

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

CV NO. 1289 of 2006

BETWEEN

HERMES MARQUETTA BUTCHER-RAYSIDE

CLAIMANT

AND

RAYSIDE CONSTRUCTION LIMITED

DEFENDANT

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

**2016: October 17, 20, 24, 31
November 03**

2017: March 07

2020: June 11

Sir Elliott Mottley Q.C., Ms. M. Shepherd and Ms. J. Kelly, Attorneys-at-Law of E.D. Mottley & Co. for the Claimant.

Mr. Leslie Haynes Q.C., Mr. P. McWatt and Ms. S. Sealy, Attorneys-at-Law for the Defendant.

DECISION

Introduction

[1] This is a claim for damages for constructive dismissal.

Background

- [2] The Claimant was employed by the Defendant company, (“RCL”), in January 1999 as an assistant to the Accountant. She was married to the then majority shareholder, Chairman of the Board and Managing Director of RCL, Mr. Keith Rayside Snr.
- [3] The Claimant was continuously employed by RCL, and held a number of positions until 30 July 2004, when the Board confirmed her appointment as CEO to RCL. The Claimant also served as a Director of RCL.
- [4] By an agreement dated 20 October 2006, CLICO Holdings (Barbados) Limited, (“CLICO”), purchased a majority shareholding in RCL. Prior to this acquisition, CLICO conducted a due diligence investigation of RCL. This exercise was undertaken by Natalie John as CLICO’s Internal Auditor. After the acquisition Mrs. John became the Vice President, Finance at RCL.
- [5] On 05 December 2005, the Claimant received the following letter from Terrence Thornhill, President of CLICO

“Dear Mrs. Rayside:

Since assuming the management and conduct of the affairs of [RCL] we have notified you that your present employment as CEO of RCL cannot continue.

In the spirit of continued cooperation between the principal shareholders, we have suggested and are prepared to offer you another position in RCL. To

this end we requested you to let us have your thoughts with respect to your future role with RCL. Your response has been to leave it up to us to determine the matter.

To assist us in arriving at a determination, we have requested your file from the HR department of RCL and we were informed that such a file could not be found. Accordingly, we are without the assistance of several relevant matters including your qualifications and experience. We have noted however your assertions that you assumed the role of CEO by default, that you commenced your employment with RCL in the accounts department and that that is where you would feel comfortable.

In the circumstances, we offer you the position of Senior Accounts Officer with responsibility for monitoring the accounts payable and receivables of the company. In this role, you will be reporting directly to the Financial Controller of the company and will receive a monthly salary of \$5,000 per month.

Arrangements are in train for a CEO to be appointed by January 1st 2006. We therefore look forward to discussing with you our present offer in the next few days so as to ensure a smooth transition from January 1st. We have taken the liberty of copying this letter to the other substantial shareholder and we look forward to an amicable resolution”.

The letter was copied to the Claimant’s husband.

- [6] The Claimant subsequently spoke with CLICO’s Chairman, Mr. Leroy Parris, about the contents of the letter. A meeting was arranged for 12 December

2005. Prior to the meeting, the Claimant received correspondence dated 08 December 2005 from Mr. Parris. She was informed that:

“With effect from November 21, 2005 [CLICO] has acquired a controlling interest in [RCL].

The change in the ownership of [RCL] is not anticipated to result in any changes to your current conditions of work. Your years of service with the company will continue uninterrupted and your employment will continue on terms and conditions no less favourable than previously obtained.

We look forward to working together to ensure the continuity and success of [RCL]”.

[7] The Claimant met with Messrs. Parris and Thornhill on the evening of 12 December 2005. Her evidence of what transpired at the meeting and on the following day was never challenged by any of the witnesses for RCL. And neither Parris nor Thornhill provided a witness statement or any oral evidence to contradict the Claimant’s version of events.

[8] The Claimant recalled that:

“50. At the afternoon meeting with Mr. Parris I pointed out to them that I had received a very offensive letter from them. I stated that I had a contract with [RCL]. I told them to give me my money I was owed under the contract and let me go. Mr. Parris said that if that was the way I felt I should go right away. I said I have things to complete and then I would go when I was finished.

51. Mr. Terrence Thornhill returned to my office with me. He watched me until 6.00 p.m.

Whilst I was finalizing my departure Mr. Parris rang Mr. Thornhill and asked him was I serious. I said Mr. Parris should speak to me directly. I took Mr. Thornhill's phone and spoke to Mr. Parris in the presence of Mr. Thornhill. I explained to Mr. Thornhill the contents of my filing cabinet. I told him they could call me if there were any problems. I gave him my cell number. He rang the cell number in my presence to see if I had given him the correct number. Mr. Thornhill told me to hurry up as he had to take his daughter to the movies. I told him I had my personal effects which included a Dell computer, refrigerator etc. which I needed to remove. He told me that would be no problem come back and get them when I was ready. I locked the door to my office and gave Mr. Thornhill the key. I got in my car and left. Mr. Thornhill left behind me.

52. I was advised by my lawyer that I should obtain a formal letter of dismissal. I returned to RCL the following morning. I asked for my office keys to gain access to my office. [Ms. John] said she was not going to give them to me. Mr. Rayside called her. She refused to go to him. Mr. Parris then came to RCL and cursed me telling me to get out of his so and so place. He cursed me in the presence of Mr. Rayside and Mr. Hallam Nicholls. Mr. Parris refused to give me a dismissal letter or a paper to enable me to get unemployment benefit. At this point I left the premises of RCL and put the matter in the hands of my Attorneys-at-Law".

[9] Subsequent to the Claimant's departure from RCL, her lawyer wrote to

RCL's manager on 14 December, 2005 as follows:

“The letter dated December 5, 2005 from [CLICO] has been handed to us with instructions to reply.

By that letter our client was informed that her employment with [RCL] as CEO could not continue. Further, the letter stated that arrangements were in train to have a CEO appointed by January 1, 2006. We are further instructed that, on December 12, 2005 our client was summarily dismissed by Mr. Ray Parris, acting on behalf of [CLICO] the majority shareholder.

We have advised our client that this conduct on behalf of [RCL] and [CLICO] amounts to constructive dismissal of our client.

Pursuant to a contract dated August 1, 2004 between [RCL] and our client, she was employed as the [CEO] for a period of five years.

In the circumstances our client is claiming damages for wrongful dismissal.

We should be grateful if you would let us know whether you are prepared to settle this matter amicably. If we do not hear from you by December 31, 2005 we are instructed to institute an action claiming damages for wrongful dismissal”.

Pleadings

- [10] The Writ of Summons was filed on 17 July 2006. The Claimant alleges that her constructive dismissal occurred on or about 09 December 2005, without just cause. Damages are claimed for the unexpired term of her contract of employment, from 01 December 2005 to 31 July 2009, and comprise:

- (1) basic monthly salary;
- (2) monthly entertainment allowance;
- (3) monthly travel allowances;
- (4) the benefit of a fully loaded executive company vehicle fully maintained and insured plus 60 litres of petrol per week; and
- (5) an annual performance bonus.

Costs and interest are included in the claim.

[11] RCL filed its defence of 02 November 2006, and admitted that the Claimant was promoted to CEO on 01 August 2004. The existence of a written contract of employment was denied. RCL alleged that the Claimant's dismissal was justified because she had authorized a number of payments by RCL that undermined RCL's finances. It pleaded that in total a sum of \$518,560.39 should set off against anything the Court found to be due to the Claimant. A counterclaim was also entered for the said sum with interest and costs.

[12] In her reply the Claimant denied any misuse of RCL's monies, or that RCL had just cause to dismiss her.

The Issues

[13] The issues to be determined by the Court are as follows:

- (1) was there a written employment contract executed by the parties;
- (2) did RCL have just cause to dismiss the Claimant;

- (3) was the Claimant constructively dismissed; and
- (4) was the Claimant obliged to mitigate her loss?

The Employment Contract

- [14] The Board of RCL approved the appointment of the Claimant as CEO on 30 July, 2004. The appointment took effect from 01 August 2004. This is not disputed. The Court also accepts that the parties entered into a written agreement called the Executive Service Agreement. The Agreement is dated 01 August 2004, and is duly executed.
- [15] The essential terms of the Agreement refer to the contract period (Clause 1); salary and other benefits (Clause 3 and Schedule 2); bonus (Clause 4); and termination (Clause 7). The initial period of the Agreement was for five years, and would automatically extend for a further five years unless terminated for just cause. It was stipulated that the Claimant's employment could be terminated "for just cause only".

Just Cause For Dismissal

- [16] Canadian courts have defined just cause as:

“...conduct on the part of the employee incompatible with his or her duties, conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance”. (Per Saunders J in **Leung v. Doppler Industries Inc.**, 10 CCEL (2d) 147 (BSCS) at para. [26]; aff'd 86 BCAC 137).

[17] An employer may terminate an employee for just cause if the employee is guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of willful disobedience to the employer's orders in a matter of substance. (See **R v. Arthurs, Ex p. Port Arthur Shipbuilding Co. (1967) CanLII 30 (ONCA)**). Termination for just cause is described as an extreme measure that should not be resorted to in a trifling case. (**Carscallen v. FRI Corp. (2005) CanLII 20815**; and **Jupiter General Insurance Co. v Shroff [1937] 3 AllER 67**).

[18] Just cause is simply an employer's right to summary dismissal of an employee in certain circumstances. According to Halsbury's Laws of England:

“An employer has a common law right to dismiss an employee without notice on the grounds of an employee's gross misconduct and such a dismissal is not wrongful. Originally this right was explained as a legal incident of the status of master and servant but, in line with the modern contractual analysis of the employment relationship, it is now explained in contractual terms, as the acceptance by the employer of a repudiation of the contract by the employee. Alternatively, gross misconduct justifying summary dismissal may be seen as conduct so undermining the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment”. (5th ed., Vol. 40 at para. 700).

[19] The Privy Council has held that a finding of justifiable summary dismissal is

one of fact and degree. In **Henry v. Mount Gay Distillers Limited (Barbados) [1999] PC 39**, the Board pronounced that:

“It is well established that summary dismissal is only justifiable where there has been a breach of one or more duties of the employee and such breach constitutes a repudiation of the contract of employment as being inconsistent with the continued employment of the employee... The question whether misconduct is such as to justify summary dismissal is a question of fact and degree. As such, it is a matter for decision by the trial judge and not by appellate courts”. (Per Lord Browne – Wilkinson at para. 8; see also Norman Selwyn in “Selwyn’s Law of Employment”, 16th ed. at para. 16.9).

[20] The burden of proof is on RCL to show just cause for the Claimant’s dismissal. And it is a heavy burden. (**Staley v. Squirrel Systems (2013) BOCA 201; Leung**, supra para. [16], at para. [27]). In determining whether just cause exists for the dismissal of an employee, there are a number of factors which a court should consider. These factors are, *inter alia*:

“... the length of the executive’s service, the past conduct of the executive and the executive’s duties and responsibilities within the organization. With regard to this last factor, the greater the trust placed upon an executive in relation to particular matters, the less tolerant a court will be. In fact, while the plaintiff’s employment history together with his age, his responsibilities and his position with the employer are certainly to be taken into account in the application of the contextual approach, on the other hand it would be an over-simplification to say

that immunity from the consequences of dishonesty can simply be purchased by an exemplary work record”. (A. Edward Aust et al, “The Executive Employment Contract”, 2012, LexisNexis, at p.373).

[21] An employer is entitled to rely on grounds of dismissal that are discovered after an employee is dismissed. (**Knowlan v. Trailmobile Parts & Services Canada Ltd 2006 BCSC 337 (CanLII); Campbell v. Harrigan Rentals and Equipment Ltd 2013 BCSC 1813 (CanLII)**). However, the employer cannot invoke after-acquired cause for dismissal if it should have known of the alleged misconduct sooner. (**Doucet v. Spielo Manufacturing Inc. 2011 NBCA 44 (CanLII)**).

[22] According to Halsbury:

“The common law rule relating to wrongful dismissal is that, provided good cause for dismissal in fact existed, it is immaterial whether or not it was known to the employer at the time of dismissal. A summary dismissal can, therefore, be justified by facts only ascertained by the employer subsequent to the dismissal, and on grounds differing from those alleged at the time”. (Halsbury’s Laws of England, supra para. [18] at para. 702. See also **Boston Deep Sea Fishing and Ice Co. v. Ansel (1888) 39 ChD 339; Lakshmi v. Mid-Cheshire Hospitals NHS Trust [2008] EWHC 878 (QB)**).

[23] A court may prevent an employer from terminating an employee for misconduct if the employer condoned the misconduct that constituted the employer’s reasons for dismissal. But condonation is only possible in

circumstances where the employer is fully aware of the employee's misconduct. (Aust et al supra para. [20] at p. 397; **McIntyre v. Hockin (1889) 16 OAR 498 (Ont. Ca)**).

[24] How then are the above mentioned principles to be applied to a determination of just cause in this case? The first step is RCL's pleadings. The relevant parts of the defence allege that:

- “4. It was a term of the [Claimant's] employment with [RCL]....that the [Claimant] could be dismissed for just cause.
5. On various dates between 2003 and 2005 as hereinafter particularised the [Claimant] without due authority and or approval paid [RCL's] monies to Third Parties for and on her own behalf.

PARTICULARS

- | | | |
|-----|--|---------------------|
| 5.1 | 29 March 2004 - paid to
Life of Barbados Ltd. | \$ 87,118.63 |
| 5.2 | 21 November 2005 – paid to
Tyron Harper | \$ 35,000.00 |
| 5.3 | 2003 – Telegraphic transfers to
Ryan Butcher | \$ 44,992.50 |
| 5.4 | 2004 – Telegraphic transfers to
Ryan Butcher | \$189,956.51 |
| 5.5 | 2005 – Telegraphic transfers to
Ryan Butcher | <u>\$ 73,369.19</u> |
| | | <u>\$430,436.83</u> |
6. Having regard to the aforementioned the [Claimant's] dismissal was justified.
 7. Alternatively if, which is denied, the Agreement alleged at paragraph 5 was concluded between the

parties then clause 7.2 thereof provided that the [Claimant] could be dismissed for just cause. [RCL] will refer to the said Agreement at the trial hereof for its full terms and effect.

8. [RCL] repeats paragraph 5 herein and states that having regard to the same the [Claimant's] dismissal was justified.
9. Further and or in the alternative [RCL] is entitled as to the whole of the [Claimant's] claim to set off the sum of \$430,436.83 referred to at paragraph [5] herein being monies paid by the [Claimant] to Third Parties for and on behalf of the [Claimant] at her request together with the further sum of \$70,000.00 paid by [RCL] for and on behalf of the [Claimant] at her request to Sorelle Inc. as well as the sum of \$18,123.56 being the price of goods sold and delivered to the [Claimant].

PARTICULARS

(i)	In relation to the sum of \$430,436.83 [RCL] repeats the particulars referred to in paragraph [5]	\$430,436.83
(ii)	11 April 2004 – paid by [RCL] to Sorelle Inc. for and on behalf of the [Claimant] at her request	\$ 70,000.00
(iii)	11 May 2000 – 13 November 2003 to the price of goods sold and delivered to the [Claimant]	\$ <u>18,560.39</u>
		\$ <u>518,560.36</u> ".

[25] RCL pointed to five separate transactions as providing just cause for the Claimant's dismissal. There is no claim of just cause for dismissal in relation to the money paid to Sorelle or the price of goods allegedly sold and delivered

to the Claimant. Therefore, RCL has to establish, on a balance of probabilities, that:

- (1) \$87,118.63 belonging to RCL was paid by the Claimant to Life of Barbados Ltd. on 29 March 2004, for and on her behalf, and without authority and/or approval;
- (2) \$35,000.00 belonging to RCL was paid by the Claimant to Tyrone Harper on 21 November 2005, for and on her behalf, and without authority and /or approval; and
- (3) sums of \$44,992.50, \$189,956.51, and \$73,369.19 were paid to Ryan Butcher in 2003, 2004 and 2005 respectively by the Claimant using RCL's money, for and on her behalf, and without authority and/or approval.

For convenience, the Court will also examine the payments to Sorelle, and the goods allegedly sold and delivered to the Claimant.

[26] Should RCL prove any or all of these allegation, on a balance of probabilities, it must also establish in relation to the transaction proved, that it amounted to misconduct on the part of the Claimant that justified summary dismissal. The Court will proceed to examine each transaction.

Payment to Life of Barbados

- [27] The evidence of Natalie John is that this payment was recorded as an expense to an RCL account. She considered it to be a suspicious and/or an unauthorised payment although it was not challenged by RCL's management. This was said in relation to all the impugned transactions. Ms. John explained that she used the terms "suspicious" and "unauthorised" "to describe the transactions which, in my professional judgement, I do not regard as having had the appropriate level of approval recorded in RCL's accounts". (At para. 5 of Witness Statement filed on 20 June 2012).
- [28] Ms. John's investigations revealed that the money was paid out on behalf of RCL to cover the premiums of various life insurance policies held by the Claimant. The payment was not for RCL's employer's liability insurance as recorded in RCL's accounts. This witness had no recollection of speaking to Mr. Rayside Snr. about this transaction. However, she did speak to the Claimant, but there is no evidence as to the content of the conversation.
- [29] The Claimant's explanation for the payment to Life of Barbados was that it was to bring lapsed policies for her sons up to date. The cheque voucher was authorised by Mr. Anthony Blenman with the permission of Mr. Rayside Snr. The cheque was signed by the Claimant and Mr. Blenman. Mr. Blenman gave no evidence about this payment. The Claimant did not know if the cheque

was authorised by the Board of Directors.

- [30] Undoubtedly the Claimant benefitted from this transaction. But there is no evidence as to what transactions required specific Board and/or shareholder approvals; no evidence of RCL's policy in this regard. Put another way, there is neither evidence of the level of authorization mandated for such a transaction nor evidence that the Claimant did not have the required level of authorisation.

Payment to Tyrone Harper

- [31] In her witness statement, Ms. John said that this payment was:

“Recorded as an expense to account number 88450 - Subscription and Donations. The description was Donations re Contract. The Accountant at that time Mr. Anthony Blenman was called in from vacation, by [the Claimant], to sign this cheque although she was a signatory to the account”. (Para.5)

- [32] Ms. John referred to the transaction as being suspicious because Mr. Blenman was summoned from vacation to authorize the payment of the cheque as a signatory to the account. In addition, the transaction occurred on the same day that CLICO was to assume the management of RCL. (Para.8 of Witness Statement).

- [33] In her cross-examination Ms. John stated that the cheque written to Mr. Harper was not signed by the Claimant. However, during re-examination, Ms. John was shown a copy of the cheque and she confirmed recognizing the signatures

of the Claimant and Mr. Blenman. She was unable to recall the person with whom she discussed the cheque.

- [34] The Claimant explained the cheque as a political donation from RCL. She said that she co-signed the cheque on the express authority of Mr. Rayside Snr. (Para.58 Witness Statement filed on 16 May 2011). There is no evidence that the Claimant benefitted in any way from this transaction. There was no evidence from Mr. Harper as the recipient of the cheque. And there was no evidence offered by Ms. John to seriously contradict the Claimant's explanation.

The Transfers to Ryan Butcher

- [35] Ryan Butcher is the Claimant's son from a previous marriage. He and his brother lived with the Claimant and her husband who was RCL's major shareholder. The Court accepts that the three payments were made by RCL to cover Ryan's educational expenses at a university in Florida. Debit advices were forwarded from RCL to the bank, and the bank sent telegraphic transfers to Ryan's account in Florida.
- [36] Ms. John described these transfers as suspicious and unauthorised. She said that they were suspicious because they were recorded as training in RCL's expense account. Ms. John spoke to the Claimant about the transfers, but she was unsure whether any of the transfers were authorised by the Claimant.

During cross examination Ms. John was shown a letter written on RCL's letterhead and signed by the then major shareholder. The letter is dated 29 September, 2000, and is directed "TO WHOM IT MAY CONCERN". It states in part that:

"Mr. Keith Clement Rayside – Snr. is the owner and the Chairman of the Rayside Construction Group of Companies, situated in Barbados.

This group of companies has been in existence for over fifty (50) years and is the oldest and leading construction firm in the island with assets in excess of \$50M. Mr. Rayside is the husband of [the Claimant], the mother of Ryan Butcher who is currently a student at Fairleigh Dickinson University. Mr. Rayside is responsible for the total maintenance of this child and will be the guarantor for the apartment".

- [37] Counsel for RCL did not object to Ms. John being asked to comment on this letter. Her response was that she did not recall seeing the letter either before or after her due diligence on behalf of CLICO. However, she was not prepared to say that she never saw it. Ms. John was also shown other documentation relating to the payment of educational expenses, on behalf of Mr. Rayside's youngest son Dwayne Rayside, by RCL. She did not consider these payments to be either unauthorized or suspicious.
- [38] There is no evidence that Ms. John sought confirmation from Mr. Rayside Snr. that RCL made the payments on behalf of Mr. Butcher at his direction,

and in the same way that Dwayne Rayside was maintained. But her oral evidence was that if Mr. Rayside Snr. had authorised the transfers, she would still have considered them to be unauthorised but not suspicious. This is surprising, given Ms. John's statement that she did not consider the payments on Dwayne Rayside's behalf to have been either unauthorised or suspicious. It was RCL's money that was used to support Dwayne Rayside.

The Sorelle Payment

- [39] Sorelle is the name of a business registered in February 2003 by the Claimant. When operational, it carried on a boutique business. Therefore, the Claimant benefitted from the money RCL paid to her business. There is no evidence that the Claimant signed the cheque for the payment. It was signed by the major shareholder and another person. Again Ms. John could not recall if she spoke to Mr. Rayside Snr. about this payment.
- [40] The Claimant did not deny receiving the RCL cheque on behalf of her business. Her witness statement confirmed that:

“Mr. Rayside wrote a cheque to Sorelle for \$70,000.00. He and Mr. Blenman co-signed it. This sum was a gift to me from Mr. Rayside to help with the running of my boutique.... Prior to taking on the role of CEO I had wanted to open a boutique...I had planned the boutique as a sideline”. (Para.56).

- [41] The Claimant's oral evidence added that:

“Mr. Rayside gave me a cheque, and that is all I can tell you. I don’t know if it was his personal funds or not. You would have to direct the question to Mr. Rayside whether it was appropriate to use [RCL’s] funds for my side business. I did not see anything out of the norm....I assumed the cheque was authorised by the company. Mr. Rayside brought it home to me. I don’t know if it was authorized”.

The Claimant also accepted that when she received the cheque she was a director of RCL.

[42] There is no evidence, either direct or inferential, that the Claimant requested \$70,000.00 from anyone at RCL.

Goods Sold and Delivered

[43] The allegation here is that goods belonging to RCL, to the value of \$18,123.56, were sold and delivered to the Claimant between 11 May 2000 and 13 November 2003. The various sums due were recorded to a company account as receivables, but they were eventually written off as bad debts in November 2005.

[44] Ms. John’s oral evidence in relation to this charge was as follows:

“The goods were invoiced to the Claimant. I saw a stamp “Delivered” on some of them so I would conclude that they were delivered. The invoices were for materials from the company. Some of them had another name – Ian. I don’t recall the full name at this time. I don’t recall who I spoke to about these invoices, but I would have spoken to someone.

[Witness shown pages 4 to 33 of Bundle 2]. I do not see a signature from [the Claimant] on any of these invoices.

I was not employed by [RCL] when these things were written off. I do not know the circumstances that led to the writing off of these debts. I do not recall speaking to Mr. Rayside about the write off.

[Witness shown invoice at p.10 of Bundle 2].

The invoice shows that the goods were delivered to Ian Hunte/Marquetta Rayside. I do not know what the slash represents. I don't believe that I would have spoken to anyone about the slash. These were all delivered to Farm, St. George. I am not aware that in 2000 the Claimant was the wife of Mr. Rayside. I am aware that she lived at Rutland but I do not know the year".

[45] The Claimant's response was a denial of any knowledge of the transactions alleged. She deposed that:

"Although it is alleged in the defence of [RCL] that I had goods delivered to me in the sum of \$18,123.50 I do not have any knowledge of this fact. No particulars have been included to verify when and to whom the goods were delivered. I deny that any goods were sold or delivered to me for my own personal use". (Para.59 of Witness Statement).

[46] When shown the invoices exhibited at pages 4 to 33 of Bundle 2, the Claimant commented that:

"I do not recognize these invoices. I went through them. I know the name Ian Hunte. He is my brother. I recognize the address Farm Development, St. George. That is Mr. Hunte's

address. I am not aware that he purchased building materials from [RCL]. I do not know how these invoices came to be generated. These were invoiced to me without my knowledge. I was doing accounts at [RCL] but this did not fall under my portfolio”.

- [47] No evidence was offered by RCL to challenge the Claimant’s explanation, or to undermine her credibility. There is no evidence of correspondence written to the Claimant, between 2000 to 2003, requesting the payment of any outstanding debt for goods purchased by her from RCL. Ms. John’s investigation and her evidence were seriously deficient and did not discharge RCL’s burden of proof.

The Companies Act

- [48] Ms. John identified three of the seven impugned transactions as running afoul of section 89 of the Companies Act (“Cap.308). She swore that:

“Moreover, I am advised by [RCL’s] Attorneys-at-Law and verily believe that any agreement to lend monies to Sorelle and Ryan Butcher and/or sell and deliver goods to the [Claimant] would have triggered the provisions of Section 89 of [Cap.308] which required the [Claimant] to disclose any interest which she may have had in the contract in writing or by requesting that her interest be recorded in the minutes of any meeting of the directors. I am not aware that the [Claimant] ever made such a written disclosure”. (Para.13 of witness statement).

- [49] At the outset the Court notes that there is no evidence of any agreement between RCL and the Claimant to lend money to either Sorelle or Ryan

Butcher. And, as pointed out earlier, the allegation that RCL sold and delivered goods to the Claimant was not proved. (Supra para.[47]).

[50] Section 89(1) of Cap.308 provides that:

“A director or officer of a company

(a)who is a party to a material contract or proposed material contract with the company, or

(b)who is a director or an officer of any body, or has a material interest in any body, that is a party to a material contract or proposed material contract with the company,

must disclose in writing to the company or request to have entered in the minutes of meetings of directors the nature and extent of his interest”.

[51] There is no evidence of a contractual or proposed contractual arrangement between RCL and Sorelle or Ryan Butcher. The same is true with respect to the allegation that the Claimant received goods from RCL that she did not pay for. Section 89 of Cap.308 has no relevance to the determination of these issues by the Court. (See Andrew Burgess on the question of what constitutes a material contract in “Commonwealth Caribbean Company Law”, 2013 at p.252).

[52] Keith Rayside Jnr., a former director and employee of RCL, deposed that during his tenure as a director, he was not aware that the Board of Directors authorised payments to Ryan Butcher or Sorelle, or that the Board authorised

the write off of goods allegedly sold to the Claimant, as bad debts. (See paras.6, 7 and 8 of Witness Statement filed on 20 June 2012). Mr. Rayside Jnr. was of little assistance to RCL's defence because he was not a director at the critical time. He offered no first hand or documentary evidence about the process for authorisation of transactions by the Board. A most telling piece of evidence from him was that "It is correct that my father built [RCL], and he did as he liked".

[53] It was submitted on behalf of RCL that in the absence of a shareholder resolution permitting authorisation of the various payments by the major shareholder, management of RCL was in the hands of the Board of Directors. Section 58 of Cap. 308 provides in part that:

“(1) Subject to any unanimous shareholder agreement, the directors of a company must

- (a) exercise the powers of the company directly or indirectly through the employees and agents of the company, and
- (b) direct the management of the business and affairs of the company”.

[54] Professor Burgess writes that these provisions:

“...expressly vest the responsibility for the management of the company in the directors. At the same time the statutes recognise that many of the administrative and executive tasks involved in management can only be effectively performed by delegation to officers acting under the supervision

of the directors”. (Burgess supra para. [51] at p. 200).

[55] Drawing on an Australian precedent, Professor Burgess concluded that a director’s duty of care and skill:

“... required that all directors had a duty to acquire at least a rudimentary understanding of the company’s business and to keep themselves informed about its affairs. The standard did not require directors to perform detailed inspections of the day-to-day activities of the company, but required them to engage upon the general monitoring of its affairs and policies. The standard also requires directors to maintain familiarity with the financial status of the business by regular review of its financial statements. These monitoring function cannot be met merely by relying on other people”. (Supra para. [51] at p. 269, referring to **Daniels v. Anderson (1995) ACSC 607 NSW CA**).

[56] There is no allegation or evidence that the Board of RCL had no knowledge of the seven transactions, or that the transactions were hidden from the Board. There is no credible evidence of such from any Board member or Board Secretary. And there is no allegation that either the Board, or the Claimant as CEO (and a member of the Board), did not properly monitor or review the financial affairs of RCL.

Assessment of Allegations

[57] Although the payment to Life of Barbados did benefit the Claimant, there is no evidence of an absence of authority or approval for the RCL cheque.

According to her witness statement, the Claimant had no authority to sign any RCL cheques without a cosignatory. (Para. 55 witness statement). This was not challenged by RCL. Therefore, the reasonable inference is that she was authorised to sign any cheque as long as there was another signatory. RCL offered no evidence as to the type or size of financial transactions that the Claimant could authorise or approve as CEO. Concomitantly there was an absence of evidence relating to the type or size of financial transaction that required Board approval. A similar evidential vacuum exists with respect to the payment to Tyrone Harper. And there is no evidence that the Claimant benefitted from that transaction. In addition, there is no evidence that the Claimant authorised the payments to Ryan Butcher.

[58] The Claimant further represented that all the payments made by RCL were with the knowledge and authority of her late husband, who was the major shareholder at the critical time. Mr. Rayside Snr. was not the major shareholder when RCL's cheque was issued to Tyrone Harper. However, the Court noted the evidential deficiencies surrounding this payment. (Supra para. [34]).

[59] Counsel for RCL argued that even if Mr. Rayside Snr. was the major shareholder, if he had attempted to have the payments approved at a meeting of shareholders, there was the possibility of a revolt by minority shareholders.

Counsel envisaged oppression proceedings by the minority. This was unlikely, on a balance of probabilities, given the evidence of Mr. Rayside Jnr.

He testified that:

“As a shareholder I was entitled to attend annual general meetings. I do not recall the last shareholder’s meeting I attended. This is partly because my father never held annual general meetings. I don’t recall if I attended a shareholder’s meeting in 2004. I do not recall if I attended any annual general meetings during the time I ceased to be a director and when I was dismissed. I do not recall being given any audited statements after the amalgamation of the companies”.

There is no evidence before this Court that either CLICO or the Board of RCL or the minority shareholders ever questioned any of the impugned transactions or the performance of the Claimant as CEO.

[60] The Court repeats the words of Mr. Rayside Jnr. that Mr. Rayside Snr. built RCL, and that Mr. Rayside Snr. did as he liked. There is evidence of a corporate culture prior to CLICO’s purchase of RCL’s majority shareholding in November 2005. Mr Rayside Snr. was considered to be the owner of RCL. As the patriarch of his family, he employed his children in the business. The children were also minority shareholders. He married the Claimant and accepted financial responsibility for her children. He was known for his generosity, and apparently treated RCL’s money as his own. Ms. John confirmed in cross examination that:

“Before CLICO bought [RCL] I was aware that Mr. Rayside made transactions to his family”.

[61] In **Alleyne et al v. Marriotts (Barbados) Limited, Magis. Apps. Nos. 13,14,15, and 16 of 1996, CA decision dated 13 May 1998**, the appellants claimed wrongful dismissal. The respondent argued that the appellants were dismissed for dishonesty. The Court of Appeal reasoned that:

“...what has to be decided in the present case was not whether the respondent had reasonable grounds for believing the appellants to be dishonest but whether the respondent had proved that the appellants were dishonest.

...the question to be answered in relation to each appellant is whether summary dismissal was justified. Dismissal of any employee would have been justified had dishonesty been proved against that employee. However, reasonable suspicion is not proof and, as it turned out, dishonesty was not proved against any of them. The evidence seems to have revealed procedural breaches and negligence. But these were not the focus of the respondent’s case or of the magistrate’s attention. The respondent did not rely on breaches of procedure or negligence for their action in dismissing the employees and the magistrate never directed her mind to that type of misconduct”. (Pages 6 and 7 of judgment).

[62] In this case it is not enough for RCL to believe that it had good grounds to dismiss the Claimant. These grounds must be proved on a balance of probabilities. The quality of the evidence adduced by RCL, for each of the five charges presented as justifying the Claimant’s dismissal, did not satisfy

the heavy burden placed on RCL. RCL did not satisfy the Court, on a balance of probabilities, that it was justified in dismissing the Claimant on any of the five grounds argued.

Condonation

[63] Counsel for RCL argued strenuously that as the Claimant did not specifically plead condonation, the Court cannot take into account any evidence of CLICO's condonation of the Claimant's conduct. Counsel submitted that:

“In the present case, there has been no plea that [RCL] condoned the Claimant's conduct, it was never put to any witness of the Defendant nor was the Defendant given the opportunity to respond to such allegations as Witness Statements were filed well in advance of this matter arising. Therefore, for it to come to light for the first time at the end of the trial it is submitted that it would unfairly prejudice the Defendant's position as it was not aware at the time of filing its witness statements that this was in fact the issue between the parties”. (Para. 10 of further written submissions filed on 31 March, 2017).

[64] It is not strictly correct to say that the issue of condonation came to light “for the first time at the end of the trial”. It was referred to by counsel for RCL during cross examination of RCL's witness Ms. John. RCL's counsel objected to a line of questioning by the Claimant's counsel on the basis that the Claimant had not pleaded condonation. At this juncture of the evidence, Ms. John had already informed the Court that CLICO was aware of the alleged

infelicities before it purchased the majority shareholding in RCL.

- [65] Prior to the purchase by CLICO, Ms. John was mandated to conduct a due diligence exercise on behalf of CLICO. This is her evidence:

“I came across the transaction in 2005 in the course of due diligence testing.... Suspicion arose during due diligence. CLICO still bought [RCL]...

Before CLICO bought [RCL] I was aware that Mr. Rayside made transactions to his family...

My work for due diligence was to look at the payment transactions, and some of the physical assets in comparison with the fixed asset register. I reported my findings to the management of CLICO Holdings...

The purpose of my due diligence was for the benefit of CLICO...

Due diligence was carried out in 2005 possibly late October and in November.

...CLICO purchased [RCL] with the knowledge of these unauthorized or suspicious transactions”.

- [66] In **King v. Mayne Nickless Transport Inc., 1994 CanLII 1735 (BC CA)**, the British Columbia Court of Appeal considered whether the failure to plead condonation was fatal to the employee’s case. Counsel for the Claimant relied on the dissenting judgment of Lambert J., who opined that:

“...I am satisfied that the failure to plead those matters in a reply should not constitute a ground for allowing the appeal unless the defendant suffered some prejudice because of the failure. Counsel for the defendant said that waiver was neither pleaded

nor referred to in argument. But there has been no reference in his oral or written submissions to any evidence or line of inquiry which might have affected the evidence at trial if waiver had been specifically pleaded. I think that issues of condonation or estoppel or waiver were adequately raised by the deemed denial of the allegations of cause as a defence to the action. If the issue was adequately raised by the pleadings and by the evidence, as I think it was, then the trial judge was not precluded from considering it by the fact it was not properly explored in argument. A trial judge is not required or supposed to stop thinking about an issue that is properly before him just at the point where counsel stops. Accordingly, I consider that the trial judge properly relied on condonation, estoppel and waiver in his refusal to give effect to the defence that there was cause for termination...". (Para. 54 of judgment).

This was not the judgment of the majority, who found that there was no condonation of the employee's conduct, and that he was not wrongfully dismissed.

[67] Condonation is a question of mixed law and fact, and ideally it should be specifically pleaded so as not to prejudice the employer's presentation of its case. It was RCL's witness who placed condonation before the Court in her witness statement. Ms. John was employed by CLICO and then by RCL. She deposed that:

"Over the course of my appointment I have come across several transactions which I considered to be suspicious and/or unauthorised but were nonetheless unchallenged by management of [RCL]". (Para.3).

[68] Thus the evidence of condonation was gifted to the Claimant through RCL's pleadings. The pleadings were further supplemented by Ms. John's oral evidence. (See para. [65] supra). It was open to counsel for RCL to clarify or rebut the evidence of condonation through re-examination of Ms. John. This did not happen. There was no request for leave to tender additional evidence. Any perceived prejudice to RCL was of its own making. In these circumstances the Court will not strike out or ignore the evidence of condonation in this case.

[69] In **Pagliaroli v. Rite-Pak Produce Co. Limited, 2010 ONSC 3729 CanLII**, the court held that:

“...condonation may involve a hierarchical analysis of the inner-workings of an employer. It seems to me if misconduct is to be excused, someone within the organization with the ability to terminate or trigger a review and influence the continuation of the employer-employee relationship has to either have knowledge of the conduct in question or choose, for whatever reason, to ignore or approve it”. (Para. [36] of judgment).

[70] Ms. John confirmed that CLICO and RCL's management were aware of the transactions. What is more telling is that with knowledge of the transactions, the Claimant was offered another post in the accounts division of RCL. (See para. [5] supra). The Court finds that on the evidence both CLICO and RCL chose to overlook and therefore condoned all the transactions. In the

circumstances, there was no just cause to dismiss the Claimant.

Constructive Dismissal

[71] The constructive dismissal of an employee occurs when an employer unilaterally alters a fundamental condition of employment. The employer by his actions demonstrates that he no longer intends to be bound by the employment contract. (See Aust et al, supra para. [20] at p.436; **Potter v. New Brunswick Legal Aid Services Commission 2015 Carswell NB 87 (SCC); Faber v. Royal Trust Co. [1997] 1 SCR 846 (SCC); Lemay v. Canada Post Corp. [2003] OJ No. 3052 (Ont. SCJ)).**

[72] If the employee does not accept the fundamental alteration to his contract, and he resigns, the employee will be entitled to damages for wrongful dismissal. In other words, the employee may accept the fundamental repudiatory breach of his employment contract, leave his job and sue for constructive dismissal. (**Labarre v. Spiro Mega Inc., DTE 2001-T-640 (Que. SC); Farquhar v. Butler Brothers Suppliers Ltd. [1988] BCJ No. 191, 23 BCLR (2d) 89 (BCCA)).**

[73] It is imperative that the employee responds to the breach of his contract by leaving the workplace. If the employee delays in resigning after a fundamental contract breach by the employer, he may be taken to have affirmed the contract and, if so, he may lose the right to claim constructive dismissal.

(Halsbury's Laws, supra para. [18] at para. 720; **Western Excavating (ECC) Ltd. v. Sharp [1978] QB 761**).

[74] The decision whether there has been a breach of contract by the employer, so as to constitute constructive dismissal of the employee, is one of mixed law and fact. The employee must be able to show that he left in response to the employer's conduct. (**Pedersen v. Camden London Borough Council [1981] ICR 674**). Thus, the burden of proving constructive dismissal is on the employee. (**Sandy Lane Hotel Co. Limited v. Laurayne [2013] CCJ 1 (AJ)** at para. [2] of judgment).

[75] The letter the Claimant received from CLICO on 05 December 2005, was the first formal notification that the Claimant's position as CEO would end on 31 December 2005. The alternative position of Senior Accounts Officer, that was offered to the Claimant, represented a considerable demotion in status and the financial and other perks of the office of CEO. This constituted an anticipatory and fundamental breach of the contract of employment. And the Claimant was entitled to leave RCL and claim damages for constructive dismissal.

[76] There is no evidence that the Claimant accepted the repudiation of her contract prior to meeting with Mr. Parris on 12 December 2005. The Claimant continued working for another seven days after receipt of the letter on 05 December. The Claimant's unchallenged evidence is that she spoke with Mr.

Parris prior to the meeting. Her witness statement deposes that:

“I informed Mr. Parris that I had consulted a Lawyer in respect of the letter dated 5 December 2005. Mr. Parris told me he wanted to set up a meeting with me after the Managers Meeting which was to be held on the morning of Monday 12 December 2005. He said the meeting could be at a venue of my choice and I could bring someone with me. I decided to invite Mr. Roger Gill to attend the meeting with me”. (Para. 46).

[77] Nowhere in her witness statement or her oral evidence did the Claimant confirm to Mr. Parris, or to anyone else with the requisite authority, that she accepted the repudiation of her contract, and would be leaving RCL. Other than the fact that the Claimant had consulted a lawyer, and that she agreed to a meeting with Mr. Parris on 12 December 2005, nothing is known about the content of their conversation prior to the meeting. Therefore, when Mr. Parris forwarded the letter of 08 December 2005, three days after Mr. Thornhill’s letter of 05 December 2005, there was as yet no confirmed acceptance of the repudiation of the Claimant’s contract of employment. The Claimant was still in the employ of RCL. The Court finds that the anticipatory breach of the contract was effectively withdrawn by Mr. Parris on 08 December 2005. (See para. [6] supra).

[78] The Claimant’s unchallenged evidence continued in her witness statement as follows:

“At the afternoon meeting with Mr. Parris I pointed out to them that I had received a very offensive letter from them. I stated I had a contract with [RCL]. I told them to give me my money I was owed under the contract and let me go. Mr. Parris said that if that is the way I felt I should go right away... I locked the door to my office and gave Mr. Thornhill the key”. (Paras. 50 and 52).

[79] At this meeting, the Claimant attempted to negotiate her exit from RCL. She was willing to leave on condition that she was paid for the unexpired term of her contract before leaving. Mr. Parris’ invitation to the Claimant to leave was the effective point of her dismissal. This was not constructive dismissal, but wrongful dismissal nevertheless.

[80] The Court having found that the Claimant’s dismissal was not justified, it follows that she is entitled to damages for wrongful dismissal.

Mitigation of Loss and Damages

[81] Counsel for RCL contends that any right that the Claimant may have to damages is overshadowed by her failure to mitigate her losses. The argument is that:

“In this case we are aware that in or about the year 2009, the Claimant took up employment with a firm called [Westcott] Construction for one year, in which contract of employment the Claimant disclosed that she was paid a salary of \$20,000.00 per month and has thus mitigated her losses for that duration of time. However, more significant is her

evidence that she was not working prior to this because she never sought any other source of employment prior to this time as she was otherwise occupied with her side business at Sorelle.

In the circumstances, it is submitted that [the Claimant] failed to mitigate her losses”. (Paras. 45 and 46 of written submission filed on 16 January 2017)

- [82] Counsel relied on the case of **Red Deer College v. Michaels [1976] 2 SCR 324**, in which the Supreme Court of Canada opined that a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation. (At p. 331 of judgment). Chief Justice Laskin further opined that:

“If it is the defendant’s position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge’s assessment of the plaintiff’s evidence of unavoidable consequences”. (P.331)

- [83] According to Aust et al, the general law is that:

“A wrongfully terminated executive has the obligation to attempt to mitigate the damages flowing from the loss of his or her employment. Thus, the executive must make an honest and reasonable effort to find comparable employment and he or she must act in a prudent and diligent manner in his or her attempts at mitigation. The executive must not refuse job offers which are

reasonable given the circumstances. The rules of mitigation apply whether the employment relationship was governed by a fixed-term employment contract or one of indeterminate duration, unless the contract specifies to the contrary”. (Aust et al, supra para. [20] at pages 598 - 599).

[84] In **Forshaw v. Aluminex Extrusions Ltd. [1989] 27 CCEL 208 (BCCA)**,

the British Columbia Court of Appeal held that:

“That “duty” – to take reasonable steps to obtain equivalent employment elsewhere and to accept such employment if available – is not an obligation owed by the dismissed employee to the former employer to act in the employer’s interest...

The duty to “act reasonably”, in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee’s position would take in his own interest to maintain his income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him”. (At pages 212-213 of judgment).

[85] The evidence available for the Court’s evaluation is limited. In her witness

statement the Claimant revealed that:

“Since my dismissal from RCL I worked at Westcott Construction Ltd for approximately 1 year from January 2008 until the company’s closure. I

have not worked since the conclusion of that job”.
(Para. 60).

[86] The Claimant’s oral evidence is that:

“I worked at Westcott Construction. Between my dismissal and work with Westcott Construction I had no other job. I did not apply for a job until last Friday [14 October 2016]...

My salary at Westcott Construction was twenty thousand a month. I had my boutique, not full time so I did not pursue a job between my dismissal from [RCL] and my employment at Westcott. Boutique Sorelle moved from Super Centre to Sheraton and the name changed. That business is not still going on today. Its operations ceased. I don’t recall exact date or year... I worked at Westcott Construction one year”.

[87] When the Claimant was dismissed on 12 December 2005, her contract of employment had an unexpired term. The fixed contract term was five years with effect from 01 August 2004. Therefore, at 12 December 2005, the unexpired term was 3 years 7 months and 19 days. Between 13 December 2005 and 31 December 2008 the Claimant pursued self employment with her boutique business. There is no evidence as to what financial benefits, if any, the Claimant derived from the business.

[88] The burden of proof is on RCL to establish that the Claimant did not take reasonable steps to mitigate her loss. (See **Red Deer** supra at para. [78]). RCL produced no evidence that similar posts in local construction companies were

available when the Claimant was dismissed. Indeed, the offer of alternative employment made by RCL concedes that the Claimant had no unique skills, experience or qualifications to be CEO of another construction company. The offer as a Senior Accounts Officer was a considerable step down from CEO in terms of status and remuneration. The Claimant could not be expected to accept another position with RCL that would involve working in an atmosphere of hostility, embarrassment or humiliation. (See Aust *supra* at para. [20]; **Cayen v. Woodward Stores Ltd. [1991] B.C.J. No. 58; Anderson v. Tecsuit Eduplus Inc. [1999] 179 NSR (2nd) 284 (NSSC)).**

[89] In the absence of evidence that the Claimant had alternative job choices, the Court is unable to say that it was unreasonable for her to become self employed. There is no evidence of bad faith on her part. The business was already in existence. RCL did not elicit any evidence about any remuneration the Claimant derived from Sorelle. Therefore, there is no evidence of income earned by the Claimant that should be set off against any award for damages.

[90] The remaining question is whether the Court should deduct the Claimant's remuneration earned at Westcott, for the entirety of 2008, from any damages awarded to her. More recent Canadian authority suggests that, in some instances, the breach of a fixed term contract by an employer entitles the

employee to all financial rights attributable to the unexpired term of the contract, and that mitigation is unnecessary.

[91] **Howard v. Benson Group Inc., 2016 ONCA 256 (CanLII)**, is a landmark decision of the Ontario Court of Appeal. The claimant was employed under a five year fixed term contract, and terminated without cause twenty-three months into the contract. Clause 8.1 of the contract permitted the employer to terminate the contract at any time, and pay the employee in accordance with the Ontario Employment Standards Act. The lower court ruled that this term was ambiguous and unenforceable because it was unclear whether the amount to be paid to the employee was limited to termination pay or included benefits due to the employee during the notice period. The lower court implied a requirement to provide reasonable notice, and also held that the employee had a duty to mitigate his damages. (**Howard v. Benson Group, 2015 ONSC 2638 (CanLII)**).

[92] The employee appealed, and the employer did not challenge the ruling of the lower court that the notice term was ambiguous and unenforceable. The Ontario Court of Appeal overturned the lower court. The Court of Appeal held that the employee was entitled to contractual damages for the unexpired part of his fixed term contract. This court reasoned that in the absence of a

termination clause in the contract, the parties had agreed to a specific termination date which negated the common law duty on the employer to provide reasonable notice. The court also held that the common law duty to mitigate does not apply to a fixed term contract that has no mitigation clause.

[93] Speaking for the Court of Appeal, Miller JA reasoned that:

“[21]...Where an employment agreement states unambiguously that the employment is for a fixed term, the employment relationship automatically terminates at the end of the term without any obligation on the employer to provide notice or payment in lieu of notice. Such a provision, if stated unambiguously, will oust the implied term that reasonable notice must be given for termination without cause: **Lovely v. Prestige Travel Ltd., 2013 ABQB 467, 568 AR 215**, at para.135; **Ceccol v. [Ontario Gymnastic Federation (2001) 55 OR (3d) 614]** at para.25.

[22] Of course, parties to a fixed term employment contract can specifically provide for early termination and... specify a fixed term of notice or payment in lieu. However, ... if the parties to a fixed term employment contract do not specify a predetermined notice period, an employee is entitled on early termination to the wages the employee would have received to the end of the term: **Lovely** at para. 136; **Bowes [Goss Power Products Ltd., 2012 ONCA 425, 351 DLR (4th) 219]** at para. 26; **Canadian Ice Machine Co. v. Sinclair [1955] SCR 777** at p. 786.

.....

[26] The Employment Contract, without Clause 8.1, unambiguously remains a fixed term contract.

Without Clause 8.1, it contains no provision for early termination without cause. In keeping with **Machtiger [v. HOJ Industries Ltd., [1992] 1 SCR 986]** and **Ceccol**, the Employment Contract is sufficiently clear to oust the common law presumption of reasonable notice on termination. It follows that the appellant is entitled to the compensation that he would have earned to the end of the Employment Contract.

....

[44] In the absence of an enforceable contract provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term, and that obligation will not be subject to mitigation. Just as parties who contract for a specified period of notice (or pay in lieu) are contracting out of the common law approach in **Bardal v. Globe & Mail Ltd. (1960) 24 DLR (3d) 140 (Ont. HC)**, so, too, are parties who contract for a fixed term without providing in an enforceable manner for any other specified period of notice (or pay in lieu)".

[94] Clause 7 of the Executive Service Agreement between the Claimant and RCL speaks to the termination of the Agreement as follows:

“7. Termination

- 7.1 Either the company or the Executive may determine not to extend the Executive’s employment at the end of the Initial Term on at least twelve months prior notice.
- 7.2 The Employment may be terminated for just cause only.
- 7.3 Termination under this clause does not affect any accrued rights or remedies of either party”.

[95] Clause 1 of the Agreement also provides that:

“1.2 The Executive’s employment will commence on the Commencement Date and is for an initial term of five years (‘Initial Term’).

1.3 Subject to termination for just cause, this agreement will automatically extend at the end of the Initial Term for a further term of five years on the same terms”.

[96] The only reference to notice in the Agreement is in the context of either the Claimant or RCL declining to continue their relationship after the initial five year contract. Either party was expected to give the other twelve months’ notice of such a decision. The Agreement contains no provision for notice or pay in lieu of notice to terminate the Agreement before the initial five years of the contract. It does not envisage early termination except for just cause.

[97] The Court also notes that the Agreement does not mention mitigation by the Claimant in the event of the early termination of the contract by RCL. In **Howard**, the Ontario Court of Appeal was of the view that any such duty to mitigate must be written into the agreement. Miller JA opined that:

“There is no reason to depart from the rule in **Bowes** that there is no duty to mitigate where the contract specifies the penalty for early termination. It does not matter whether the penalty is specified expressly, as in **Bowes**, or is by default the wages and benefits for the unexpired term of the contract, as in the case of fixed term contracts generally”.

[98] This Court is persuaded by the reasoning in **Howard**, and fortified by the fact that the Supreme Court of Canada denied the employer leave to appeal. Applying the reasoning in the **Howard** case to the Claimant's contract, it follows that in the absence of a specific term requiring her to mitigate her loss, the remuneration from Westcott Construction cannot be deducted from her damages for wrongful dismissal. The Claimant is entitled to the emoluments that were agreed in her contract for the unexpired term of the contract.

Calculation of Damages

[99] The Claimant was dismissed on 12 December 2005. There is no evidence that she received any salary or allowances for December 2005. Counsel submitted that damages should be calculated for forty-four months. RCL did not contest that this is the period for which the Claimant would have received these benefits, if her contract had not been terminated.

[100] Schedule 2 of the Employment Agreement between the Claimant and RCL refers to a gross monthly remuneration package of \$22,500.00. This is made up of salary \$21,250.00, entertainment \$650.00, and travel \$600.00. In her witness statement the Claimant alleged entitlement to a basic monthly salary of \$21,500.00. (Para. 62). However, no explanation was offered for the \$250.00 increase over the figure fixed by the Agreement. Therefore, any calculation of damages pertaining to salary must be based on the contract sum

of \$21,250.00.

[101] There is a claim for the benefit of “a fully loaded executive company vehicle including 60 litres per week of petrol”. (See Para. [10] supra and para.62 of witness statement). Although this benefit is not mentioned in the Agreement, it was not disputed by RCL. Unfortunately, there is no evidence as to whether the use of the vehicle was restricted to RCL’s business, or whether the Claimant was permitted access to the vehicle and petrol for her private use.

[102] Aust el al discussed the use of a company car and concluded that:

“... if a car was provided to the executive for his personal enjoyment or an allowance was given as a prerequisite of employment, the allowance or an amount representing the private use of the vehicle for the notice period will usually be awarded. However, if the vehicle was furnished for the performance of the executive’s duties, courts have refused to award compensation”. (Supra para. [20] at pages 514-515).

Without the evidential foundation, this Court is unable to calculate an award for loss of use of the company vehicle with petrol.

[103] Clause 4 of the Agreement provides for the payment of a bonus to the Claimant in these terms:

“The [Claimant] will be entitled to receive an annual performance bonus after [RCL] posts any profit at a rate set at the discretion of the Board of Directors. [RCL] shall remunerate the [Claimant’s] bonus in the month

immediately after the profit has been posted”.

[104] The Claimant offered no evidence that RCL ever posted a profit between the date of her appointment as CEO and the expected end of her contract. There is no evidence of a discretionary bonus rate being set by the Board within that time frame. No award is made for unpaid bonus.

Disposal

[105] Judgement is entered for the Claimant, and the Counterclaim is dismissed. She is entitled to the payment of salary, entertainment and travel allowances, for a period of forty-four (44) months.

[106] I will hear the parties on the issue of interest, costs and any other consequential orders.

Apology

[107] This case was filed in 2006, and passed through the hands of various judges before being assigned to this Court. It was ten years before the trial began in 2016, and concluded in March of 2017. The decision is delivered today after a three year hiatus.

[107] The Caribbean Court of Justice, as our apex Court, has consistently urged the Barbados judiciary to issue judgements expeditiously. More recently,

Parliament instituted a six month time frame for judgments to be delivered. The failure to observe the six month deadline exposes a judge to the possibility of disciplinary action.

[109] It was in **Sea Havens Inc. v. John Dyrud [2011] CCJ 13 (AJ)**, that the Honourable Mr. Justice Hayton reminded us that:

“.....judges should strive to deliver judgements within three months normally or in complex cases within six months, though it is appreciated that an unfortunate backlog of judgments waiting to be drafted may delay matters for some time”. (At para. [6] of judgement. He was referring to the exhortation of Saunders JCCJ, as he then was, in **Reid v. Reid [2008] CCJ 8 (AJ)** at [22]).

[110] Hayton JCCJ made a most astute observation that precisely describes the circumstances of this Court, that is, “an unfortunate backlog of judgments waiting to be drafted”. This backlog was built up over a number of years of continuous trials; and frequently with four out of five working days dedicated to trials which included interlocutory applications and cost hearings. While this backlog accrued, the head of the judiciary, counsel and the Barbados Bar Association were at all times aware of the precarious position of this Court. No significant off bench time was ever offered as the backlog continued to escalate. Add to this mix the fact that this Court was without the services of a dedicated judicial assistant between June 2019 and May 2020.

[111] The Court appreciates the frustration of parties and their counsel who continue to await outstanding judgments from this Court. I hereby tender my sincere apologies for any contribution this Court made to the delays in this matter.

Sonia L. Richards
Judge of the High Court