JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 03034

BETWEEN	**SADIE VAUGHAN**	**CLAIMANT**
AND	**NATIONAL WATER COMMISSION**	**DEFENDANT**

APPLICATION TO STRIKE OUT STATEMENT OF CASE - WHETHER DISCLOSING NO REASONABLE GROUNDS FOR BRINGING CLAIM – WHETHER ABUSE OF COURT PROCESS-WHETHER NO REASONABLE PROSPECT OF SUCCESS- EMPLOYMENT CONTRACT-PENSION AND REDUNDANCY AGREEMENT- WHETHER INITIAL IMPOSSIBILITY OF PERFORMANCE-WHETHER COMMON MISTAKE-WHETHER STATUTORY DUTY BEING PERFORMED OR CONTRACTUAL RELATIONSHIP- IMPLIED CONDITIONS PRECEDENT -ESTOPPEL

IN CHAMBERS

Heard : 8th April, 14th November 2008.

Mrs. Michele Champagnie for Claimant.
Mrs. Symone Mayhew, Ms. Keri-Anne Rowe and Ms. Julianne Ellis, instructed by Nunes Scholefield De Leon & Co. for the Defendant.

Mangatal J:

1. This is an application to strike out the Statement of Case filed on behalf of the Claimant and for judgment to be entered for the Defendant.

2. The grounds upon which the application is filed are that

(a) The Claimant's Statement of Case discloses no reasonable cause of action against the Defendant.

(b) The Statement of Case discloses no (reasonable) ground for bringing a Claim.

(c) The Statement of Case is an abuse of the process of the court.

(d) The Statement of Case has no real prospect of success.

3. In the Fixed Date Claim Form filed on her behalf the Claimant Mrs. Vaughan seeks the following orders, amongst others:

(i) A declaration that the Claimant is entitled to pension and redundancy benefits agreed between the Claimant and the Defendant and confirmed in letter dated August 30, 2004.

(ii)Specific Performance of the contract offered by the Defendant and accepted by the Claimant by way of redundancy package and pension benefits confirmed in letter dated August 30, 2004 in certain sums.

(iii)Specific Performance is being claimed. in relation to this contract in respect of which the Claimant asserts that there has been part performance by the Defendant, she has relied to her detriment such that an estoppel arises in her favour, and there has been a breach by the Defendant in refusing to honour the terms and in unilaterally changing the terms to the disadvantage of the Claimant.

(iv) The Claimant seeks a declaration that in so far as the Ministry of Finance may be entitled to direct that the Claimant be paid amounts less than those stated in the letter of August 30 2004, the Defendant is liable to pay her the difference whether by way of redundancy and /or pension or otherwise.

(v) The Claimant also claims damages in the alternative to specific performance.

(vi) The Claimant relies on the doctrine of estoppel both to support her claim and in answer to any claims brought by the Defendant against her.

(vii) The Claimant is also claiming further or alternative relief and interest at commercial rates.

FACTUAL BACKGROUND NOT IN ISSUE

4. The Claimant was employed as a teacher by the Ministry of Education and she gave approximately 16.5 years of service to that Ministry. The Claimant commenced employment with the Defendant on July 5, 1993. In 2004 the Defendant carried out a restructuring exercise and a number of posts were made redundant, including the M2 post in Port Maria which the Claimant was then currently occupying. The Claimant originally was posted at the Defendant's Corporate Finance Office in Saint Andrew. She was at the grade referred to in the Defendant's structure as an "M3"/ "Management 3". This was the substantive post occupied by the Claimant up to in or about February of 2003.

5. In or about March of 2003, at the Claimant's request, she was transferred to the Defendant's Port Maria office where she filled an "M2"/ "Management 2" position. However, the Defendant continued to pay the Claimant at the level of her substantive grade as it was company policy that one's salary would not be reduced.

6. In the Defendant company's structure, the term "red-circled" was used to describe the situation where someone was receiving remuneration which exceeded the Defendant's pay scale for the particular post. In the Claimant's case she was "red-circled" because she was working in a position at a lower grade than her substantive post

and was being paid at the level of her substantive grade, and not at the level of the lower grade.

The Claimant's Case

7. According to the Claimant, the redundancy exercise carried out in 2004 was a negotiated redundancy in that the Defendant negotiated the termination package with various parties including with the Unions and the Executive Staff Association, and with the Claimant, with respect to the Claimant's position.

8. In or about July 2004 an agreement was made between the Claimant and the Defendant whereby the Claimant would accept a redundancy package and pension benefits whereupon her M2 post would be abolished by reason of redundancy.

9. The agreement was made partly orally and partly in writing.
In so far as it was made orally, it was made between the Claimant and representatives of the Defendant, in particular, Miss Fern Hamilton the then Acting Vice President of Human Resources & Administration.
There was another M2 post which was going to be available at the Defendant's Marescaux Road Division and this M2 post was offered to the Claimant by Miss Hamilton.

10. During one of the discussions which the Claimant had with Miss Hamilton the Claimant enquired whether if the Claimant was made redundant, the Defendant would link the Claimant's years of service with the Ministry of Education and with the Defendant. Miss Hamilton agreed to this on behalf of the Defendant. She agreed that the Claimant should go to the Ministry of Education and get the relevant documents to confirm the dates which the Claimant had worked in the Ministry. This was done by the Claimant and the Defendant received information showing that the Claimant had worked for 198 months/16.5 years with the Ministry. The Defendant used this information to calculate the

Claimant's separation entitlements prior to the Claimant's departure from the Defendant.

11. An agreement was arrived at between the Defendant and the Unions and Executive Staff Association, that there would be no more red-circled positions in the new structure. It was agreed that where, as in the Claimant's case she was an M3 and going to take up an M2 position, the Claimant should be paid off as an M3 being made redundant and offered a new job as an M2 in the new structure. The Claimant did not wish to be made redundant and wanted to continue working with the Defendant.

12 However, notwithstanding this agreed position, the Defendant through Miss Hamilton refused to allow the Claimant to receive her pay out benefits as an M3 and then to start a new job in the M2 position. According to the Claimant, the Defendant wanted her to agree not to receive her pay out benefits as M3 but to take up the new M2 position. The Claimant pointed out to Miss Hamilton that this would be perpetuating the red circle situation and the Claimant refused to proceed on that basis.

13. After receiving a detailed explanation from the Defendant as to the terms of separation, the Claimant decided to forego reassignment and to accept the redundancy and payment package which was being offered to her in which it was agreed to link her years of service with the Ministry of Education with her years of service with the Defendant.

In so far as the agreement was in writing, it is contained in or is to be inferred from the following documents:

(a) letter dated August 30, 2004 from the Defendant under the signature of its President Mr. Hunter;

(b) letter from the Defendant to the Claimant dated October 11, 2004;

(c) internal memorandum of the Defendant from the Acting Vice President of Human Resources and Administration to the Payroll Department, Acting Manager dated October 14, 2004.

14. The said letter dated August 30, 2004 and its enclosure accurately outlined the terms on which it was agreed between the Claimant and the Defendant that her post would be made redundant. In particular it was agreed that a period of 28 years 8 months and 13 days would be used, being the Claimant's combined service to the Ministry of Education and the National Water Commission. This calculation took into account the break between the two when the Claimant was employed elsewhere. It was agreed that the date of hire would be September 1, 1970 and the last work day would be August 31, 2004.

15. The Claimant says that she relied on the figures confirmed to her in the Separation Entitlement Sheet in deciding to accept the redundancy and in not taking up the M2 post which was being offered on terms in breach of the agreement arrived at. Although the Claimant thought that the offer being made with regard to the new M2 post was unfair she would have nevertheless accepted it if she had known that the Defendant intended to also breach its Separation Agreement with her, which Agreement was confirmed in the Defendant's letter dated August 30, 2004.

The Claimant's position at the Defendant was made redundant effective August 31, 2004.

16. Although the Defendant made partial payments to the Claimant up to April 2006, and has partially performed the agreement, the Defendant has failed to honour the full terms of the agreement. The breaches are particularized as follows (paragraph 30 of the Particulars of Claim):

a. *On September 7, 2004, seven days after the termination of the Claimant's employment with the Defendant, the Claimant was advised by Mr. Michael Montaque on behalf of the Defendant that her redundancy and pension package had been "revised" with the net effect being that the Claimant's pension and severance package had been reduced by over 50 %.*
b. *Refusing to pay to the Claimant the amount agreed on and confirmed in letter dated August 30, 2004.*
c. *Paying to the Claimant amounts significantly less than the amount agreed on and confirmed in letter dated August 30, 2004.*
d. *Stopping all payments to the Claimant since about May of 2006.*

The Defendant's Case

17. The Claimant was employed as a teacher by the Ministry of Education in 1970 and spent several years in that employment. The Claimant commenced her employment to the Defendant on July 5, 1993. In August of 2004 the Claimant was made redundant as her post was abolished. The Claimant had requested that her pensionable benefits for her years of teaching service be 'linked' to her pensionable benefits from the Defendant. The granting of pension, gratuity or other allowance by the Defendant is governed by the Pensions (Parochial Officers) Act, which also governs the granting of pensions to officers in the service of the parish councils.

The Defendant's policy was to provide the facility of linking in order to expedite their employees' receipt of their pension benefits from their previous employer. The employee would be paid the sum total of the employee's entitlement and then the Defendant would be reimbursed by the employee's former employer for the portion paid to the employee by the Defendant for which the previous employer was liable to pay.

18. The Claimant received a letter from the Defendant dated August 30, 2004 setting out the Defendant's calculation of what they estimated the Claimant's linked entitlement would be. The calculations clearly outlined that they were based on an employment start date of 1970. Both parties knew that the Claimant's employment to the Defendant commenced in 1993. The letter expressly stated that the Ministry of Finance would issue finalized calculations. The Defendant later discovered that the Claimant was not entitled to pensionable benefits in respect of her years of service as a teacher, which was approximately 16 ½ years. Additionally, the preliminary calculations done by the Defendant were not approved by the Ministry of Finance; the Ministry's finalized calculations were much lower than the calculations made by the Defendant and much lower than the sum paid to the Claimant which was approximately 70% of the preliminary calculations.

The Defendant says that the letter which the Claimant seeks to rely on as a binding contract between them was not a contract, where they made an offer to the Claimant which she accepted. It was merely a calculation of what the Defendant estimated that the Claimant would be entitled to based on an employment start up date as a teacher.

The Defendant says that there was no contract. If there was a contract, there were express and implied condition precedents which were not fulfilled.

19. Mrs. Symone Mayhew represented the Defendant and she referred me to Rule 26.3 of the Civil Procedure Rules 2002 " the C.P.R.". Rule 26.3 deals with Striking Out of Statements of Case and the relevant aspects of the Rule state:

26.3 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-

....

(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...

20. Mrs. Mayhew submitted that this matter rests heavily on documents. She states that the Claimant as far as the Defendant is concerned is saying that the letter of August 30 2004 constitutes the contract between the Claimant and the Defendant. She submits that if that is so, then one cannot look behind that contract or give oral evidence as to the contract.

21. The application is said to be an application to strike out pursuant to Rule 26.3(1)(c) of the C.P.R. However, one of the grounds stated in the application is that "The Claimant's statement of case has no real prospect of success". I agree with Mrs. Champagnie's written submission that such an application really amounts to an application for summary judgment. Striking out and Summary Judgment are related but not necessarily identical. Indeed, the Rules on Summary Judgment make reference to the Rules regulating Striking Out. Both are powers which the court possesses to dispose of issues which do not need full investigation at trial. However, in **Three Rivers D.C. v. Bank of England** [2001] 2 All E.R. 513, Lord Steyn, in paragraph 5 indicated that in the case before him, which concerned a striking out application, one of the grounds concerned the question whether the action is an abuse of the process in that it

has no real prospect of success. I will deal with this aspect of the case later in this judgment.

22. It was submitted by Mrs. Mayhew that a condition precedent to any contract between the Claimant and the Defendant was that the Claimant was entitled to benefit from the years of being a teacher by way of pension and therefore that there could be linkage between her entitlements from the N.W.C and an entitlement to pensionable benefits in respect of her years of service with the Ministry of Education. She states that the N.W.C. started making payments to the Claimant on the basis of linkage but subsequently the Ministry of Finance advised the Defendant that the Claimant was not eligible for pension in respect of her years of service as a teacher and therefore that there could be no linkage of her years of service as a teacher with her years of service at the Defendant. She also submitted that the **Pensions (Parochial Officers) Act** applies to the Defendant and the Defendant being a creature of Statute, it would have to act within the confines of its statutory authority. She argued that there are no provisions in the **Pensions (Parochial Officers) Act** which govern or authorize the payment of pensionable benefits to persons for their years of teaching service to the Ministry of Education.

23. According to the Defendant, the issues are as follows:

ISSUES

i. Does the Pensions (Parochial Officers) Act allow for the linking of pensionable benefits in respect of the years of teaching service with the Ministry of Education to the years of pensionable benefits in respect of the years of service with the Defendant?

ii. Were both parties i.e. the Defendant and the Claimant of the view that such linking was possible when agreement to link such service was made?

iii. Were both parties of the view that the Claimant was entitled to pensionable benefits in respect of her years of service as a teacher? That is, that there was something to link?

iv. Were the calculations presented in the letter of August 30, 2004 based on such 'linkage'?

v. Does the letter of August create a binding contract capable of being specifically performed?

vi. Is there any unconscionable conduct giving rise to an estoppel in the instant circumstances?

vii. Can the Defendant be compelled to pay the Claimant pensionable benefits in respect of her years of service as a teacher where she is not entitled to such sums from the Ministry of Education?

viii. Can the Claimant be compelled to repay the sums in excess of her actual entitlement which were paid to her by the Defendant?

Ground 1-Rule 26.3(1)(c) of the C.P.R.

Ground 2-The Claimant's statement of Case discloses No Reasonable Cause of Action Against the Defendant

24. I agree with the learned authors Gilbert and Vanessa Kodilinye , where, in their work **Commonwealth Caribbean Civil Procedure**, 2nd edition, at page 329 they state :

The traditional approach to striking out, as propounded by Lord Templeman in Williams & Humbert Ltd. v. W & H Trade Marks (Jersey)Ltd., is that striking out is appropriate only in plain and obvious cases, and those which require prolonged and serious argument are

unsuitable for striking out. This approach has been confirmed in a post-CPR House of Lords case, Three Rivers District Council v. Bank of England (No. 3).

25. In **S & T Distributors Limited v. CIBC Jamaica Ltd.** , a decision of the Court of Appeal of Jamaica, (delivered July 31, 2007) Harris J. said at pages 29-30:

The striking out of a claim is a severe measure. The discretionary power to strike out must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implications of striking out and balance them carefully against the principles as prescribed by the particular cause of action which is sought to be struck out.

26. The words "discloses no reasonable cause of action", used by the Defendant as ground 2 of its application, are not actually the words used in the C.P.R. Those words were used under the former Rules in Jamaica and in England. In bringing an application on such a ground the Defendant must satisfy the test without reference to any Affidavit evidence. Again, the point is well- made in the work by Gilbert and Vanessa Kodilinye, at page 170 which I find it convenient to quote:

The reason for the prohibition on evidence is that the basic question under this head is whether such a cause of action is known to the law, which is purely a question of law, the facts being assumed in favour of the party whose pleading is sought to be struck out.

27. In **Swain v. Hillman** [2001] 1 All E.R. 91, Lord Woolf, at page 92 referred to the English Rule 3.4, which is the same as our Rule 26.3(1) (c), i.e. it makes provision for the court to strike out a statement of case if it appears that it discloses no reasonable grounds for bringing or defending the claim. In contrasting it with Rule 24.2 of the English Rules, which deals with summary judgment, Lord Woolf explained that

the reason for the contrast in language between Rule 3.4 and Rule 24.2 is that under Rule 3.4, the court is generally only concerned with the statement of case that is being attacked.

28. In **McPhilemy v.Times Newspapers Limited** [1991] 3 All E.R. 775, at page 793 Lord Woolf M.R. stated:

What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.

29. What the Claimant in this case is saying is that by way of a contract which was partly oral and partly in writing the Claimant arrived at a negotiated agreement for her redundancy and pension benefits. She claims that the Defendant has breached the contract and she claims, amongst other relief, declarations, specific performance of the agreement and /or damages. Assuming all the facts to be in the Claimant's favour as set out in her Particulars of Claim and the documents attached to it, I agree with Mrs. Champagnie, Attorney-at-Law for the Claimant that it cannot properly be said that the Claimant's statement of case does not disclose a reasonable cause of action against the Defendant. These are not instances where the claim is unknown to law or on the pleading, on the statement of case, unsustainable. On the contrary, the claim as is does disclose reasonable causes of action. I would not therefore be prepared to strike out the claim on this ground.

Ground 3-Allegation that the statement of case discloses no ground for bringing a claim

30. The words of Rule 26.3(1) (c) actually are that the statement of case discloses no reasonable ground for bringing the claim. In Claim No.

2526 of 2004, **Sebol Limited v. Selective Homes & Properties Limited and Ken Tomlinson**, unreported, delivered October 9th 2007, Sykes J. took a very interesting and novel approach to the interpretation of Rule 26.3 (1) (c). An appeal has been filed in the matter, and whilst I understand that it has been heard, the Court of Appeal has not yet delivered its ruling in relation to this matter. In a nutshell, Sykes J. found that the wording of Rule 26.3(1) (c) was wider than the words of the old Rules i.e. whether the pleadings disclose a reasonable cause of action. Therefore more cases could be struck out on the ground "no reasonable ground for bringing the claim" than "no reasonable cause of action being disclosed. At paragraph 24 of his decision, Sykes J. stated:

24. *Let us look at what rule 26.3 (1) (c) actually says. The rule does not speak of a reasonable claim. It speaks of reasonable grounds for bringing the claim. It would seem to me that simply as a matter of syntax the instances in which a claim can be struck out against a defendant are wider than the old rules. The rule contemplates that the claim itself may be reasonable, that is to say, it is not frivolous, unknown to law or vexatious, but the grounds for bringing it may not be reasonable. Clearly the greater includes the lesser. Thus if the claim pleaded is unknown to law then obviously there can be no reasonable grounds for bringing the claim. It does not necessarily follow, however, that merely because the claim is known to law the grounds for bringing it are reasonable. The rule focuses on the ground for bringing the claim and not on just whether the pleadings disclose a reasonable cause of action. In this case the claim for rectification is known to law but the grounds are not reasonable in light of Pan Caribbean's assignment of all its rights to NIBJ.*

31. At paragraph 25 Sykes J. refers to the judgment of Lord Hutton in the House of Lords decision in **Three Rivers D.C.v. Bank of England** [2001] 2 All E.R. 513 at paragraph 119 where Lord Hutton states:

The applications before Clarke J and the Court of Appeal were governed by the R.S.C. but those rules have been replaced by the Civil Procedure Rules 1998. ***I think that r. 3.4(2) (a) of the new rules corresponds in a broad way to RSC Ord. 18, r.19(1)(a)*** (emphasis that of Sykes J.)

Justice Sykes went on to indicate that when Lord Hutton said that the rules correspond in a broad way he did not think that Lord Hutton meant that the old and the new have the same meaning. Sykes J. went on to state:

I agree with his Lordship on this- in a broad way and the broad way is, I believe, as I have indicated, which is that it covers claims that are unknown to the law, vague, incoherent and ill-founded. It is not necessary to say how much more it covers but what I can say is that it covers the case before me.

32. In **Swain v. Hilman**+ (at the page quoted above), as in the case of the old rule where only the pleadings could be looked at, Lord Woolf also appeared to treat the rule that there are no reasonable grounds for bringing the claim as likewise to be decided on a perusal and examination of the statement of case under attack only.

33. When I look at the Claim in this case, whether one takes the meaning of Rule 26.3(1)(c) to mean the same thing as the former Rule requiring the pleading to disclose a reasonable cause of action, or whether one treats it as having broadly the same meaning, or whether one gives it the wider interpretation given to it by Sykes J., there is nothing in the Claimant's statement of case that I find is a basis for striking out under Rule 26.3(1) (c). I have already described the basis upon which I say that that there is nothing in the Statement of Case that fails to disclose a reasonable cause of action. This is not a plain and obvious case where striking out may be appropriate. It follows that I do not find that there are no reasonable grounds for bringing this claim.

WHETHER THE CLAIM IS AN ABUSE OF THE PROCESS OF THE COURT

34. Earlier, I had adverted to the statement of Lord Steyn in the **Three Rivers Case** when he seemed to say that a claim could be an abuse of the process of the court if it has no real prospect of success. I do not think that a claim which has no real prospect of success necessarily amounts to an abuse of the process of the court, although it can be. It may simply be that filing a claim which has no real prospect of success is a misguided or ill-advised course of action. In most of the authorities, the term "an abuse of the process of the court" has been reserved for situations where the court process is being used for improper purposes. So for example, a claim can be an abuse of the process of the court even if there appears to be a prima facie valid claim or a claim which discloses a reasonable cause of action. In the **2007 White Book, Volume 1, the English Rule** 3.4(2)(b), which deals with the situation where the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings, the commentary at 3.4.3 is as follows:

> *Although the term "abuse of the court's process" is not defined in the rules or practice direction, it has been explained in another context as "using that process for a purpose or in a way significantly different from its ordinary and proper use" (Attorney General v. Barker[2000] 1 F.L.R. 759 DC, per Lord Bingham of Cornhill, Lord Chief Justice). The categories of abuse of process are many and are not closed. They include litigating an issue that has been decided in a previous case, inordinate or inexcusable delay, and oppressive*

> *litigation conducted with no real intention to bring it to a conclusion. The function of the court is to do justice between the parties, not to allow its process to be used as a means of achieving injustice.....It is an abuse to bring vexatious proceedings, i.e. two or more sets of proceedings in respect of the same subject matter which amount to harassment of the defendant in order to make him fight the same battle more than once with the attendant multiplication of costs, time and stress.....*
>
> *The court has power to strike out a prima facie valid claim where there is abuse of process. But there has to be an abuse, and striking out has to be supportive of the overriding objective. It does not follow from this that in all cases of abuse the correct response is to strike out the claim. The striking out of a valid claim should be the last option. If the abuse can be addressed by a less Draconian course it should be(Reckitt Benkiser (UK) Ltd. v. Home Pairfum Ltd. [2004] EWHC 302.....(Laddie J.)*

In the present case, I do not see anything that could be described as a use of the process for a purpose or in a way significantly different from its ordinary and proper use. Further, although the categories of abuse of process are not closed, this case does not in any way manifest the degree of extreme misuse ordinarily associated with abuse. Nor do I find that it is likely to obstruct the just disposal of the proceedings.

WHETHER THE STATEMENT OF CASE HAS NO REAL PROSPECT OF SUCCESS

35. As to this ground, Mrs. Champagnie at paragraph 85 of her submissions states that this is really tantamount to an application for summary judgment. I agree with Mrs. Champagnie. Summary Judgment is dealt with in Part 15 of the C.P.R. The English Rules on summary judgment make reference to the Rules as to striking out . So too do our Rules. Of this reference and relationship Lord Woolf had this to say in **Swain v. Hillman**, page 92:

There is a note to r.24.2 referring to r. 3.4.....Clearly there is a relationship between r. 3.4 and r. 24.2. However, the power of the court under Part 24, the grounds are set out r. 24.2, are wider than those contained in r. 3.4.

In the White Book, at 3.4.6 it is pointed out that there is some amount of overlap between some striking out applications and some applications for summary judgment. It is there stated :

> *Many cases fall within both r.3.4 and Pt 24 and it is often appropriate for a party to combine a striking out application with an application for summary judgment. Indeed, the court may treat an application under r.3.4(2)(a) as if it was an application under Pt 24; see Taylor v. Midland Bank Trust Co. Ltd. (No. 2) [2002] W.T.L.R.95.*
>
> *A party may believe he can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law(including the construction of a document) In such a case the party concerned may make an application under r.3.4 or Pt 24 (or both) as he thinks appropriate..... .*

It is pointed out, however, that the overlap is not total, and that, for example, unlike the striking out rules, the summary judgment rules apply to the summary disposal of issues including preliminary issues.

Our Rules 15.2, 15.5 and 15.6, so far as relevant, state the following:

Grounds for Summary Judgment

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.

(Rule 26.3 gives the court power to strike out the whole or part of statement of case if it discloses no reasonable ground for bringing or defending the claim.)

Evidence for the purpose of summary judgment hearing

15.5 (1) The applicant must-

(a) file affidavit evidence in support with the application;....

(2) A respondent who wishes to rely on evidence must-

(a) file affidavit evidence;.....

Powers of the court on application for summary judgment

15.5 (1) On hearing an application for summary judgment the court may –

(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;

(b) strike out or dismiss the claim in whole or in part;

(c) dismiss the application;

(d) make a conditional order ;

(e) or make such order as may seem fit

.....

(3) Where the proceedings are not brought to an end the court must also treat the hearing as a case management conference.

36. In her submissions Mrs. Champagnie refers to Rule 15.3 (c) which states:

Types of proceedings for which summary judgment is not available

15.3 The court may give summary judgment in any type of proceedings except-

.....

(c) proceedings by way of fixed date claim form.

37. Mrs. Champagnie goes on to submit that as the present proceedings are proceedings by way of fixed date claim form then the application for summary judgment is misconceived procedurally.

38. In her reply to this point, Mrs. Mayhew submitted that that would only hold true for bona fide Fixed Date Claim Forms and that in the instant case this was not such a claim form.

Part 8 of the C.P.R. deals with how to start proceedings. Rules 8.1(3) and 8.1(4) state:

The Claimant –how to start proceedings

8.1....(3) A claim form must be in Form 1 except in the circumstances set out in paragraph (4).

(4) Form 2 (fixed date claim form) must be used-

(a) in mortgage claims;

(b) in claims for possession of land;

(c) in hire purchase claims;

(d) where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact;

(e) whenever its use is required by a rule or a practice direction; and

(f) where by any enactment proceedings are required to be commenced by petition, originating summons or motion.

39. In my judgment, the only rule which the Claimant could arguably fall under would be Rule 8.1(4)(d) i.e. that the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute

as to fact. It seems to me that the Claimant cannot have it both ways. In responding to the application to strike out, Mrs. Champagnie has argued that there are disputes as to fact which the court cannot resolve at this stage without trial. Amongst the issues in respect of which it is argued that there are disputes as to the facts are the following:

(a) The Claimant says that there was an agreement between herself and the Defendant and that this agreement was partly oral and partly in writing and in so far as it is in writing, it is not only the letter of August 30 2004 upon which she relies. The Defendant says that the letter of August 30 2004 upon which the Claimant relies as confirming the agreement was not an offer which was being made for acceptance by the Claimant but was simply a calculation of what the Defendant estimated to be the Claimant's entitlement based on an employment start date of 1970.

(b) The Defendant states that there was a common and mistaken assumption that the Claimant was entitled to pensionable benefits based on her employment to the Ministry of Education. However, the Claimant says that the Defendant agreed to give her a package based on her total years service to the Government of Jamaica. The Defendant merely asked her to satisfy them that she had been a teacher for the period stated by her and this was confirmed. The Claimant states that the Defendant did not say that it would only give her the package if she was eligible for a pension for her years of service as a Teacher and that they expected, or were required to receive reimbursement from the relevant government agency or Ministry. As is pointed out in the written submissions, the

letter of August 30 2004 does not say so and in fact Mrs. Champagnie is correct that the letter of October 11 2004 from the Defendant to the Claimant did say that in her case, there was a decision to link her past service with government agencies for the computation of her separation benefits in light of the fact that the policy change referred to in earlier correspondence had not been communicated to the Claimant prior to her separation. The Claimant is saying she was suffering under no such mistake and that that was not the basis of the agreement which she says was arrived at with her.

(c) The question of what was the Defendant's policy. The Defendant says that it was its policy to provide the facility of linking in order to expedite their employees' receipt of their pension benefits from their previous government department employer. The employee would be paid the sum total of their entitlement and then the Defendant would be reimbursed by the relevant government agency for the portion paid to the employee by the Defendant for which the previous employer was liable to pay. The Claimant disputes that this was the policy, or at any rate, that that was what was communicated or applicable in her case. She says that even if there was such a policy, or that the Defendant may have so changed its policy, the letter of October 11 2004 was indicating that the Defendant recognized that they had already entered into a binding agreement with her and that they intended to honour it.

40. Although the resolution of this case will depend largely on determination of points of law and construction of documents, it does seem to me that there are substantial disputes as to fact in this case. I agree with the thrust of Mrs. Mayhew's submission, which I

understood to be that this claim ought to have been begun by claim form and not by fixed date claim form. However, under Rule 26.9 of the C.P.R. the court has power to make orders rectifying procedural errors and this seems to me to be a suitable case in which to order that these proceedings continue, or be treated as if begun by claim form and not by fixed date claim form. In that event, in my judgment the application for summary judgment can, and ought to be considered.

41. A number of authorities were cited to me, and I must confess that for some time I have been looking at the documents, the law and the quite complex legal arguments advanced. One of the fundamental legal issues raised by the Defendant is whether there was impossibility of performance, the Defendant being a statutory authority. The argument continues that there are no provisions in the **Pensions (Parochial Officers) Act**, (which Act the Defendant claims governs this case), which authorize the payment of pensionable benefits to persons for their years of teaching service to the Ministry of Education. I intend to address this issue below. However, I do not think that it can be said that the claim consists of matters where there is no real prospect of success and further, that there are no issues which require full investigation at trial. This is the crux of my decision; although there are indeed a number of documents that will have to be construed by the court, and indeed as Mrs. Mayhew argues, the resolution of this matter rests heavily on documents and points of law, the Claimant is not saying that the written documents are all there is. She has maintained that the agreement which she alleges was partly oral as well as partly in writing and that this agreement took place against the backdrop of a negotiated redundancy. In other words, it is not common ground that the

documents set out all the interactions and communications between the parties, and the Claimant makes reference to specific oral discussions, in particular with Miss Fern Hamilton, who was at the material time the Acting Vice President of Human Resource & Administration. Coupled with that is the fact that some of the matters which the Defendant seeks to rely on are not expressly stated in any of the written documents nor in any of the legislation to which I have been referred. Indeed, for the Defendant itself to prove some of the claims which it maintains it seems to me that it also needs to have a trial of the matter and evidence led as to its policies, practices. Perhaps through discovery and information provided, there will also be evidence as to how previous employees were treated upon separation, what exactly was the policy change referred to in the correspondence, and when did it come about. The issue of whether the Defendant made agreements outside of its policy is also a matter that must be tried, as well as the legal consequences if it in fact did so.

42. With regard to the argument about initial impossibility, or ultra vires, as the Defendant's Attorneys have classified it in their written submissions, some of the relevant provisions of the legislation are set out below.

Section 3 of **the National Water Commission Act** states:

3. Establishment and incorporation of National Water Commission.

3. (1). There is hereby established a body to be called the National Water Commission which shall be a body corporate with perpetual succession and a common seal and with power to acquire, hold and dispose of property, to enter into contracts, to sue and be sued in its said name and to do all things necessary for the purposes of this Act.

Subsections 2 (1), 3 (1) and 3(2) and section 7 of **the National Water Commission (Pension) Regulations, 1967** state as follows:

2.(1) In these regulations-

.....

"pensionable office" means an office for which separate provision is made in the annual estimates of the Commission and which has been declared to be pensionable by resolution of the Commission approved by the Minister and notified in the Gazette,

.....

3.(1) The Commission may with the approval of the Minister grant a pension, gratuity or other allowance to any person who, immediately prior to retirement, held a pensionable office in the service of the Commission.

(2) The grant of any such pension, gratuity or other allowance shall be determined in accordance with the relevant provisions of the Pensions (Parochial Officers) Act which shall, for the purpose of this regulation, apply to persons holding pensionable offices in the service of the Commission as they apply to officers in the service of Parish Councils holding pensionable offices under that Act subject to the modification that for references in that Act to a Parish Council or the service of a Parish Council there shall be substituted references to the Commission or to the service of the Commission, as the case may be.

7. For the purpose of these Regulations, any unbroken period of service which an officer or servant may have had in an established capacity as a permanent officer or servant in the service of the Central Government of Jamaica, any Parish Council or the Kingston and St. Andrew Corporation, <u>if continuous with his service with the Commission</u>, shall be deemed to be service with the Commission.(my emphasis).

Section 7 of the **Pensions (Parochial Officers) Act** states:

7. Circumstances in which pension may be granted.

7.(1) Subject to subsection (3), no pension, gratuity, or other allowance, shall be granted under this Act to any officer except-

(i) on his retirement from the parochial service in one of the following cases-

(a) on or after attaining the age of fifty-five years or, in special cases with the approval of the Governor-General fifty years;

(b) on abolition of his office;

(c) on compulsory retirement for the purpose of facilitating improvement in the organization of the department of the Parish Council to which he belongs, by which greater efficiency or economy may be effected;.....

43. As regards the question of ultra vires and the scope of the **Pensions (Parochial Officers) Act**, the Defendant's Attorneys submit that there was an initial impossibility which militated against the formation of a contract on the basis of linking which would render the Defendant liable to pay the Claimant, without more, pensionable benefits in respect of her years of employment to the Ministry of Education. This is because they say that there are no provisions in the **Pensions (Parochial Officers) Act** which govern or authorize the payment of pensionable benefits to persons for their years of teaching service to the Ministry of Education.

44. This submission may be factually accurate. However, Regulation 7 of the National Water Commission (Pension) Regulations indicates that the concept of linkage is quite permissible for the Defendant, at least where the period of employment to the Central Government and the period of employment to the Defendant is unbroken. It should be noted also the Regulation says that the

period of service to the other Government department shall be deemed to be service with the Commission, and the section does not address, nor have I been able to trace, any other section which deals with the question of reimbursement. Nor does the section say that the years of service to the other Government department should only be taken into account if those years entitled the employee to pension benefits. In the present case, as Mrs. Champagnie rightly concedes, this regulation cannot apply because the Claimant had a period when the service was broken, in fact for a number of years. However, she argues that what the Defendant has done in effect is to enter into an agreement with the Defendant whereby they offered her the opportunity to be treated in the same way as someone to whom section 7 applies. She further submits that there was no prohibition in the legislation preventing the Defendant from doing that and the Defendant is entitled to enter into contracts as any legal person is.

45. The Defendant relies upon the very interesting case of **Mahmoud v. London Borough of Lambeth** [2005] EWHC 2641. The Defendant local authority applied to strike out a claim or alternatively sought summary judgment in respect of the Claimants' claim concerning the withdrawal of a renovation grant. The local authority had approved a grant to renovate the Claimants' house. However, after the work started, the local authority realized that it had made a mistake as the Claimants did not qualify for the grant. In fact the Claimants were not and never had been entitled to the grant because their joint earnings were significantly in excess of the relevant threshold and they owned a second property. The grant was as a consequence withdrawn. The Claimants contended that the local authority was in breach of contract and that they had relied on its promise to pay the grant money. It was argued on behalf of the local

authority that the Claimants did not have a cause of action against it. Judge Previte Q.C. granted the application to strike out the claim. Further or in the alternative, he granted the application for summary judgment. It was held that the Defendant's decision to award a resident a renovation grant under the Housing Grants Construction and Regenerative Act 1996 was an exercise of its statutory powers and did not give rise to a cause of action in contract enforceable under the common law. It was also held that no consideration had moved from the Claimants to the Defendant. Additionally it was held that the concept of promissory estoppel based on the Claimants' reliance could not amount to a cause of action and could not be raised to prevent the exercise of a statutory discretion or to excuse a public body's failure to perform a statutory duty.

46. At paragraph 42 of the judgment Judge Previte said :

> *42. The crux of the case is, as I have said, the exercise of the Defendant's statutory duty under the 1996 Act. The Defendant has a public duty to make or refuse grants according to the statutory criteria set out in the Act. If a mistake is made by the Defendant, then it is under a duty to withdraw the grant. That does not give rise to a private right to sue for breach of contract ....*

At paragraph 43 the learned judge made some comments which do not surprise me. He said:

> *43. This may be a hard case. Indeed, I think any court would have sympathy with the Claimants, because, no criticism can possibly be made of them in the way in which they applied for the grant and the information which they gave. The errors were wholly within the Defendant's organization. Having said that, of course, the hardship to them obviously cannot*

afford relief which cannot be granted in this court. It may be that there are other avenues which may be pursued, or at least, investigated, on behalf of the Claimants.

47. It is noteworthy that in the case before him the Judge found that the facts in the case were not in dispute. Hence he saw no need for their full investigation at trial. He said that there was to a large extent agreement about the background and circumstances in which the grant was made and what had occurred since then.

48. I think that is a point of departure in this case. Another distinction is that in this case, the claim is made in relation to the employment relationship. A further distinction that I see as possible is that in this case it really seems to me, indeed this is part of the reason that I have wrestled with the issues for so long, that prolonged and serious argument, not suitable for a striking out or summary judgment application is required. Quite frankly, in my view this very difficult and important point of law has not been fully ventilated, nor indeed, does it seem that it should be, in the absence of a Defence to be filed by the Defendant, or in the absence of a full-fledged trial to resolve this point, as well as facts which I say are in dispute. The facts that are in dispute may well impinge on the background and the nature of the arrangement between the Claimant and the Defendant. It seems tidier and more just to deal with all these issues at the same time before dealing with the determination of the points of law, some of which may only be capable of resolution after the true factual matrix has been established.

49. It is interesting to note that at paragraph 33 of his judgment Judge Previte refers to a judgment of Woolf L.J. where an application to strike out appears to have been dismissed. It is stated:

33. One of the authorities relied on by (Counsel for the Claimants) is the case of Dennis Rye and Others v. Sheffield City Council...Judgment was

given on 31st July 1997. The case concerned sums which are alleged to be due by way of improvement grants for work done on houses by the Plaintiff following the services of a repair...requiring work to be carried out to render the premises fit for human habitation under s.189 of the Housing Act 1985. An application was made to strike out the claims on the basis that the proceedings disclosed no reasonable cause of action and are an abuse of the process of the court under the rules of the Supreme Court, Rule 19. In the course of his judgment Woolf J. in dealing with the issues, stated:

"The statutory provisions as cited make it clear that this legislation contains a statutory code for the approval of grants. The rule is designed to give to the person entitled to the benefit of the grant a right to payment of the grant on compliance with the conditions contained in the legislation. When this has happened the authority has no justification for refusing payment. In this situation I cannot see why the landlord cannot bring an ordinary action to recover the amount of the grant which is unpaid as an ordinary debt." (my emphasis).

> *...there was a dispute as to whether the conditions had been fulfilled and, in particular, whether the works had been completed to the satisfaction of the council. That was a matter which could be investigated at trial.*

50. In her written submissions, Mrs. Champagnie raises the interesting point that the **Pensions (Parochial Officers) Act** speaks about pensions, gratuity or other allowance "immediately prior to retirement". The Claimant, she submits, was not retiring. She was being made redundant in a negotiated redundancy. (Mind you, sub-section 7(1) (i) (b) does speak about entitlement to pension upon abolition of one's office). Counsel submits that the fact that the agreement may not fit neatly into the four corners of the **Pensions (Parochial Officers) Act**

does not make it ultra vires to the Defendant's general powers to contract. She argues that if, which is not admitted, the Defendant cannot honour the agreement as a "pension" it must nevertheless honour it as this was the contractual separation which it negotiated with the Claimant and it has the power to enter into contracts.

51. Having looked at the matter in its entirety, it seems to me therefore that there must be a full trial in this matter, including a trial on the issue whether there was a contract, and if so, as to its true terms, and as to the policies of the Defendant, including the approach taken with this particular Claimant.

52. I am therefore of the view that the application should be dismissed.

My orders are as follows:

(a) This Fixed Date Claim Form is to be continued as if begun by Claim Form.

(b) The Defendant's Notice of Application for Court Orders dated October 24 2007 is dismissed.

(c) Costs of the application are awarded to the Claimant to be taxed if not agreed or otherwise ascertained.

53. The matter not having been brought to an end, in accordance with Rule 15.6(3) I now treat this hearing as a Case Management Conference.