single issue that arises on the appeal is whether the learned judge was correct in her conclusion that, on the material before her, the case for summary judgment had not been made out and that there were issues to be ventilated at trial.

The contract

[6] The term of the contract was for a period of one year, from 1 July 2009 to 30 June 2010. It was expressly provided that "all cleaning and janitorial services shall be performed with due diligence and efficiency and in accordance with accepted technologies and practices used in the cleaning industry" (clause 4), and the respondent was required to remedy promptly any incomplete or unsatisfactory work (clause 5).

[7] Clause 16, the meaning and intent of which assumed great significance before the judge and in the appeal itself, provided as follows (the appellant is described in the contract as 'the Board' and the respondent as 'the Independent Contractor'):

> "The Independent Contractor agrees to cooperate with and abide by the Board's grievance procedures in resolving any grievances related to the provision of these cleaning and janitorial services. In this regard, the Board shall bring to the attention of the Independent Contractor or his appropriate representative any complaints involving the cleaning and janitorial services and the Independent Contractor shall in accordance with its regular procedure, investigate such complaints and use its best efforts to resolve them in a fair and equitable manner. The Independent Contractor agrees to notify the Board promptly of any

> action taken or proposed with respect to the resolution of such complaints and the avoidance of similar complaints in the future."

[8] The respondent undertook to perform cleaning and janitorial services in accordance with "the highest standards of professional and ethical competence and integrity" (clause 18) and clause 19 provided for termination of the contract as follows:

> "This Agreement may be terminated by either Party without cause upon at least thirty (30) days written notice prior to the term of this Agreement."

[9] Additionally, the appellant was given (by clause 20) the right to terminate the contract immediately (i) upon the suspension by the respondent of the provision of cleaning and janitorial services under the contract; or (ii) failure by the respondent to comply with any of its obligations under the contract. The detailed scope of work under the contract was incorporated in an annex to the contract (annex 1).

The pleadings

[10] In her statement of claim, the respondent referred to clause 16 and to the various complaints set out by the appellant in the letter of 4 February 2010. This letter showed, it was pleaded, that the termination of the contract by the appellant was for cause, but that the respondent had not been given the opportunity provided for by clause 16 to address the appellant's complaints. In para. 6 of the statement of claim, the respondent stated the following:

> "Instead of giving the Claimant an opportunity to investigate and resolve such complaints as required under the Contract, the defendant, in breach of the Contract, unilaterally terminated the Contract under clause 19…which provided for termination without cause upon giving thirty (30) days written notice."

[11] The respondent claimed damages for breach of contract in respect of the unexpired portion of the contract, together with interest.

[12] In its defence, the appellant pleaded that it had complied with the grievance procedure in section 16 "either completely or substantially" (para. 5) and maintained that its termination of the contract by the letter of 4 February 2010 was therefore not a breach of contract. Further, that it having complied with the grievance procedure and the respondent having failed or refused to rectify the matters complained of, the appellant "was immediately entitled to terminate the Contract in accordance with Clause 20" (para. 9). In the alternative, the appellant pleaded as follows:

> "Furthermore and in any event, the Defendant could not be in breach of contract because the Defendant was entitled to terminate the Contract upon the giving of thirty days written notice to the Claimant as provided for in Clause 19 of the Contract, which Clause provides for termination without cause, and the Defendant paid the Claimant the sum of $5,883.37, which sum is equivalent to the payment for the notice period. By virtue of the averments contained in this Paragraph the Defendant was contractually entitled to terminate the Contract in the manner in which it did."

[13] Finally, as regards the damages claimed by the respondent, the appellant again denied that it had breached the contract and that any loss or damage had been sustained by the respondent.

The evidence

[14] Hafiz J had before her two affidavits, one sworn to by Ms Leonora Flowers (on 29 April 2010) on behalf of the appellant and the other sworn to by the respondent herself (on 29 June 2010).

[15] In her affidavit, Ms Flowers stated that, in compliance "with the terms of the grievance procedure", the appellant gave notice to the respondent, both orally and in writing, "of its dissatisfaction with the quality of service delivery" provided by her

(para. 8). She exhibited what appeared to be an internal memorandum dated 20 January 2010, which set out details of various areas of dissatisfaction. Although Ms Flowers referred to this memorandum as one "detailing some of the correspondence" between the respondent and the appellant, it does not appear from its actual terms that it was in fact directed to the respondent. Ms Flowers also referred to a joint inspection of the appellant's premises, during which [the appellant] brought to the attention of [the respondent] and pointed out specific examples of the "poor performance" of the respondent and asked her "to improve the quality of service delivery" (para. 9). Ms Flowers also exhibited to her affidavit an internal 'cleaning summary report', dated 13 July 2009, in which various other areas of dissatisfaction with the respondent's services were identified. Again, it does not appear from this report that it was either directed to the respondent or brought to her attention.

[16] Ms Flowers' conclusion on the performance issues was that, despite having undertaken to address the complaints which had been brought to her attention, the respondent had "failed or refused to address the [appellant's] complaints in a satisfactory manner", thus requiring the appellant to make further complaints to the respondent (para. 10). The appellant's continued concerns with the respondent's performance of the contract were, Ms Flowers stated, documented in the appellant's letter of termination dated 4 February 2010, which read as follows terms:

> "Dear Ms Herrera:
>
> I refer to service Contract Number 2009/36 dated July 1, 2009 between Social Security Board and Ida Herrera of Belmopan Cleaning & Sanitation Services to provide cleaning and janitorial services for the Headquarters building.
>
> Kindly refer to Clause 11 of the aforementioned contract which reads: *The cleaning and janitorial services shall be subject to inspection at all times. The entire premises shall be maintained at a high level of cleanliness and hygiene acceptable to the Manager, Human Resources, Social Security Headquarters, Belmopan.*
>
> Management hereby express [sic] its dissatisfaction with the level of service received over the past months. These incidents were brought to your attention both verbally and in writing, as well as taking you on a walk through inspection. Despite these efforts, many complaints are still forthcoming from the staff and the level of service provided is of

grave concern to the Board since we are responsible for providing a clean and healthy working environment for our employees.

Furthermore, the contract was awarded at a cost including the provision of 3 Workers and 1 Supervisor, for which you informed us that you are the Contractor/Supervisor. It has come to our attention that since late November 2009, only 3 Workers have been providing services to the Board, as is evident from the security register that is required to be signed by your staff. This was also evident in the level of work carried out by your staff and when our office contacted you on the matter, you acknowledged and advised that you would rectify the situation. Although this was done in late January 2010, there is no improvement or consistency in the level of service provided.

Kindly be advised that notice is hereby served with effect from **February 8th, 2010** on the termination of your contract. Clause 19 of the aforementioned contract refers and reads: *This Agreement may be terminated by either Party without cause upon at least thirty (30) days written notice prior to the term of this Agreement.*

The Board hereby informs you that in lieu of the notice period, you will be paid the equivalent sum for the thirty (30) days; therefore, your services are no longer required after **February 5th, 2010**.

Your cheque for **$5,883.37** less taxes due will be deposited to your account on Monday, February 8th, 2010."

[17] In her affidavit, the respondent referred to the 4 February 2010 letter of termination, with the comment that she did not know what was meant by the reference to "these incidents" (at para. 3 of the letter), or what was the nature of the complaints which were said to have been "still forthcoming from the staff". The respondent complained that these complaints were never identified to her, as required by clause 16 and that, by terminating the contract, she had been prevented from initiating her own procedures for dealing with complaints "promptly and in a manner which was fair to both parties" (para. 11). The appellant had not given her time "to investigate its complaints and resolve them in a fair and equitable manner" (para. 13).

[18] The respondent specifically denied receiving or being made aware of the memorandum dated 20 January 2010, or of the cleaning summary report dated 13 July 2010. However, the respondent did make reference to one complaint which she had received (relating to the number of persons deployed by her to provide cleaning

and janitorial services) and of the steps she had begun to take to remedy this situation when the appellant prevented her from completing the process by sending her the 4 February 2010 termination letter. The respondent contended finally that the appellant's termination of her contract was "for cause" and that the appellant ought therefore to have proceeded, if it wished to terminate it, under clause 20(ii) of the contract.

Hafiz J's judgment

[19] In her written judgment, the learned judge considered that, on the affidavit evidence, there were factual disputes surrounding the cause of termination of the contract and that, "where there are disputes as to facts this has to be resolved at trial" (para. 40). Further, despite the fact that the appellant in its letter dated 4 February 2010 purported to terminate the contract pursuant to clause 19, the contents of the letter showed the appellant to be expressing dissatisfaction with the quality of service being provided by the respondent. Thus, the judge concluded, the termination was therefore for cause, although in terminating the contract "the appellant relied on the no cause provision" (para. 43). In the case of a termination for cause, it would be necessary for the appellant to show that there had been a failure by the respondent to comply with the relevant contractual provisions, including clause 16, which set out the required grievance procedures. The contract had two termination clauses and, "when there is cause to terminate", the grievance procedure must be followed" (para. 45). Finally, issues such as bad faith and "abuse of contracting discretion", which had been raised on behalf of the respondent, were matters for trial, as was the question whether the respondent was entitled to damages above the amount already paid in lieu of one month's notice.

The grounds of appeal and the submissions

[20] The appellant relied on three grounds of appeal, which were as follows:

> "(1) The Learned Judge was wrong in law to refuse to grant the Appellant's Application for Summary Judgment or, alternatively, to strike out the Respondent's claim having regard to the fact

that the Appellant was not or could not have been in breach of contract.

(2) The Learned Judge was wrong in law in failing to make a finding that at all material times the Appellant followed the terms of the contract and that the Appellant validly terminated the contract in accordance with the terms thereof.

(3) The Learned Judge was wrong in law in failing to make a finding that in any event and even if there was a breach of contract the Appellant cured the said breach by paying the Respondent an amount of notice and in such circumstances it was an abuse of process for the Respondent to bring such a claim because such a claim would be a waste of the court's resources."

[21] For the appellant, Mr Bradley put his case in this way. The appellant was entitled to terminate the contract by notice under clause 19 without cause. This it did by its letter dated 4 February 2010 and by paying the respondent in lieu of the stipulated notice period. Although there may be a factual dispute surrounding the question whether the grievance procedure provided for by clause 16 was followed, nothing turns on it in this case, the appellant having, as it was entitled to do, bypassed the grievance procedure altogether by terminating the contract upon 30 days' notice, in accordance with clause 19. But in any event, even if the appellant did breach the contract, any damages payable to the respondent are limited by law to the period of notice and the payment already made by the appellant to the respondent in lieu of notice was sufficient to cure any defect in the termination.

[22] For the respondent, Dr Kaseke reminded us at the outset that this is an appeal from the exercise by the judge of a discretionary power and that, on long established principle, this court should accordingly be reluctant to intervene, unless it can be shown that the judge was plainly wrong. In this case, the appellant having predicated its case on two alternatives, firstly, that it did exhaust all the grievance procedures under the contract, and secondly (and alternatively), that it terminated the contract under clause 19 without cause, as it was entitled to do, a proper

resolution of the issues in the case could only be achieved by a trial, and not by an order for striking out or for summary judgment. The judge was therefore correct, in the light of her finding that "there are factual disputes surrounding the cause of termination of the contract…" (para. 39), in her determination that these issues should be resolved at trial. In any event, clause 19 is not open ended, but is qualified by considerations of good faith, fair dealing and abuse of contractual discretion. Finally, as regards the issue of damages, Dr Kaseke submitted that it does not necessarily follow that, after the evidence at the trial is all in, the court will automatically find that the damages to which the respondent is entitled are limited to the amount already paid in lieu of notice.

[23] Mr Bradley in a brief reply pointed out that matters such as good faith and fair dealing and the like had not been pleaded by the respondent, neither were any special damages claimed. The judge had therefore been "plainly wrong" to consider that these were issues to be resolved at trial.

[24] In support of these submissions, we were referred by both counsel to a number of authorities, some of which it will be necessary to examine in due course.

The rules

[25] The appellant's application in the court below was made pursuant to rules 15.2 (b) and 26.3 (1) (b) and (c) of the CPR. Rule 15.2 provides as follows:

> "15.2 The court may give summary judgment on the claim or on a particular issue if it considers that -
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue."

[26] Footnote 48 to this rule explicitly links it to rule 26.3, which provides, in so far as it is relevant to the instant case, as follows:

> "26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -
>
> (a) …
>
> (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim.
>
> (d) …"

The basis of summary judgment

[27] Both Mr Bradley and Dr Kaseke referred us to **Swain v Hillman [2001] 1 All ER 91**, an early decision of the Court of Appeal of England and Wales on the scope of the Civil Procedure Rules 1998, upon which the Belize CPR were modelled. In that case, Lord Woolf MR (who, as Lord Woolf CJ, had been the architect of the far-reaching procedural reforms to which the CPR gave expression) said this (at page 92):

> "Under Part 24.2 [our 15.2], the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of being successful or succeeding' do not

need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success".

[28] Lord Woolf MR went on to observe that, by making an order for summary judgment in an appropriate case, the court gives effect to the overriding objectives of the rules (rule 1.1 (1)), by saving expense, achieving expedition and by avoiding "the court's resources being used up on cases where this serves no purpose". But there are, as Lord Woolf MR went on to indicate (at page 95), limits to this power:

> "Useful though the power is under Part 24, it is important that it be kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at trial…the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

[29] Judge LJ (as he then was) summarised the position in this way (at page 96):

> "To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence the discretion in the court to give summary judgment against a claimant, but limited to those cases where, on the evidence, the claimant has no real prospect of succeeding. This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court."

[30] In the light of these authoritative dicta, I would therefore accept that the appropriate test for the court on an application for summary judgment under rule 15.2 is to determine whether, on the material available to the court at that stage, the party against whom it is sought has a realistic, as opposed to a fanciful, prospect of success. It she has no such prospect, then the court should use its power of disposing of the matter summarily. However, in considering such an application, the court should be mindful of the seriousness of the step of disposing of a claim or a defence without a trial, and it should decline to do so where the material discloses that there are issues which should be investigated at a trial, after all its attendant preliminaries such as witness statements, disclosure and inspection of documents and the like, have been completed.

[31] As regards rule 26.2(b), the meaning of the phrase "abuse of the process of the court" is not defined in the rules. However, the editors of Civil Procedure (2007, volume 1, para. 3.4.3) refer to Lord Bingham of Cornhill's definition of the phrase in another context (in **Attorney General v Barker [2000] 1 FLR 759, para. 19**), as "a use of the court process for a purpose or in a way significantly different from its ordinary and proper use", and suggest that "The categories of abuse of process are many and are not closed". It seems to me that, while a claim or defence that is susceptible to an order for summary judgment may in some cases also be exposed to striking out as an abuse of the process of the court, it need not necessarily be so in all cases and it will therefore be necessary to consider the circumstances of each case.

Discussion – the instant case

[32] Put starkly, the question for decision in this case may be formulated in this way: does the respondent have any real prospect of success in her claim against the appellant for damages for breach of contract, based on the appellant's alleged failure to comply with the grievance procedures set out in clause 16 of the contract, in the light of the appellant's exercise of its right to terminate the contract without cause by notice under clause 19?

[33] In approaching this question, it is necessary to bear in mind, as Dr Kaseke very properly reminded us, that the powers given by rules 15.2 and 26.3 are discretionary powers. In such cases, it is well established that this court will not interfere with the judge's exercise of her discretion unless it is satisfied either that she exercised her discretion in accordance with a wrong principle or that her decision is so plainly wrong that she must have exercised that discretion wrongly (see per Lord Scarman in **B v W (Wardship Appeal) [1979]1 WLR 1041, 1055** referred to by Lord Fraser in **G v G [1985] 1 WLR 647, 652**, to which we were referred by Dr Kaseke).

[34] On the issue of termination of contracts in general, the editors of Chitty on Contracts (30th edn, volume 1, para. 22 – 048) state the following:

> "The parties may expressly provide in their contract that either or one of them is to have an option to terminate the contract. This right of termination may be exercisable upon a breach of condition by the other party (whether or not the breach would amount to a repudiation of the contract), or upon the occurrence or non-occurrence of a specified event other than breach, or simply at the will of the party upon whom the right is concerned. In principle, since the parties are free to incorporate whatever terms they wish for the termination of their agreement, no question arises at common law whether the provision is reasonable or whether it is reasonable for a party to enforce it, unless the situation is one in which equity would grant relief against forfeiture."

[35] It seems clear from the authorities that the true nature of, and any limitations on, the right of termination given by the contract to the appellant in the instant case must be determined by reference to the terms of the contract itself. This proposition derives clear support from the judgment of the Privy Council on appeal from this court in **Attorney General of Belize and others v Belize Telecom Ltd and anor [2009] 2 All ER 1127**, in which, delivering the judgment of the Board, Lord Hoffmann cited with approval the following passage from the earlier judgment of Lord Pearson in **Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 WLR 601, 609**:

> "[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

[36] I therefore consider that the answer to the question posed by this appeal must therefore be sought primarily as a matter of construction of the contract itself. In this regard, it seems to me that the terms and structure of the contract do not yield a ready answer to the question. On the one hand, clause 16, prescribes the procedure to be followed "in resolving **any** grievance related to the provision of these cleaning and janitorial services" (my emphasis), while on the other hand, clause 19 provides, on the face of it without qualification, that the agreement may be terminated by either party without cause upon at least 30 days' written notice. Neither clause is made subject or subordinate to the other and yet, standing separately, they appear to pose something of a contradiction. For it is not at all clear whether the parties intended that clause 16, which appears to require resort to the grievance procedures in all cases of dissatisfaction with performance, should be capable of being "bypassed" by resort to clause 19, as Mr Bradley submitted, or that, despite the apparently unqualified right of termination given to either party by clause 19, it is not applicable where one party in fact posits a cause as the basis for termination, as the judge in effect held.

[37] In **Gunton v Richmond-upon-Thames London Borough Council** [**1980] 3 WLR 714**, to which we were referred by Mr Bradley, a dismissed employee's appointment was stated to be terminable by his employer by one month's notice in writing, but was also subject to regulations which were subsequently adopted and which prescribed a procedure for the dismissal of employees on disciplinary grounds. These regulations formed part of the plaintiff's contract of employment. By a majority, the Court of Appeal held (Buckley and Brightman LJJ, Shaw LJ dissenting), that the effect of the incorporation of the disciplinary regulations into the plaintiff's contract of employment was that the plaintiff could not lawfully be dismissed on a disciplinary ground until the prescribed procedure had been carried out and his purported dismissal by one month's notice was accordingly wrongful. Brightman LJ stated the position as follows at (page 474):

> "What then is the legal position if a notice of requisite contractual length is given to determine an employee's contract of service, but such notice is the result of a recommendation improperly made and upon which the defendant could not lawfully act? The plaintiff has suffered a wrong, and so far as damages can do so, he must be put in the same position as if the wrong had not been done. To assess the damages, the invalid notice should be disregarded. It was a nullity. It should be assumed that the council gave, as they could have done, a valid one month's notice at the earliest permissible date. It was argued that a valid one month's notice could have been given on the same day as the void one month's notice, but the proposition would make a complete nonsense of the protection which purports to be afforded by the disciplinary code, and I reject the submission. The council were intending to dismiss on a disciplinary ground. It would be inconsistent with the terms of the contract for the council to be treated as entitled to give a month's notice until the day when the disciplinary procedures could have been completed."

[38] The issue in **Gunton** was obviously resolved on the basis of the terms of the contract itself and it cannot therefore be taken as an authoritative indication of how the seeming contradiction in the contract in the instant case should be resolved. But

it is a clear example of a case in which, despite the apparently unqualified right of the employer to dismiss by the giving of the appropriate period of notice, that right was nevertheless held to be subject to the operation of some other term of the employee's contract of employment.

[39] On the appellant's view of the matter in the instant case, the disputed factual issues are irrelevant, given the terms of clause 19, while on the respondent's view, the right given by clause 19 is qualified by the existence of those very issues. This, it seems to me, is not an issue that can be resolved at this stage of the proceedings. Put in the language of rule 15.2 itself, it cannot be said at this stage, in my view, that the respondent has no real prospect of succeeding in her claim. I make no comment on Mr Bradley's obviously correct observation that some of the issues raised by Dr Kaseke in this appeal, such as good faith and fair dealing, ought to have been pleaded, as it seems to me that that will be a matter for Dr Kaseke and, perhaps, the trial judge to consider in due course.

[40] The question of damages, in my view, attracts a similar consideration. It is a fact that it is usually the case, as Mr Bradley submitted, on the analogy of a breach of an employment contract, that the measure of damages for breach of a contract terminable by notice will normally relate to the period which would have had to elapse before the defendant could lawfully have terminated the contract (see **Gunton**, per Brightman LJ, at page 473). However, as Dr Kaseke also submitted, given the compensatory objective of damages, it does not necessarily follow that, after all the evidence has been heard at the trial, the damages to which the respondent may be entitled in this case, in the event that she is successful on liability, will automatically be limited to the amount payable for the notice period (as regards the traditional function of damages, see Halsbury's Laws of England, 4th edn Reissue, Vol. 12(1), para. 941). In these circumstances, I cannot therefore say that the judge's conclusion that "the issue of damages should be ventilated at trial" (para. 47) was an egregious exercise of her discretion.

[41] I would therefore conclude that no basis has been shown in this case for this court to interfere with Hafiz J's exercise of her discretion to refuse to grant summary judgment, pursuant to rule 15.2. Given that there was no allegation of any separate

conduct amounting to an abuse of the process of the court, neither is the learned judge's refusal to grant the striking out application pursuant to rule 26.3(1)(b) open to challenge in this court.

Conclusion

[42] For these reasons, this appeal must in my view be dismissed and the order of the judge below confirmed, with costs to the respondent to be agreed or taxed.

[43] I have been authorised by Alleyne JA, who is no longer a member of the court, to say that he agrees with this judgment and concurs in the order I have proposed at para. [42] above.

[44] And finally, I must apologise for the inordinate delay in delivering this judgment, a draft of which was in fact completed as long ago as the end of October 2011. As is often the case in such matters, there are a number of reasons for the delay, but I cannot possibly proffer any of them to the parties and counsel in the case as an excuse in the circumstances.

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MORRISON JA