JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 88/08

BEFORE: THE HON. MR JUSTICE COOKE, J.A.
THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE MORRISON, J.A.

BETWEEN	UNITED GENERAL INSURANCE COMPANY LIMITED	APPELLANT
AND	MARILYN HAMILTON	RESPONDENT

Mr Conrad George instructed by Hart , Muirhead & Fatta for the appellant

Mr Paul Beswick instructed by Ballentyne, Beswick & Co. for the respondent

19, 20 January and 15 May 2009

COOKE, J.A.

I have read the draft judgment of Morrison J.A. I agree with his reasoning and conclusion. I wish to add nothing further.

HARRISON, J.A.

I agree.

MORRISON, J.A.

Introduction

1. This is an appeal from an order made by Thompson-James J on 29 July 2008 refusing to strike out the respondent's statement of case or to strike out certain paragraphs of the respondent's particulars of claim or to grant summary judgment in favour of the appellant on her claim.

2. The respondent was employed to the appellant with effect from 10 January 2000 as Information Systems Manager pursuant to terms and conditions of employment set out in a letter from the appellant to the respondent dated 16 December 1999 ("the contract"). The contract provided that, upon her appointment as a permanent member of the appellant's staff at the end of the required three month probationary period, a minimum of one month's notice would be required to terminate the respondent's employment.

3. In addition to the usual terms and conditions as to salary and other monetary benefits, leave and the like, the contract provided, among various items described as "fringe benefits", for pension benefits in the following terms:

> "Group Pension Scheme with obligatory contribution of 5 percent of salary with the option to contribute an additional 5 percent. The Company makes a contribution of 5 percent."

4. By letter dated 28 July 2006, the respondent's employment was terminated by the appellant with immediate effect on the ground that it had come to the appellant's attention that she "had knowingly put the organisation at risk by introducing pirated software into the environment." It is common ground that, save for a disputed amount of $40,000.00, the respondent was paid on termination one month's net emoluments in lieu of notice. As a result, the respondent issued proceedings against the

appellant on 12 March 2007 challenging the stated reason for terminating her employment and claiming damages for wrongful dismissal.

The pleadings

5. As the application which was before Thompson-James J asserted that the respondent's pleadings could not sustain any cause of action against the appellant, it is necessary to set out in full paragraphs 9-20 of the particulars of claim:

> "9. Pursuant to the contract of employment between the parties, the defendant made certain contributions to the pension scheme operated by the defendant for its employees and which contributions were made during the tenure of the claimant's employment and for and on behalf of the claimant's pension account.
>
> 10. The aforesaid contributions were made for the benefit of the claimant and for her pension account only and the defendant was obliged on termination of the claimant's employment to pay over the total of the said contributions and the claimant's contributions to the claimant together with any interest or investment proceeds accumulated therefrom.
>
> 11. Further and/or in the alternative the claimant will say that the defendant has breached an expressed condition in the agreement for services evidenced by the letter of employment dated the 16th day of December, 1999, and stated as follows:
>
> > *As Fringe Benefits, the Company provides:*
> >
> > *(3) Group Pension Scheme with obligatory contribution of 5 percent of salary with the option to contribute an additional 5 percent.*

The Company makes a contribution of 5 percent.

12. The aforesaid condition meant and was intended to mean that the employee being the claimant, was guaranteed the contribution stated therein by the defendant, in consideration of her being obliged to contribute to the defendant's pension fund.

13. The defendant has failed and/or refused to pay over the proper amount due to the claimant from its pension scheme and has instead paid to the claimant only the amounts attributable to her contributions which were deducted directly from her salary, and is therefore in breach of the condition in the agreement for services requiring the defendant to provide a stated contribution payable to the claimant's pension enrollment fund and the defendant and its pension fund has been unjustly enriched at the expense of the claimant by the defendant's refusing to pay over the defendant's pension contribution intended for the benefit of the claimant.

14. The defendant will say that her contract of employment does not provide for any specified period of notice, and in lieu thereof, a reasonable period of notice for an employee of her standing is 36 months.

15. At the time of her termination, the claimant was *57* years of age, and in excellent health. The claimant had reasonable expectations of working with the defendant until her retirement at age *65* and would therefore have been able to earn income at increasing rates for at least another 8 years, estimated at $30,000,000.00 after taxes and statutory deductions.

16. Furthermore, the claimant's position was one of significant responsibility and accountability. The action of the defendant in wrongfully dismissing the claimant has irreparably tainted

the claimant's personal and job related credibility and therefore created a significant disadvantage for the claimant in obtaining alternative employment, particularly in an employment market for senior Computer Information technology professionals and manager, which is of limited scope in the Island. The loss of credibility is exacerbated by the fact that the claimant is of advanced working age, and also had spent in excess of 5 years with the defendant at the time of her termination, giving rise to an immediate assumption by both prospective employers and other persons in the industry, that the claimant had been fired for dishonest behaviour of some kind.

17. The claimant will say that the manner and circumstances of her dismissal were in breach of the implied term of trust and confidence in the agreement for employment between the parties. At all material times, the claimant reposed in the defendant, the confidence and trust which was expected and implied in the relationship of master and servant, and relied upon the defendant not without reasonable and proper cause to conduct itself in such a way as to cause distress, anxiety and concern to the claimant and/or humiliate the claimant before her peers or other employees and/or injure the claimant's reputation as a manager and as a person who could be trusted with the management of corporate matters of importance, and/or cause damage to the claimant.

18. The claimant has suffered from anxiety and depression as a result of the wrongful dismissal, and further has lost confidence in her ability to function effectively and efficiently as a manager in a highly technical and technologically mobile area of commerce.

19. Further and/or in the alternative the claimant will say that her wrongful dismissal from the post of Information Systems Manager was effectively

> an imputation of dishonesty in the exercise of her job related functions as Information Systems Manager, which had the effect of an importation of obloquy among the commercial community of the Island, and as a result permanent loss and damage. The action of the defendant has therefore effectively slandered the reputation and character of the claimant, causing her permanent loss and damage.
>
> 20. The claimant has been unable to secure alternative employment since her termination from the defendant despite continuing attempts. The claimant will give credit to the defendant for any alternative employment obtained during the period of 5 years from the date of her termination."

6. The appellant filed a defence in which it reiterated its stated reason for dismissing the respondent and, in specific response to those paragraphs of the particulars of claim set out above, pleaded as follows:

> "8. As to paragraph 8, the Defendant will say that although it was entitled to accept the Claimant's repudiatory breach of contract, to treat the contract as discharged and, accordingly, to dismiss her summarily without compensation, the Defendant (without prejudice to the above position) paid to the Claimant a sum equivalent to her net emoluments of employment for her notice period, specified in her contract of employment as being one (1) month.
>
> 9. Save that the Defendant will say that Paragraph 9 is irrelevant to any cause of action available to the Claimant (and is therefore liable to be struck out, and the Defendant will apply for an order striking it out) such paragraph is admitted.

10. Paragraph 10 discloses no cause of action; as pleaded in paragraph 9, of the Particulars of Claim, pension contributions were paid by both the Claimant and the Defendant to the pension scheme. No claim in respect of such contributions lies against the Defendant, and the Defendant will apply to strike out Paragraph 10.

11. Paragraphs 11, 12 and 13 disclose no cause of action in law, and the Defendant will apply to strike them out.

12. The Defendant denies Paragraph 14, and avers that the Claimant's contract of employment embodied in the letter to her from the Defendant dated 16 December 1999, includes a provision that (emphasis added):

> "During the three (3) months probationary period, neither party will be required to give notice of termination. However, should your probation be extended beyond three months the required notice period is two weeks as stipulated by law. ***Once appointed a minimum period of one month will be required.***"
>
> Accordingly, the Claimant was entitled to one month's notice of termination of employment. In the premises (if, which is denied, the Defendant was not entitled to dismiss the Claimant summarily) the Claimant is not entitled to notice of termination, reasonable or otherwise, in excess of such period.

13. Paragraphs *15,* 16, 17 and 18 give rise to no cause of action, and are liable to be struck out, and the Defendant will apply to do so.

14. As to paragraph 19, the Defendant will say that it gives rise to no cause of action and is liable to be struck out; and further or alternatively, that it is scandalous and

> embarrassing and ought to be struck out, and the Defendant will apply to do so.
>
> 15. Paragraph 20 gives rise to no cause of action and is liable to be struck out, the Defendant will apply to do so."

The application for court orders

7. As expressly foreshadowed by the defence, the appellant immediately filed notice of application for the following orders from the court:

> (i) That the claimant's claim be struck out, pursuant to Rule 26.3 of the Civil Procedure Rules 2002 ("the CPR").
>
> (ii)Alternatively, that paragraphs 9-13 and 15-20 of the particulars of claim be struck out.
>
> (iii) In the further alternative, that summary judgment on the claim be granted to the defendant, pursuant to Rule 15.6 of the CPR.

8. Thompson-James J heard the application on 28 May, 9 June and 18 July and in a written judgment handed down on 29 July 2008 dismissed it in its entirety. The learned judge considered that the material before her and the submissions made on behalf of both sides indicated that there were triable issues in the case relating to the contract: the respondent's dismissal, "her remunerations to include her pension after the separation", the probable effect of the termination on her present position on the job market and "the defamation and slander issues". These were all matters, the judge concluded (citing with approval the decision of the Court of

Appeal in England in ***Swain v Hillman and Another*** [2001] 1 All ER 91), which required to be ventilated at trial.

The appeal

9. Dissatisfied with this result, the appellant filed the following grounds of appeal, restating in somewhat greater detail its position in the court below:

> "a. That the Learned Judge erred in finding that there are issues to be investigated and aired at trial.
>
> b. That the Respondent's/Claimant's statement of case should be struck out as it shows no reasonable grounds for bringing a claim. There is a valid contract of employment, embodied in the letter to the Respondent from the Appellant dated 16th December 1999 which provides for a one month notice period for termination, on which the Appellant also relies.
>
> c. The Respondent/Claimant has no cause of action, and as such, the statement of case is an abuse of process of the Court and it should therefore be struck out for the same reason stated in (b) above.
>
> d. Alternatively that the following paragraphs of the Respondent's/Claimant's Particulars of Claim should be struck out, for the following reasons:
>
> a) Paragraph 9 is irrelevant to any cause of action available to the Respondent/ Claimant;
>
> b) Paragraphs 10 to 13 disclose no cause of action against the Appellant/Defendant as

the Respondent/Claimant has shown no breach of the Appellant/ Defendant's contractual obligations under the contract of employment, the Appellant/Defendant having made the pension payments to the pension scheme, has no right at law to require their repayment, and cannot be sued in law for not having done so;

c) Paragraphs 15 to 18 disclose no cause of action;

d) Paragraph 19 gives rise to no cause of action; and further and alternatively, it is scandalous and embarrassing and does not detail the case against the Appellant/Defendant, as is required by Part 69 of the Supreme Court of Jamaica Civil Procedure Rules (2002); and

e) Paragraph 20 gives rise to no cause of action.

2) Alternatively, that the Court should order Summary Judgment on the claim as the Respondent/Claimant has no real prospect of succeeding on the claim."

The submissions

10. Mr Conrad George for the appellant made detailed written and oral submissions, which I hope I do no disservice by summarising as follows:

(a) The court has jurisdiction to strike out a statement of case or part thereof if it appears to the court that it is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings or that it discloses no reasonable grounds for bringing the claim (Rule 26.3 (b) and (c)).

(b) The court has power to give summary judgment on a claim or particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue (Rule 15.2).

(c) The remedy for wrongful dismissal is an award of damages and, since an employer may always give notice to terminate the contract of employment, the recoverable damages are capped by the emoluments that would have been earned in the notice period. (***Addis v Gramophone Co. Ltd*** [1908 - 1910] All ER Rep 1). The respondent having been fully paid her entitlements for the notice period, no further scope remains for damages for injured feelings, loss of reputation, difficulty in finding fresh employment, or the like.

(d) Part 69 of the CPR prescribes how defamation claims are to be brought and the claim in the instant case does not conform to the requirements of the rules.

(e) The appellant's obligation under the contract is to provide a group pension scheme, permit the respondent to become a member of it and to make its own contributions thereto. Thereafter the respondent's rights are derived from the trust instruments under which the pension fund is held and her recourse for any breach is to the trustees and not to the appellant or her employer. The appellant has not been shown to be in breach of its obligation to the respondent with regard to her entitlements under the pension scheme.

(f) The pleadings and the evidence disclose no cause of action against the appellant and/or the respondent has no real prospect of succeeding on the claim or on the issues against the appellant, with the result that Thompson-James J erred in declining to make the orders it sought.

11. Mr Paul Beswick, who appeared for the respondent in this court, as he had in the court below, contended that all the relevant issues had been satisfactorily dealt with by Thompson-James J in a proper exercise of her discretion and that her conclusion ought not to be disturbed.

12. On the wrongful dismissal aspect of the claim, Mr Beswick queried whether it was properly open to the appellant to place reliance at this stage on the notice provision of the contract, having not done so at the time of dismissal. In any event, he contended, the clear tendency of the modern authorities demonstrated that the traditional position (represented by ***Addis***) is under siege.

13. On the pension issue, Mr Beswick pointed out that there was no evidence that the pension arrangements were subsumed under any trust arrangements, with the result that the respondent's entitlements must remain a matter of pure contract as between the parties.

14. And finally, on the defamation claim, Mr Beswick, while conceding with his usual candour that the claim as originally filed did run afoul of Part 69 of the CPR in several respects, pointed to the fact that amended particulars of claim had since been filed (on 16 October 2008) which were now fully in compliance with the requirements of the rules.

The rules

15. Rule 15.2 of the CPR provides as follows:

> "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."

16. As the note to the rule itself shows, the power of the court under this rule is not dissimilar, and may be regarded as ancillary to the power under Rule 26.3 to strike out the whole or part of a statement of case disclosing no reasonable grounds for bringing or defending a claim. Both parties rely, as did the learned judge, on ***Swain v Hillman and Another*** [2001]1 All ER 91, a decision of the Court of Appeal of England and Wales on the scope of CPR Pt 24.2, which is the equivalent to our Rule 15.2. This is how Lord Woolf MR described the relationship between the English equivalents of our Rules 15.2 and 26.3:

> "There is a note to r 24.2 referring to r 3.4. Rule 3.4 makes provision for the court to strike out a statement of case, or part of a statement of case, if it appears that it discloses no reasonable grounds for bringing or defending a claim.
>
> Clearly, there is a relationship between r 3.4 and r 24.2. However, the power of the court under Pt 24, the grounds are set out in r 24.2, are wider than those contained in r 3.4. The reason for the contrast *in* language between r 3.4 and r 24.2 is because under r 3.4, unlike r 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim.
>
> Under r 24.2, 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 and defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC submits, they direct

> the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

17. Lord Woolf MR went on to observe that it was important "that a judge in appropriate cases should make use of the powers contained in [Rule 15.2]", as a means of giving effect to the overriding objective of the rules (Rule 1.1(1)) by saving expense, achieving expedition, avoiding misuse of the court's resources and generally promoting the interests of justice. However, Lord Woolf MR concluded:

> "Useful though the power is under Pt 24, it is important that it is 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 the trial. As Mr. Bidder put it in his submissions, the proper disposal of an issue under Pt 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."

18. I would respectfully accept this as the correct approach to the questions that arise on this appeal, though I think that it is also relevant to bear in mind Mr Beswick's reminder that we are here dealing with an appeal from the exercise of the judge's discretion, with which we ought not lightly to interfere, save where it is shown to have plainly been exercised on incorrect principles.

Wrongful dismissal

19. The bedrock of Mr George's submissions on this point is, of course, the much discussed decision of the House of Lords in ***Addis v***

Gramophone Co Ltd [1909] AC 488. The headnote to the report states the ratio decidendi of the case as follows:

> "Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment."

20. As Lord Steyn observed in ***Johnson v Unisys Ltd*** [2001] 2 All ER 801, 804, ***Addis*** "has had a restrictive impact on the damages which an employee may recover for financial loss actually suffered as a result of the manner of wrongful dismissal". As a result, the usual rule is that such damages "normally consist of the amount which the employee would have earned during the period of notice which the employer was legally obliged to give to bring the contract lawfully to an end" (Treitel's Law of Contract, 12th edition, paragraph 20-073). However, by statute in the United Kingdom, further compensation may be recoverable for unfair dismissal even where such notice is given (see paragraph 26 below).

21. ***Addis*** has been routinely followed and applied by this court (see, for example, ***Kaiser Bauxite Company v Cadien*** (1983) 20 JLR 168, ***Chang v National Housing Trust*** (1991) 8 JLR 295 and ***Cocoa Industry Board et al v Melbourne*** (1993) 30 JLR 242). If it applies to the instant case, as Mr George contends that it plainly does, then the respondent will be hard

put to establish a right to damages beyond the one month's pay in lieu of notice which she has already received.

22. But Mr Beswick maintains that ***Addis*** cannot now necessarily be regarded as sacrosanct, a view that is not without support in the modern authorities. In ***Malik & Mahmud v Bank of Credit and Commerce International (in liquidation) SA*** [1997] 3 All ER 1, the defendant bank had collapsed as a result of a massive and notorious fraud perpetrated by those controlling the bank. The claimants, two long-serving employees of the bank, were unaware of the fraud and had no part in it. After the defendant went into liquidation the claimants were made redundant by the liquidators and thereafter experienced difficulty in obtaining employment in the field of banking because of their association with the defendant. They therefore filed a claim for 'stigma compensation' arising from their having been put at a disadvantage on the labour market.

23. In a path-breaking decision, the House of Lords allowed their claim, holding that, in a proper case, financial loss in respect of damage to reputation might be recoverable for breach of a contract of employment. The House confirmed that there is an implied obligation of mutual trust and confidence in employment contracts and that an employer is accordingly under an obligation not to, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage that relationship.

24. Lord Nicholls, with whom Lords Goff and Mackay agreed, considered that ***Addis*** did not preclude the recovery of damages in a dismissal case where the manner of dismissal involved a breach of the implied term of trust and confidence which caused financial loss. This is how he put it (at page 9):

> "***Addis v Gramophone Co. Ltd*** was decided in the days before this implied term was adumbrated. Now that this term exists and is normally implied in every contract of employment, damages for its breach should be assessed in accordance with ordinary contractual principles. This is as much true if the breach occurs before or in connection with dismissal as at any other time".

25. The editors of McGregor on Damages (17th edition, paragraph 28 – 024) comment that the "great importance" of ***Malik & Mahmud*** lies in its recognition "for the first time that damages may be recoverable for financial loss arising from damage to an employee's reputation resulting from breach of the employment contract, thereby making an inroad upon the common understanding of ***Addis v Gramophone Co***". And in ***Johnson v Gore Wood & Co (a firm)*** [2001] 1 All ER 481, 517, Lord Cooke, who dissented in the actual result, observed in a passing reference to ***Malik & Mahmud*** and some of the relevant Commonwealth authorities that "I take leave to doubt the permanence of the Addis case in English law".

26. Less than five years after the decision in ***Malik & Mahmud, Addis*** would only escape direct assault in the subsequent decision of the House of Lords in ***Johnson v Unisys*** (supra) as a result of the conclusion of the majority that, because Parliament in the United Kingdom had (under Part X of the Employment Rights Act 1996) provided the dismissed employee with a limited remedy for the wrongful manner of his dismissal, it would be an improper exercise of the judicial function for the House to craft a judicial remedy in the light of the evident intention of Parliament that such claims should be heard by specialist tribunals empowered to provide a remedy restricted in application and extent. Were it not for this limitation, it is clear that the House might have been disposed to conceive of an implied term in the contract of employment that would allow an employee to recover damages for loss arising from the manner of his dismissal.

27. Both Lords Hoffman and Millett (with whom Lords Bingham and Nicholls agreed) thought that, had they felt able to do so, the development of a new implied term that a power of dismissal should be exercised fairly and in good faith would have been a preferable solution to seeking "to found the right on the implied term of trust and confidence which is now generally imported into the contract of employment" (per Lord Millett at page 825, and see also Lord Hoffman at page 818).

28. Lord Steyn in dissent, on the other hand, saw no reason why a claim for financial loss resulting from the manner of a wrongful dismissal should not be accommodated within the broader implied obligation of trust and confidence, the aim of which is "to ensure fair dealing between employer and employee, and that is as important in respect of disciplinary proceedings, suspension of an employee and dismissal as at any other stage of the employment relationship" (page 813).

29. ***Johnson v Unisys*** is therefore, though restricted in effect from the standpoint of actual decision, of great importance in its recognition of the change in the law's attitude to the contract of employment from a time when it was regarded as "an ordinary commercial contract terminable at will by either party provided only that sufficient notice was given in accordance with the terms of the contract "(per Lord Millett, at page 823). Instead, as Lord Hoffman observed (at page 815):

> "...over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality. Most of the changes have been made by Parliament. The Employment Rights Act 1996 consolidates numerous statutes which have conferred rights upon employees. European Community Law has made a substantial contribution. And the common law has adapted itself to the new attitudes, proceeding sometimes by analogy with statutory rights."

30. ***Eastwood and Another v Magnox Electric plc*** [2004] 3 All ER 991 arguably represents yet a further step in this process. In that case certain dismissed employees sued their former employers for negligence and breach of contract, claiming that they had suffered financial losses as a result of psychiatric illnesses caused by pre-dismissal unfair treatment. The House of Lords held that, while an employee's remedy for unfair dismissal was that provided by legislation, where, before his dismissal, he had acquired a cause of action for breach of contract or otherwise, that cause of action remained unimpaired by his subsequent unfair dismissal and the statutory rights to which that gave rise.

31. This provided a basis for distinguishing ***Johnson v Unisys*** and Lord Nicholls, who delivered the judgment concurred in by the majority (Lord Steyn delivered a separate concurrence), explained that while the loss "flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the ***Johnson*** exclusion area, the loss from the dismissal itself is within that area" (page 1002).

32. It will be seen from all of this that, although ***Addis*** has yet to be formally overruled in England, the concept of the employment contract as an ordinary commercial contract which it enshrines is plainly wearing thin. McGregor on Damages (supra) notes that the influence of ***Addis***, certainly in relation to claims for damages for injured feelings or reputation, "is now, and at the highest level, showing signs of weakening"

(paragraph 28.016). A similar movement in the cases is to be found in the Commonwealth (see the authorities referred to by Lord Cooke in ***Johnson v Gore Wood & Co,*** supra, at page 517).

33. In the instant case, the respondent specifically pleads a breach of an implied term of trust and confidence. Despite ***Malik & Mahmud*** and the subsequent cases, she may yet face some formidable hurdles in establishing this at trial. In the first place, apart from the obiter comments of Lord Nicholls in ***Malik & Mahmud*** (at page 10) and ***Johnson v Unisys*** (at page 803) and the sustained assault by Lord Steyn on ***Addis*** in his judgments in both those cases and in ***Eastwood v Magnox Electric***, there has not been uniform support for the extension of the implied term of trust and confidence to a manner of dismissal case, which this case plainly is. Secondly, any development of a new implied term that the power of dismissal will be exercised fairly and in good faith (the possible solution favoured by Lords Hoffman and Millett) will still have to overcome the obstacle of ***Addis*** itself, as a decision of the House of Lords that has withstood the test of a hundred years, and the fact that it has readily been followed and applied in this jurisdiction.

34. However, these difficulties notwithstanding, I do not think it can be said that, applying the language of Rule 15.2, the respondent "has no real prospect of succeeding on the claim or issue". Nor can I say, adopting Lord Woolf MR's formulation in ***Swain v Hillman*** (at page 92) that her

prospects of success are no more than "fanciful". For instance, while the Industrial Disputes Tribunal may, in cases of industrial disputes within its jurisdiction, order reinstatement or compensation if it finds that the dismissal of a worker is "unjustifiable" (Labour Relations and Industrial Disputes Act, section 12(5)(c)(i) and (ii)), there is no comprehensive unfair dismissal legislation in Jamaica, such as that which posed what Lord Nicholls characterised as "an insuperable obstacle" to a successful claim for damages arising out of the manner of dismissal in ***Johnson v Unisys*** (page 803). This point may, arguably, also admit of the opposite proposition, which is that by providing a remedy for unjustifiable dismissal to a limited category of workers, the legislature in Jamaica must be taken to have considered and rejected extending it beyond that category. This is itself an indication, in my view, that the question of whether it is open to our courts to develop the law in this area by implying a suitable term in the contract of employment is, to borrow from Lord Hoffman this time, "finely balanced" (***Johnson v Unisys***, page 819).

The pension claim

35. Mr George referred us to and placed great reliance on the following statement of Lord Millett in ***Air Jamaica Ltd and Others v Charlton and Others*** (1999) 54 WIR 359, 367:

> "The employee members of an occupational pension scheme are not voluntary settlors. As has been repeatedly observed, their

> rights are derived from their contracts of employment as well as from the trust instrument. Their pensions are earned by their services under their contracts of employment as well as by their contributions. They are often (not inappropriately) described as deferred pay.
>
> This does not mean however, that they have contractual rights to their pensions. It means, only that, in construing the trust instrument, regard must be had to the nature of an occupational pension and the employment relationship that forms its genesis."

36. On this basis, Mr George submitted that where a pension scheme is created by employing the machinery of a trust, it is to the trust instrument and the trustees of the fund that employees should look for a remedy, not to the employer. And this is, in my view, on the assumption that the employer is not itself in breach of any independent contractual obligation to the employees, fair enough.

37. But the problem with the appellant's position at this stage of the proceedings, it seems to me, is that, as Mr Beswick submitted, there is "not a scintilla of evidence" of the existence of a third party trustee, nor indeed is there any evidence of a trust instrument, beyond a laconic reference in the single affidavit in support of the application for summary judgment to "the governing rules and regulations of the Trust Deed under which the pension scheme operates". Mr George himself, to his credit, readily acknowledged that this was an evidential gap.

38. Lord Millett also pointed out in ***Air Jamaica v Charlton*** (at page 366) that there is no theoretical bar to the establishment of a pension scheme "by contract between the employer and each employee and without using the machinery of a trust". In the instant case, the appellant was obliged by its contract with the respondent to provide (as a "fringe benefit") access to a group pension scheme to which the appellant and the respondent would each contribute 5% of her salary. In the absence of any evidence of the interposition of a trust fund between the appellant and its employees for the purpose of fulfilling this obligation, I can see no reason in principle why, without more, the respondent's claim for an account of pension contributions made by the appellant on her behalf should be foreclosed at this very preliminary stage of the litigation.

The defamation claim

39. Although Thompson-James J had declined to strike out or give summary judgment against the respondent on the defamation aspect of the claim, Mr Beswick frankly conceded that the pleading in this regard was not in compliance with Part 69 of the CPR, as the appellant had contended. When one looks at the original pleading, it is clear that this concession was also quite properly made. However, the respondent on 17 October 2008 filed, as she was entitled to do pursuant to Rule 20.1 of the CPR, amended particulars of claim which, Mr Beswick submitted, were now fully compliant with Part 69. Mr George did not contend otherwise.

In the light of these developments, it is in my view no longer necessary to make any pronouncement on whether Thompson-James J ought to have struck out the original pleading.

Conclusion

40. In ***Swain v Hillman***, Judge LJ (as he then was) made this comment (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".

41. In ***Samuels v Stewart and Others*** (Claim No. HCV 2001/5-081, judgment delivered 23 December 2004), in a valuable discussion on ***Swain v Hillman***, Sykes J commented on this passage as follows:

> "This is clear indication that the power now conferred on the courts to grant summary judgment should be exercised very circumspectly. Often times when the application is made for summary judgment, the only information before the courts will be just the pleadings and sometimes witness statements. No evidence is heard, there is no cross-examination. The case of either party may be strengthened by requests for information."

42. I respectfully agree. In the instant case, for the reasons which I have attempted to set out, I would conclude that it has not been demonstrated in this appeal that Thompson-James J exercised her

discretion by reference to any erroneous principle in deciding that on the basis of the pleadings "there are serious issues to be investigated and aired at trial". I would therefore dismiss the appeal, with costs to the respondent to be taxed, if not sooner agreed.

COOKE J.A.

ORDER:

The appeal herein is accordingly dismissed, with costs to the respondent to be agreed or taxed.