JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 153/2012

BEFORE: THE HON MISS JUSTICE PHILLIPS P (AG)
THE HON MRS JUSTICE SINCLAIR HAYNES JA
THE HON MISS JUSTICE STRAW JA

BETWEEN	**ALCOA MINERALS OF JAMAICA INCORPORATED**	**APPELLANT**
AND	**MARJORIE YVONNE PATTERSON (Court appointed personal representative of the Claimant, the late ORINTHIA HANSON deceased)**	**RESPONDENT**

William D Panton and Courtney Williams instructed by DunnCox for the appellant

Aon Stewart instructed by Knight Junor & Samuels for the respondent

18, 19 March and 20 December 2019

PHILLIPS P (AG)

[1] I have read in draft the judgment of my sister Straw JA. I agree with her reasoning and conclusion and have nothing to add.

SINCLAIR HAYNES JA

[2] I too have read the draft judgment of my sister Straw JA and agree with her reasoning and conclusion.

STRAW JA

Introduction

[3] This is an appeal from the judgment of Campbell J delivered on 18 October 2012. The learned judge made a number of awards in damages in favour of the respondent which totalled $30,622,762.40. He also awarded interest and costs.

Background

[4] The appellant is a bauxite mining company whose operations are centred around a plant located in the parish of Clarendon. The respondent is Marjorie Yvonne Patterson, the personal representative of Mrs Orinthia Hanson (deceased), who was a poultry farmer that lived and worked on property she owned in the parish of Clarendon. She operated three chicken houses on the said property.

[5] In early 2002, the appellant carried out work on a property adjoining Mrs Hanson's property. This work involved the construction of a housing development (known as McGilchrist Palm) for the relocation of persons who owned property which had been acquired by the appellant. As a part of this construction, dams and/or ponds were constructed which were intended to serve as a flood protection system.

[6] Damage was caused to Mrs Hanson's property, including the chicken houses, by flooding on three occasions, which she alleged was as a result of the activities of the appellant on the adjoining property. The learned judge found liability on the part of the appellant in relation to property damage and other losses caused by the flooding on the three occasions and made the following awards:

"(1) For birds lost in the three flooding events at an average flock of 27,140 at $21 per bird.	$1,709,820.00
(2) Livestock (17 goats, pigs, 6 cows)	$1,000,000.00
(3) Restoration cost of chicken houses	$10,000,000.00
(4) Loss of contract at an average of 6 flocks per year	
(a) 2002 4 at 19.59 (27140 x 4 @ 19.59)	$2,126,690.40
(b) 2003 3 at 13.74	$1,118,710.80
(c) 2004 3 at 13.64	$1,110,568.80
(d) 2005 3 at 8.40	$683,928.00
(3) [sic] 2006 4 at 16.94	$1,839,006.40
(5) Contracts for years 2007 – 2010 (27140 x 6 x 4 years x 16.94)	$11,034,038.00
Total Award	$30,622,762.40

(6) Interest on the above at the rate of 3% from October 2, 2008 until October 18, 2012.

(7) Costs to the Claimant to be taxed if not agreed."

Grounds of appeal

[7] The appellant filed a notice of appeal on 7 December 2012, listing the following reasons for challenging Campbell J's judgment in relation to the award of damages:

> "1. The learned Judge erred in law when he found that there was a claim for $36,000,000.00 for replacement of chicken houses when there was no such claim set out in the Statement of Case.
>
> 2. The learned Judge erred in law in awarding $10,000,000.00 for replacement chicken houses when there was no such claim in the Statement of Case.

> 3. The learned Judge erred in law in making the award without an application to amend the Statement of Case pursuant to Rule 20.4(2) Civil Procedure Rules 2002.
>
> 4. The learned Judge erred in law in awarding damages for the loss of contracts for the three years 2008, 2009 and 2010 where no such claims were made in the Statement of Case.
>
> 5. The learned judge erred in law in making the award for the three years without an application to amend the Statement of Case.
>
> 6. The learned judge erred in law in awarding compensation for the loss of an average of 6 flocks each year after 2002 following the decision of Jamaica Broilers Limited to suspend the delivery of chickens during the Hurricane Season, between June and October."

[8] The appellant sought the following orders from this court:

> "1. That Judgement of the Honourable Mr. Justice Campbell Q.C. be set aside, in part, to the extent that the learned judge has awarded damages to the Respondent that are not claimed in the Statement of Case.
>
> 2. That Judgement be entered for the Appellant against the Respondent to the extent of the difference in the amounts claimed in the Statement of Case and the amounts awarded.
>
> 3. Th[e] costs of the Appeal to the Appellant to be agreed or taxed."

Counter notice of appeal

[9] The respondent is also dissatisfied with the judgment of Campbell J. The following ground of appeal is contained in the counter notice of appeal filed 21 December 2012:

> "The learned judge erred in law in awarding only $10,000,000 for the replacement of the three houses when the evidence presented to the court was that the

> replacement cost of each chicken house was $16,000,000.00."

[10] Accordingly, the orders sought from this court are:

> "(a) That the judgment of the Honourable Mr. Justice Campbell be set aside in part to the extent that the award did not fully compensate the Claimant for the damage to her chicken houses and that accordingly this award should be increased to $30,000,000.00 or such other sum as this Honourable Court thinks just having regard to the evidence led at trial.
>
> (b) Costs of the Appeal be awarded to the Respondent to be taxed if not agreed."

Issues to be determined

[11] The issues arising from the grounds of appeal may be framed as follows:

A. Whether the pleadings of the respondent set out a claim of either $36,000,000.00 or $10,000,000.00 for the replacement of the chicken houses. If it did not, were any of these amounts set out in the witness statements of the respondent for the stated purpose and would this be sufficient to ground such a claim bearing in mind no application was made to amend the statement of case to reflect such a claim.

B. Whether the claim for loss of income for 2008 to 2010 was set out in the pleadings; if not, whether the witness statements provided these particulars of allegations and whether this would be sufficient

to ground the claim where there was no amendment to the statement of case.

C. What is the effect of the findings in relation to the above issues within the context of **McPhilemy v Times Newspapers Ltd** and the common law principles in relation to pleadings for special damages.

D. Whether the trial judge erred in awarding compensation based on an average of six flocks each year after 2002 following the decision of Jamaica Broilers to suspend delivery of chickens during the hurricane season between June and October.

E. Whether the award of $10,000,000.00 made for the restoration of the chicken houses should be disallowed and, if not, whether there is any justification for increasing the award to $30,000,000.00 or more.

Issue A: Whether the pleadings of the respondent set out a claim of either $36,000,000.00 or $10,000,000.00 for the replacement of the chicken houses. If it did not, were any of these amounts set out in the witness statements of the respondent for the stated purpose and would this be sufficient to ground such a claim bearing in mind no application was made to amend the statement of case to reflect such a claim.

Submissions of the appellant

[12] Counsel for the appellant, Mr Panton, submitted that the learned judge erred in finding that there was a claim for $36,000,000.00 for the replacement of chicken

houses and further erred in awarding $10,000,000.00 for the same. He advanced two reasons for his submission. Firstly, there was no pleaded case for the award of any of these amounts and secondly, the award amounts to double compensation.

[13] With regard to the first contention, counsel submitted that in the respondent's statement of case, in respect of each event of flooding in May 2002, October 2002 and October 2005, she claimed damages to property (including the chicken houses) and livestock. He argued therefore, that after each event of flooding, she must have expended monies to repair the chicken houses (which would have been included under the claim for property damage), otherwise she would not have been able to produce chickens in the subsequent years.

[14] Mr Panton acknowledged that Mrs Hanson mentioned the cost of replacement for the three chicken houses in her witness statement and submitted that this was the highest she had ever put any issue relating to the replacement.

[15] In relation to the second contention (double compensation), Mr Panton submitted that Mrs Hanson, in her claim for special damages to property and livestock, had included the cost of repairs to the chicken houses which she said in evidence were flooded resulting in the loss of chickens. There would therefore be no need to make a separate award for the restoration of the chicken houses.

[16] Counsel contended that there was neither a claim for $36,000,000.00 nor a claim for $10,000,000.00 identified in the statement of case and that the learned judge would have erred when he stated in his judgment that a claim for an award of $36,000,000.00

was made for the replacement of the chicken houses. Counsel referred the court to rules 8.9(1), 8.9(4), 8.9A and 20.4(2) of the Civil Procedure Rules (CPR).

Submissions of the respondent

[17] Counsel for the respondent, Mr Stewart, submitted that there is no challenge to the fact that damage to property including the chicken houses, was suffered by Mrs Hanson. The issue was the quantification of the damage. He stated that she had set out in her particulars of claim, at pages 4 – 6, that she sustained the said property damage. He then referred the court to paragraph 35 of her witness statement, where she put her loss at over $6,000,000.00, excluding loss of income for the birds and livestock. At paragraph 69, she spoke to the cost of replacing three chicken houses which would be in excess of $16,000,000.00 each, based on estimates from Jamaica Broilers Limited ('Jamaica Broilers').

[18] He submitted that she included evidence therefore that would have been contained in the pleadings in relation to the need for the replacement. He submitted further that this was also to be considered in the context of the evidence of Mr Jeremy Bailey, an employee of Jamaica Broilers, who stated that the projected cost of a chicken house would be $18,000,000.00.

[19] He stated that counsel who appeared for the respondent in the court below spoke to a claim for $36,000,000.00 in her submissions and this is what the learned judge appeared to have been saying when he stated that "a claim for the replacement cost of these houses for an award of $36,000,000.00 has been made". Mr Stewart

referred the court to the submission of counsel for the respondent in the court below, who had requested a discounted award of $12,000,000.00 for each of the chicken houses.

[20] In written submissions, Mr Stewart also referred to rule 8.9(1) and (2) of the CPR and submitted that the claimant was required to include in the claim form or particulars of claim, a statement of all the facts on which the claimant relied and such statement must be as short as practicable. He referred the court to A Practical Approach to Civil Procedure[1], by learned author Stuart Sime, wherein it was stated:

> "Generally, a party will comply with its obligations when drafting a statement of case if it sets out the facts of its claim or defence, and avoids setting out the evidence it intends to adduce to prove its case."

[21] He contended that the issue for this court's determination is whether, after having examined the respondent's statement of case, the obligation to set out the factual basis of the case concerning the replacement of the chicken houses was discharged. It was submitted that the respondent had discharged her obligation to set out the factual basis of her case by virtue of referencing the damage to her property and it would have been at the hearing of the action (trial) that evidence as to what was damaged would have been fleshed out in detail. Counsel referred the court to **McPhilemy v Times Newspapers Ltd**[2].

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[1] 12th edn, paragraph 13.11
[2] [1999] 3 All ER 775

[22] In relation to the need for an amendment pursuant to rule 20.4(2) of the CPR, Mr Stewart submitted that while it may have been prudent, it was not necessary in the circumstances.

Discussion and analysis

[23] Rule 8.9(1), (2), (4) and 8.9A of the CPR provides as follows:

> "8.9 (1) The claimant must include in the claim form or in the particulars of claim a statement of all facts on which the claimant relies.
>
> (2) Such statement must be as short as practicable.
>
> (3) …
>
> (4) Where the claim seeks recovery of any property, the claimant's estimate of the value of that property must be stated."
>
> "8.9A The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."

[24] Rule 20.4(2) also reads as follows:

> "20.4(2) Statements of case may only be amended after a case management conference with the permission of the court."

[25] In **Grace Kennedy Remittance Services Limited v Paymaster (Jamaica) Limited and Paul Lowe**[3], a decision of this court, Harris JA considered the scope and function of pleadings, and referred to rule 8.9 and 8.9A of the CPR. This is set out at paragraphs 28 to 31 of her judgment:

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[3] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 5/2009, judgment delivered 2 July 2009

"28. This leads me to consider at this stage the scope and function of pleadings. It is a well established principle that pleadings are designed to disclose the case on which a party intends to rely so that the opposing party may direct his evidence to the issue or issues divulged by the pleader.

29. The function and role of pleadings was recognized by the learned authors of Pleadings, Principles and Practice at page 3 in the following context –

> 'The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of [Ord 18] was to prevent the issue being enlarged, which would prevent either party from knowing when the case came on for trial, what the real point to be discussed was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby diminish expense and delay.'

30. Part 8 of the Civil Procedure Rules 2002 governs, among other things, the scope of a pleading. It is important to look at Rule 8.9(1) and 8.9A of the rules...

31. Rule 8.9 shows that a claimant should plead a statement of facts on which it is intended to place reliance. The statement should be as short as practicable. In keeping with the general rule, a party should plead all material facts. A pleading essentially defines the boundaries of each party's case and it is important that the statement or statements therein should recite the general nature of the parties' case."

And at paragraph 32 of her judgment Harris JA considered the effect of **McPhilemy**, the authority relied on by counsel Mr Stewart, on rule 8.9 of the CPR.

"32. The authorities have shown that Rule 8.9 of the Civil Procedure Rules 2002 obviates the requirement for extensive pleadings as regards particulars. Once the general nature of a claim has been pleaded, if witness statements are exchanged, these statements may supply particulars of a claim. Lord Wolfe [sic], in ***McPhilemy v Times Newspaper*** [1999] 3 All ER

775 lends support to this proposition, when at page 778 he said:

> 'The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. 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. The Practice Direction CPR 16, paragraph 9.3 requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required.'"

[26] Based on the understanding of the function of pleadings, therefore, and as reflected in the relevant rules of the CPR, the particulars of claim of a party should reveal all the allegations or factual arguments on which it is relying; it should reflect the estimated value of all property for which recovery is sought and the claimant would require the permission of the court to rely on any allegation or factual argument which not been set out. Rule 20.4(2) would allow the claimant to apply for permission to amend the statement of case if this had not been done before the case management conference was held. The application of this rule is governed by the overriding objective

of the CPR (see the dicta of Sykes J (as he then was) in **Peter Salmon v Master Blend Feeds Limited**[4] at paragraph 22).

[27] When one examines the statement of case of the respondent, there is a general averment of property damage including damage to the chicken houses. The amounts claimed in relation to these losses are set out at paragraph 15 of the particulars of claim as particulars of special damages:

"PARTICULARS OF SPECIAL DAMAGES

May 23, 2002 damage To property & livestock due to flooding	$ 6,616,530.00
October 1, 2002 damage to Property & livestock due to flooding	$ 2,635,000.00
June 2004 damage to Property & livestock due to smoke	$ 637,800.00
January 4 & 5 2005 damage to Property & livestock due to dust	$ 7,000.00
October 12, 2005 damage to Property & livestock due to flooding	$2,236,000.00
2006- loss of income (only 3 flocks Of chicken per year)	$1,500,000.00

[4] (unreported), Supreme Court, Jamaica, Suit No CL 1991/S 163, judgment delivered 26 October 2007

2007- loss of income (no flocks of chicken)	$3,000,000.00
Value of premises	**$120,000,000.00**
TOTAL	**$136,632,330.00**"

[28] In relation to the three floods, therefore, the total claim stated for property damage including livestock is $11,487,530.00. As far as the above pleadings are concerned, one can conclude that the case for the award of damages in relation to the chicken houses has been set out, albeit no monetary claim is revealed in relation to the chicken houses specifically. The pleadings of the respondent in this case, however, do not reveal any allegation of fact that there was a replacement of chicken houses, neither is there any claim set out for replacement of chicken houses at a cost of $36,000,000.00 or any other amount for that matter. This would have been material, defining the boundary of the respondent's case, that she had to replace the chicken houses at some point in time as a result of the flooding.

[29] The next issue to be considered is whether it could be said that, at the least, the witness statements of the respondent provided these particulars so as to place the appellant on notice of this claim. The witness statement of Mrs Hanson speaks to her owning three chicken houses; that in May 2002, at the first flooding, the three chicken houses were flooded and a wall near to the chicken house, closest to the boundary of the appellant, had collapsed. At paragraph 35, she stated that she suffered considerable damage to property including the chicken houses. She stated that as part of the

reconstruction process, she dug deeper trenches around the chicken houses. She estimated her loss (excluding the loss of income from the birds) to be over $6,000,000.00 plus an additional $800,000.00 to construct a wall.

[30] In relation to October 2002, she stated that all three chicken houses were flooded and that she suffered considerable damage to property including the chicken houses; she also incurred considerable costs to clean the entire property. She estimated her losses at $1,700,000.00 (excluding loss of income for the birds and livestock). She also spent $250,000.00 to clean the trenches around the property, dig deeper trenches around the chicken houses and rebuild an area of the back wall.

[31] In October 2005, she stated that the three chicken houses were again flooded. She spoke to considerable damage to property including the chicken houses as well as incurring considerable expense to clean the entire property. She estimated her losses at $550,000.00, excluding loss of income. The total amount of expenditure associated with property damage as reflected in the witness statements would be $9,300,000.00

[32] It is at paragraph 69 of her witness statement that there is a reference to replacement of chicken houses. Paragraphs 69 and 70 of her witness statement read as follows:

> "69. The cost of replacing the 3 poultry hoses [sic] is in excess of $16,000,000.00 each based on estimates from Jamaica Broilers Limited.
>
> 70. In any event I think this would be an exercise in futility unless I were to relocate as Jamaica Broilers Limited is not

> willing to place any more birds on my property due to the flood risks/dangers."

[33] The witness statement of Mr Bailey, the representative of Jamaica Broilers, makes no reference to the cost of replacing chicken houses. However, while giving oral evidence, he speaks to the projected cost of a chicken house being $18,000,000.00.

[34] Again, the witness statement, as well as the particulars of claim, speak to damage to the chicken houses and reference general losses to property including the chicken houses. However, contrary to the submissions of counsel for the respondent, no particulars are provided that any of the chicken houses were replaced at any time or at a particular cost and there was no amplification of the evidence in relation to any such replacement of chicken houses. Mr Stewart's submission therefore that Mrs Hanson had discharged her obligation to set out the factual basis for any such claim is patently incorrect.

[35] Paragraph 69 of Mrs Hanson's witness statement, as shown above, clearly speaks to what is a projected or future cost to replace the chicken houses, a cost for which no such claim was made. This is made abundantly clear at paragraph 70, as Mrs Hanson refers to the futility of any such replacement unless she relocated her business. This finding is also reinforced by the lack of evidence as to the time frame when the chicken houses would have been replaced. The trial judge acknowledged this when he commented at paragraph [63] of his judgment:

> "[63] …If the chicken houses were able to produce after the last event claimed for in October 2005, what caused the

damage that has resulted in their claim for a total loss of the chicken houses?"

[36] The trial judge would have been correct in his assessment that the chicken houses were producing after the last flood as the evidence is that the last flock was handed over to Jamaica Broilers in 2006. However, the witness statements do not provide any particulars that the chicken houses were actually replaced. It is the opinion of this court that the claim for replacement may have been pursued as a claim for loss (of use) of the value of the chicken houses as she was no longer producing chickens. Alternatively, it may have been made as a claim for future cost of replacement if, she had intended to relocate the houses. However, no such claims were pleaded or particularised.

[37] The conclusion is, therefore, that neither the pleadings nor the witness statements set out a claim for replacement of chicken houses. On the face of these pleadings, the respondent would have breached rule 8.9(1), 8.9(4) and 8.9A of the CPR and would have required, as submitted by counsel for the appellant, an application to amend the particulars of claim as per rule 20.4(2).

[38] However, as indicated previously, a claim for losses associated with the damage to the chicken houses has been pleaded and particularized. Whether the learned judge erred in the actual award of $10,000,000.00 for the restoration of the chicken houses will be examined during the consideration of the counter notice of appeal filed.

Issue B: Whether the claim for loss of income for 2008 to 2010 was set out in the pleadings; if not, whether the witness statements provided these

particulars of allegations and whether this would be sufficient to ground the claim where there was no amendment to the statement of case.

Submissions of the appellant

[39] Mr Panton submitted that Mrs Hanson did not plead in her statement of case any continuing loss of income beyond 2007. Consequently, she was not entitled to any award of special damages in relation to any such loss for the period 2008 to 2010.

[40] It was contended that the statement of case fixes the limit to the claim for special damages, except where there is a claim for continuing loss. He contended that the pleadings specifically dealt with a specific number of years, and, if the respondent was claiming damages beyond those years, an indication would have been necessary. He emphasised that the losses which were claimed were up to 2007 and any claim for damages beyond that period (which the learned judge awarded) did not form part of the statement of case.

[41] As such, the court was not at liberty to increase the award for special damages without first considering an application to amend and allowing such an amendment to the statement of case. In the case at bar, there was no application for such an amendment, nor was there any order made by the court to that effect.

[42] Mr Panton submitted that this "new claim for special damages" was set out for the first time in the written submissions on behalf of the respondent by counsel below. These submissions were filed on 28 July 2013, after the conclusion of the evidence. In response to this "new claim" made in the written submissions, counsel for the appellant

in the trial below, provided the learned judge with an addendum to their submissions objecting on the following grounds:

> "(i) That there had been no application to amend the statement of case and therefore the new claim for damages could not be considered by the court as they did not form part of the pleaded statement of case;
>
> (ii) That pursuant to CPR rule 20.4(2) – 'Statements of case may only be amended after [a] Case Management [conference] with the permission of the court'; and
>
> (iii) The evidence having been concluded, it was not open to the Claimant to seek to amend by pleading a different case in the closing submissions."

[43] Mr Panton considered the inclusion of these additional years in the respondent's closing submissions to be tantamount to an ambush. He submitted that, even if counsel who represented the respondent at trial had relied on the evidence from Mr Bailey who provided a computation table concerning earnings of Mrs Hanson, that table stopped at 2006 and as such one would not know how the trial judge arrived at the figures post 2006.

[44] Mr Panton submitted that the learned judge therefore erred when he awarded damages for the loss of income for 2008 to 2010. In relation to **McPhilemy**, Mr Panton submitted that Lord Woolf MR was looking at pleadings which were much more complicated than in the case at bar.

Submissions of the respondent

[45] Mr Stewart conceded that the particulars of special damages (contained in the particulars of claim filed 14 May 2008) only set out loss of income for the years 2006 and 2007. He submitted however, that the loss for the years 2008 to 2010 is implicitly included in the witness statement of Mrs Hanson as she had stated that she had suffered loss from 2006. He stated also that the particulars of claim indicated that there had been loss and the court would have considered this evidence that the loss would have been continuing.

[46] In relation to rules 8.9 and 20.4(2) of the CPR, counsel relied on his earlier submissions that the fact that there was no amendment would not have been detrimental. He stated that the claim is not restricted just to the particulars of special damages as pleaded. He pointed to the fact that there is evidence that she suffered loss of income and use and enjoyment of her property.

[47] Mr Stewart submitted that this court should be guided by the dicta of Lord Woolf MR from **McPhilemy v Times Newspapers Ltd**[5] on the role of pleadings in what he termed "the post CPR dispensation". Counsel referred this court to the quotation of Lord Woolf MR which has been previously set out at paragraph [25] of this judgment as taken from paragraph 32 of Harris JA's judgment in **Grace Kennedy**.

[48] Referring to **McPhilemy**, he reiterated that the pleadings need not state in an extensive way what is the respondent's case. The letter from Jamaica Broilers

[5] At pages 792 - 793

terminating her contract would be a basis to argue that there was sufficient notice of the issue provided for the appellant. On the face of the pleadings, including the documents attached, her evidence would be sufficient particulars of the case the appellant had to meet. He pointed out that the pleadings were filed in 2008, so the evidence would have to come from her as to what calamities she suffered.

Discussion and analysis

[49] The statement of case discloses no specific claim for loss of income between 2008 and 2010 in the particulars of special damages. There is only such a claim for 2006 and 2007. For completeness and ease of comprehension, it bears repeating that paragraph 14 of the particulars of claim avers that she has been deprived of the use and enjoyment of her land and she has suffered loss and damage. This paragraph makes reference, as an annex, to a letter from Jamaica Broilers dated 24 January 2006, which states that she received her last flock from that company in March 2005. Also, paragraph 15 of the particulars of claim avers that she has lost her source of income and has had to borrow money to finance her day to day living expenses. Annexed as reference to this paragraph is a copy statement from Dehring Bunting and Golding.

[50] An examination of this statement reveals that it is described as a demand loan in relation to Mrs Hanson. The initial date is 23 June 2006 and the accounting continues up to January 2008.

[51] Mrs Hanson's witness statement, at paragraph 52, reveals that Jamaica Broilers terminated her contract in October 2005 as a result of the fact that she was in a high

risk environment due to the flooding. Mr Bailey also stated in his witness statement, that she was a contract farmer with Jamaica Broilers between 1976 to 2006.

[52] At paragraph 67, Mrs Hanson bemoans the fact that she had suffered considerable losses and at paragraph 71, she speaks to the fact that she was forced to borrow money from the bank to finance her normal living expenses. She stated also, at paragraph 72, that she has essentially lost her livelihood and further, at paragraph 73, that she has been reduced to living as a pauper, depending on the good graces of her children just to survive. This witness statement is dated 31 May 2010. Certainly, there are additional factual assertions speaking to a permanent loss of her source of income as a chicken farmer. Is Mr Stewart correct in his assessment that the witness statements and accompanying documents set out the particulars of the claim for loss of income for the years 2008 to 2010?

[53] The witness statement of Mrs Hanson does not state in direct words that she is claiming loss of income between 2008 to 2010. However, the appellant could be said to have been alerted to the possibility of such a claim beyond 2007 as the above mentioned documents clearly contained particulars that her business would have been shut down from 2006, the reason why it was shut down, and that this loss of income would have been continuing up to the point of the execution on the witness statement in May 2010.

[54] As mentioned previously, Mr Stewart is relying on the authority of **McPhilemy** in contending that the respondent would have done sufficient to provide a basis to ground

the above award. There are two issues to be considered therefore; **(1)** Can the particulars as raised in the witness statements satisfy the requirements as expressed in **McPhilemy** that the witness statements can supply the sufficiency of particulars necessary, without the necessity of an amendment to the statement of case. **(2)** Even if such a conclusion could be drawn, bearing in mind that the claim for loss of income is a claim for special damages, in this post CPR and **McPhilemy** dispensation, is it required that the statement of case should conform to the common law principles relating to a claim for special damages? These questions will be examined presently in considering issue C.

Issue C: What is the effect of the findings in relation to the above issues within the context of McPhilemy v Times Newspapers Ltd and the common law principles in relation to pleadings for special damages

Discussion and analysis

[55] In considering the first issue, that is, whether the particulars raised in the witness statements on behalf of the respondent are sufficient to provide the necessary pleadings, it is important to understand the context of the principle enunciated by Lord Woolf MR in **McPhilemy**. His statement was made during consideration as to whether a reamended particulars of justification by the defendants ought to have been allowed in a case of libel. The original particulars of justification were extensive. The proposed reamended particulars were described as very extensive additional particulars of justification. It was observed that the whole pleading spread over 38 pages. Lord Woolf MR commented that considerable time, energy and money had been incurred in producing the pleadings and then stated that the question which arose was whether

this scale of expenditure is necessary or desirable. Lord Woolf MR then went on to make the remarks about the reduced necessity for extensive pleadings.

[56] Lord Woolf MR did reinforce, however, that pleadings were not superfluous and are still required to mark out the parameters of the case being advanced by each party and that they are critical to identify the issues and the extent of the dispute between the parties. The principle stated by Lord Woolf MR was considered and applied as discussed previously, in **Grace Kennedy** by both Cooke and Harris JJA in their respective judgments. In **Grace Kennedy**, the issue was whether the learned judge below should have allowed a supplemental witness statement to be filed. The appellant argued that it raised new causes of action. The court examined the witness statement as well as the statement of claim in order to determine whether the material raised was a departure from the claim and introduced new causes of action.

[57] Cooke JA, at paragraph 15, stated that the first respondent's pleadings had made clear the general nature of the case, as the statement of claim had set out the claim for damages but that was to be distinguished from the particulars pertinent to those claims. Harris JA found that the impugned paragraphs of the supplemental witness statement, when viewed against the background of certain paragraphs in the statement of claim, outlined specifics of the claim for damages and that other paragraphs gave additional particulars of the pleaded claim.

[58] Harris JA referred also to a decision of the Eastern Caribbean Supreme Court, **East Caribbean Flour Mills Limited v Ormiston Ken Boyea**[6], where **McPhilemy** was applied by Barrow JA who delivered the judgment on behalf of the Court of Appeal. At paragraph [43] of that judgment, Barrow JA referred to Lord Hope's treatment in the **Three Rivers**[7] case, where the court was considering the question of the adequacy of pleadings. Barrow JA made the point that Lord Hope distinguished between an allegation and the sufficiency of the particulars of the allegation, he opined as follows:

> "[43] Lord Hope's reproduction and approval of the exposition by Lord Woolf MR in **McPhilemy v Times Newspapers Ltd** on the reduced need for extensive pleadings now that witness statements are required to be exchanged, should be seen as a clear statement that there is no difference in their Lordships' views on the role and requirements of pleadings. The position, as gathered from the observations of both their Lordships, is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The 'pleadings should make clear the general nature of the case,' in Lord Woolf's words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand to mean pleadings with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case. (footnote omitted)
>
> [44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings. The issue in the **Three Rivers** case was the need to give adequate particulars, not the form or document in which

[6] (unreported), Court of Appeal, St. Vincent and the Grenadines, Civil Appeal No 12/2006, judgment delivered 16 July 2007

[7] Three Rivers District Council and others v Bank of England (No 3) [2001] 2 All ER 513

> they must be given. In deciding that it was only the pleadings that she should look at to decide what were the issues between the parties the judge erred, in my respectful view. If particulars were given, for instance, in other witness statements the judge was obliged to look at these witness statements to see what were the issues between the parties. It follows, in my view, that once the material in Mr. McAuley's witness statement and Report could properly be regarded as particulars of allegations already made in the pleadings such material was relevant and, therefore, admissible..."

[59] Even when applying **McPhilemy**, therefore, the pleadings must contain the allegations or factual basis necessary to prevent surprise and to set out the parameters of the issues to be decided between the parties. The statement of claim is to provide the allegations of facts which would reflect the general nature of the party's case, while the witness statements could serve the purpose of providing the particulars or additional particulars of the allegations set out.

[60] An allegation of continuing loss of income would normally be set out in the particulars of claim in order to indicate the parameters of the claim or to define the boundaries of the case that must be faced by a respondent. In **Michael Thomas v James Arscott & Another**[8], Rowe P, at page 152 of the judgment, treated with the use of the words "and continuing" and stated as follows:

> "In my opinion, special damages must both be pleaded and proved. The addition of the term 'and continuing' in a claim for loss of earnings etc. is to give advance warning to the defendant that the sum claimed is not a final sum. When, however, evidence is led which established the extra amount of the claim, it is the duty of the plaintiff to amend his statement of claim to reflect the additional sum. If this is not

[8] (1986) 23 JLR 144 (CA)

> done the court is in no position to make an award for the extra sum."

[61] This certainly was the approach adopted post **McPhilemy** by Judge Parkes QC in **Lisle-Mainwaring v Associated Newspapers Ltd and another**.[9] This case however had complex factual issues dealing with ongoing publication of libel via electronic media and costs incurred by the claimant to deal with the ongoing publication.

[62] In **Charmaine Bernard v Ramesh Seebalack**[10] a decision of the Privy Council originating from the Court of Appeal of Trinidad and Tobago, the Board had to consider whether there needed to be amendments to the statement of case where there was nothing to indicate the heads of general damages that were being claimed; also whether the statement of case had to be amended to include the claim for special damages. The major issue concerned the interpretation of rule 20.1(3) of the Trinidad and Tobago Civil Proceedings Rules. The equivalent rule was removed from the Jamaican CPR and is therefore not relevant for our purposes but the Trinidad and Tobago provision is set out for greater clarity:

> "(3) The court may not give permission to change a statement of case after the first case management conference unless the party wishing to change a statement of case can satisfy the court that the change is necessary because of some change in circumstances which became known after that case management conference."

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[9] [2017] EWHC 543 (QB) at paragraphs 175 and 176
[10] [2010] UKPC 15

[63] However, Sir John Dyson SCJ, who delivered the judgment of the Board, in considering whether the amendments were necessary, reviewed rule 8.6(1) of the Trinidad and Tobago CPR (which is fairly similar to rule 8.9(1) of the Jamaican CPR – set out at paragraph [23] above) as well as Part 16.4(1) of the England and Wales Civil Procedure Rules. For comparison, rule 8.6(1) of the Trinidad and Tobago CPR is set out:

> "8.6 (1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies."

[64] He then addressed the issue of whether an amendment was necessary, by reviewing the arguments of counsel, the relevant rules and the principles as set out in **McPhilemy** at paragraphs 14-16:

> "14. It was common ground in the courts below that an amendment of the statement of case was required in order to permit the claimant to advance the 'lost years' claim and the claim for funeral expenses. It is now submitted on behalf of the claimant that the amendment was not required. It is said that the statement of case included a claim for damages and that information about it could have been provided by the claimant pursuant to Part 35 of the CPR either of her own initiative or in response to a request by the defendants or pursuant to a court order. Alternatively, it is submitted that the details of the claim for damages could have been provided by the claimant in a witness statement (as in part they were).
>
> 15. In the view of the Board, an amendment of the statement of case was required. Part 8.6, which is headed 'Claimant's duty to set out his case', provides that the claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies. This provision is similar to Part 16.4(1) of the England and Wales Civil Procedure Rules, which provides that 'Particulars

of claim must include—(a) a concise statement of the facts on which the claimant relies'. In McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at p 792J, Lord Woolf MR said:

> 'The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. 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. The Practice Direction to r 16, para 9.3 (Practice Direction – Statements of Case CPR Pt 16) requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a *concise* statement of those facts is required.'

16**. But a detailed witness statement or a list of documents cannot be used as a substitute for a *short* statement of *all* the facts relied on by the claimant.** The statement must be as short as the nature of the claim reasonably allows. Where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed. Under the pre-CPR regime in England and Wales, RSC Ord 18 r 7 required that every pleading contained a summary of the material facts and by r 12(1) that 'every pleading must contain the necessary particulars of any claim'. In *Perestrello v United Paint Co Ltd* [1969] 3 All ER 479, Lord Donovan, giving the judgment of the Court of Appeal, said at p 485I:

> Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the

> defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet…
>
> The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an
>
> example of damage which is 'special' in the sense that fairness to the defendant requires that it be pleaded….
>
> The claim which the present plaintiffs now seek to prove is one for unliquidated damages, and no question of special damage in the sense of a calculated loss prior to trial arises. However, if the claim is one which cannot with justice be sprung on the defendants at the trial it requires to be pleaded so that the nature of that claim is disclosed…
>
> …a mere statement that the plaintiffs claim 'damages' is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendants are entitled to fair warning." (Emphasis supplied)

[65] At paragraph 17, he concluded:

> "**These observations are applicable to Part 8.6 of the CPR as well as to Part 16.4(1) of the England and Wales CPR**." (Emphasis supplied)

[66] Sir John Dyson, in adopting the words of Lord Donovan in **Perestrello**, as being applicable to Part 8.6 of the Trinidad CPR, made it clear that the principles applying to the need to plead and particularize items of special damage were not made redundant by **McPhilemy**. Edwards J (as she then was) in **City Properties Ltd v New Era**

Finance Ltd[11] referred to **Charmaine Bernard** and concluded at paragraph [92] of her judgment:

> "[92] The outline of a case in a witness statement cannot serve as a substitute for a failure to plead facts relied on. This issue was considered by the Privy Council in the case of **Charmaine Bernard v Ramesh Seabalack** [sic] [2010] UKPC 15. In that case the statement of case did not contain details of a claim for damages. Witness statements were filed which disclosed receipts in support of allegations of damages and loss which had not been pleaded. The claimant applied for what amounted to a second amendment. In paragraphs 15 and 16 the Board examined the issue of the requirement for pleadings…"

[67] Sir John Dyson, in **Charmaine Bernard**, also considered a passage in the judgment of Barrow JA in **East Caribbean** at paragraph 26 and concluded at paragraph 27:

> "…If a statement of case contains allegations which are 'sufficiently made' (so that it satisfies the requirements of Part 8), there is no need to amend it in order to provide particulars. These can be provided by way of further information or in the form of a witness statement. But for the reasons stated earlier, in the present case the statement of case should have included a short statement of the heads of loss that were being claimed. This could have been amplified by further information and/or in the witness statement(s)."

[68] Under the common law, special damages are to be distinguished from general damages. Lord Macnaghten in **Ströms Bruks Aktie Bolag v John & Peter Hutchison**[12] stated that general damages "are such as the law will presume to be the direct natural or probable consequence of the act complained of" and that special

[11] [2016] JMCC Comm. 1
[12] [1905] AC 515, 525

damages "are such as the law will not infer from the nature of the act". He went on to say:

> "They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly."

[69] In Bullen & Leake & Jacob's Precedents of Pleadings[13], the learned authors in discussing special damages, refer also to the above judgment and add that "special damages consist of all items of loss which must be specified by the plaintiff before they may be proved or recovered."[14]

[70] In Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice, the authors also support the above principles in relation to general and special damages at page 170, under the heading – The Claim for Damages:

> "As to the allegation of damage, the distinction between special and general damage must be carefully observed. General damage such as the law will presume to be the natural or probable consequence of the defendant's act need not be specifically pleaded. It arises by inference of law, and need not, therefore, be proved by evidence, and may be averred generally...
>
> Special damage, on the other hand, is such a loss as the law will not *presume* to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was a direct result of the defendant's conduct."

And further at page 171:

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[13] Thirteenth edition
[14] Page 304

> "No general rule can be laid down as to the precise degree of exactness necessary in a claim of special damage. "The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist on more would be the vainest pedantry.' [Per Bowen LJ in Ratcliffe v Evans [1892] 2 QB 532-533]"

[71] Further, in McGregor on Damages (16th edition) at paragraph 2025, the author states the test for determining whether damage is general and special and the rationale for the principle as it relates to special damages:

> 'The basic test of whether damage is general or special is whether particularity is necessary and useful to warn the defendant as to the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial. 'Special damage', said Bowen L.J. in *Ratcliffe v Evans*,
>
> > 'means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial'."

[72] Further, at paragraph 2030, the learned author states in relation to special damages:

> "(1) Where the precise amount of a particular item of damage has become clear before the trial, either because it has already occurred and so become crystallised or because it can be measured with complete accuracy, this exact loss must be pleaded as special damage. The prime example of

> this appears in personal injury cases, where earnings already lost and expenses already incurred before the action must be pleaded as special damage before proof of them may be allowed. This is clearly laid down by Lord Goddard in *British Transport Commission v. Gourley*, [1956] AC 185, at 206 and is well illustrated by *Ilkiw v. Samuels*, [1963] 1 W.L.R. 991, C.A., an action for personal injuries where, the special damages having been agreed at £77 based on four months' loss of wages after the accident, the plaintiff was held not entitled to recover for the continuing loss of wages over the eight years before the action was heard as these should have been pleaded as special damage."

[73] This principle has been reiterated by this court in several cases. In **Robinson and Co Ltd and Jackson v Lawrence**[15], Hercules JA (Ag) referred to the above principles at page 453B of his judgment and referred to **Bonham-Carter v Hyde Park Hotel Ltd**[16] where the principle as set out by Lord Macnaghten in **Ströms** was relied on. In **Robinson and Co. Ltd**, the court held that the respondent could not receive an award for loss of earnings as a bartender, as, although it had been proved in evidence, it was not pleaded. The respondent had actually pleaded loss of earnings as a seaman and had failed to amend his pleadings to reflect loss of earnings as a barkeeper. Hercules JA stated as follows at page 453B:

> "There is no doubt that the respondent can be entitled to damages for loss of earnings he has suffered by reason of his injury up to the date of trial as part of his special damages. But those damages must be pleaded and strictly proved."

[15] (1969) 11 JLR 450
[16] (1948) 64 TLR 177

[74] In **Attorney General of Jamaica v Tanya Clarke**[17], Forte P reviewed and summarised the principles[18] relating to special damages and set them out as follows:

> "From the authorities reviewed, I extract the following considerations: -
>
> 1) Special damages must be strictly proved: ***Murphy v Mills; Bonham-Carter v Hyde Parke Hotel Ltd.***;
>
> 2) The court should be very wary to relax this principle: ***Ratcliffe v Evans***;
>
> 3) What amounts to strict proof is to be determined by the court in the particular circumstances of each case: ***Walters v Mitchell***; ***Grant v Motilal Moonan Ltd. and Another***;
>
> 4) In the consideration of 3) *supra*, there is the concept of reasonableness.
>
> a) What is reasonable to ask of the plaintiff in strict proof in the particular circumstances: ***Walters v Mitchell***; ***Grant v Motilal Moonan Ltd. and Another***; and
>
> b) What is reasonable as an award as determined by the experience of the court: ***Central Soya of Jamaica Ltd. v Junior Freeman.*** See also ***Hepburn Harris v Carlton Walker*** SCCA No. 40/90 (unreported)…
>
> 5) Although not usually specifically stated, the court strives to reach a conclusion which is in harmony with the justice of the situation. See specifically ***Ashcroft v Curtin; Bonham-Carter v Hyde Park Hotel Ltd***.´ "

[75] The issue in this case is not, per se, the actual proof of the special damage but whether it has been specifically pleaded. In fact, the issue of strict proof in special damage claims has been relaxed where circumstances commend such a stance where

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[17] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2002, judgment delivered 20 December 2004

[18] At page 8

some claimants may be unable to provide documentary proof of genuine claims based on the nature of informal business practices (see **Desmond Walters v Carlene Mitchell**[19]). The relaxation of this principle is however distinct from the issue of whether the loss has been specifically pleaded.

[76] In further consideration of this issue, this court did review the approach of the court in **Longdon-Griffiths v Smith and others**[20], a decision of the King's Bench Division. In that case, Slade J had to determine whether there had been any pleading for special damages in relation to loss of employment in a case of libel. The statement of case merely read as follows:

> "By reason of the premises the plaintiff has been brought into hatred, ridicule and contempt and his said service agreement was terminated on November 6, 1947, and the plaintiff has suffered damage."

[77] One of the arguments which counsel for the defendants presented in that case was to the effect that special damages were not pleaded. Slade J examined the above pleading contained in the statement of case and reiterated that the function of pleadings is to make clear to your opponent the case which he has to meet. He concluded that anyone reading the above pleading must have been aware that special damage was being claimed. It is important to examine how Slade J expressed his deliberations on the matter:

> "…I cannot help feeling that anyone reading para 8 and seeing the words: 'By reason of the premises the plaintiff

[19] (1992) 29 JLR 173 (CA)
[20] [1950] 2 All ER 662

had been brought into hatred ridicule and contempt,' which are common form in every defamation action to indicate general damage to reputation, followed by the words 'and his said service agreement was terminated on 6 November 1947' must have been aware that special damage was being claimed. 6 November 1947, was the very day on which the alleged libel was published and the plaintiff's appointment was determined by the persons who alone had power to determine it at the very meeting at which the document was published to them. The words 'and the plaintiff has suffered damage' must have conveyed to anyone that a claim for special damage was being made. I agree that where no special damages are claimed the defendant is well advised to let sleeping dogs lie, and he can hardly be expected to ask for particulars of the claim for special damages where none is alleged. Where the statement of claim suggests the probability that a claim for special damages is intended, I think it is a question of degree whether the statement of claim does not put forward a claim for special damages, albeit without the particulars which the rules of pleading strictly require, or whether it is so nebulous that the defendant can treat it as not being a claim for special damages at all. A statement of claim is supposed to be delivered with full particulars, but it is a rule which is more honoured in the breach than in the observance. Therefore, I find that there is here a claim for special damages, though I do not intend anything I have said to indicate that there can be laxity in pleading special damage, and still less that such laxity can justify insufficient discovery of documents. A defendant is not to be left to secure by means of discovery by interrogatories information which he ought already to have got by discovery of documents. This case has involved difficult questions and important questions of law, and I did not think it right that the plaintiff should run the risk of my having taken a wrong view on a point which I consider to be at all a technical one, and therefore, although I hold that special damage is pleaded in this statement of claim, and, therefore, it was not necessary to amend, I invited counsel for the plaintiff to apply for leave to amend para 8 of the statement of claim, and he did so."[21]

[21] See page 678

[78] It is important to note that in the above case, out of an abundance of caution, the statement of case was actually amended to reflect the claim for special damages for loss of employment. Slade J also cautioned against promoting any laxity in pleading special damage. It is to be noted also that the precise issue was whether it could be said that special damages had been pleaded in general. There was no issue of any claim for continuing loss and there was one lump sum awarded as special damages.

[79] Having reviewed the above authorities, it can be concluded that the application of the principle set out in **McPhilemy** does not obviate the requirement that the respondent's pleaded case should plead the full substance for which she seeks redress. Alternatively, it could be stated that the statement of case should include all the material facts necessary to prevent surprise and set out the extent of the dispute between the parties.

[80] From observation over the course of time, prudent counsel would usually insert the phrase "and continuing" in the particulars where there is an intention to claim for loss of income beyond the period set out in the particulars of claim. However, in assessing whether the pleading in a particular case is sufficient and requires no amendment, the overarching principle as set out in **McPhilemy** is to be applied – does the statement of case contain the allegation of fact that is sufficiently made or sufficiently pleaded? Does the statement of case establish the issues between the parties? In order to conclude that the allegation of fact was sufficiently made in this case, in particular as it involves pleadings for special damages, the court would have to be satisfied that the answer to these alternative questions would be in the positive.

[81] It is to be noted that a clear and specific reason for the permanent loss of income was only stated in the witness statement of Mrs Hanson. It is in that statement that she indicated that it was due to the high risk environment associated with flooding. Secondly, the particulars as pleaded would not have demonstrated to the appellant that the claim for loss of income would have exceeded 2007. What is clear, is that the possibility existed from the pleadings that a claim for continuing loss beyond 2007 could be made. However, the pleadings as limited to 2007, without an application for an amendment, set the boundaries for consideration between the parties.

[82] Even applying the common law principles in relation to special damages within the context of the post CPR and **McPhilemy** dispensation, therefore, I am not of the opinion that the pleadings as they exist provide a sufficiency of allegation in terms of this continuing claim for special damages to allow the award to stand. I am constrained to follow the established intelligible principles and, therefore, conclude that the submissions of Mr Panton have merit.

[83] Even though the claim for continuing loss beyond 2007 was not pleaded, the usual course for counsel to have adopted would have been to request an amendment to the statement of case to reflect such a claim pursuant to rule 20.4(2) of the CPR. Rule 8.9A of the CPR (set out at paragraph [23] of this judgment) states clearly the consequences of not setting out an allegation or factual argument on which a party wishes to rely. If it could have been set out, the permission of the court is required for any such reliance.

[84] While the breach as alleged by Mr Panton can be described as being of merely a technical nature, it does concern this court that there was nothing to indicate that the claim post 2007 would go forward until the submissions of counsel who appeared for the respondent below were filed. Even so, this issue may have been remedied if the learned judge had indicated in his reasons for judgment that he had considered the objections of counsel for the appellant but was giving leave to the respondent to amend her statement of case. This was not done and the appellant had no opportunity to make submissions on the continuing claim as to how it should be assessed (see for example, the approach of Slade J in **Longdon-Griffiths** referred to at paragraph [77]).

[85] It is unfortunate that the respondent will not be able to benefit from an award that could have been properly made, if an application for an amendment had been made and granted. Counsel appearing for litigants such as Mrs Hanson must be diligent to fulfil all the requirements necessary to ensure that their client's case is adequately pleaded.

[86] This ground of appeal therefore succeeds.

Issue D: Whether the trial judge erred in awarding compensation based on an average of six flocks each year after 2002 following the decision of Jamaica Broilers to suspend delivery of chickens during the hurricane season between June and October

Submissions of Counsel for the appellant

[87] In written submissions, Mr Panton contended that the learned judge erred in awarding damages for six flocks instead of three following the decision of Jamaica Broilers to suspend the delivery of chickens to Mrs Hanson during the hurricane season

between June and October. He submitted that the appellant should not be held responsible for the decision of a third party, Jamaica Broilers, over which it had no control. He stated that the evidence from Jamaica Broilers was that it contracted with Mrs Hanson on a flock by flock basis.

[88] In relation to the computation of this same award, he stated also that the learned judge erred in applying the figure of $16.94 as "pay per bird" to calculate any loss of earnings for Mrs Hanson in 2007 to 2010. He submitted that even if counsel, who represented the respondent at trial, had relied on this evidence from Mr Bailey, who provided that computation table to show the gross earnings of Mrs Hanson between 1999 and 2006, that table stopped at 2006. He submitted that no evidence was elicited to show how the figures for "pay per bird" post 2006 were arrived at. He questioned therefore the trial judge's use of the figure of $16.94 in order to calculate the award for the loss of contracts between 2007 and 2010.

Submissions of counsel for the respondent

[89] Counsel advanced no submissions in relation to this ground.

Discussion and analysis

[90] Counsel for the appellant is challenging items numbered 4 and 5 of the award given for loss of contract on two grounds: (1) the average of six flocks per year ought not to have been used to assess the award for each year after 2002; (2) the figure of $16.94 used for "pay per bird" to compute the award for loss of contract from 2007 to 2010 should not have been used due to lack of evidence.

[91] The evidence of Mrs Hanson (at paragraph 7 of her witness statement) is that she operated a successful poultry farm since 1972. She had built three chicken houses, raising and harvesting roughly 30,000 birds per flock and producing seven flocks per year. She had a contract with Jamaica Broilers up to 2005 when she was forced to cease operations after the third episode of flooding. Her evidence was to the effect that Jamaica Broilers terminated her contract in that year as "they said that I was in a high risk environment due to the flooding". She would have produced her last flock for them in 2006.

[92] The letter from Jamaica Broilers, dated 24 January 2006 and referred to above at paragraph [49], confirms her evidence in relation to the termination of the contract. The evidence is also that prior to this termination, Jamaica Broilers would also have taken the decision to reduce the number of flocks they placed with her yearly. A letter to this effect dated 6 November 2002 is set out below:

> "6 November 2002
>
> Mrs Orithia Hanson
> Contract Grower
> Toll Gate
> CLARENDON
>
> Dear Mrs Hanson:
>
> Please be informed that Best Dressed Chicken has taken the following decision with regard to placement of birds on your farm.
>
> Based on the magnitude of losses on your farm in recent times we will no longer be placing birds on your farm between the months of June and October each year. The risk has become too great for both the company and

> yourself. We will however, place birds prior to and following the hurricane season.
>
> We do recognize the contributions you have made to the industry, but we must remain prudent in whatever action we take.
>
> Sincerely yours,
> **BEST DRESSED CHICKEN DIVISION**
> **JAMAICA BROILERS GROUP LIMITED**
>
> [signature]
> **PAMELLA RUSSELL**
> **Field Operations Manager**"

[93] The learned judge, at paragraph [62] of his judgment, made reference to this letter and stated as follows:

> "[62] In 2002, a decision was taken not to place birds with the Claimant during Hurricane Season. The decision of Jamaica Broilers in 2002 was based, as I understand it, on the fact that two floodings had been sustained by the Claimant over the period of twenty six years that she had had birds placed with her. One of those occasions was within the hurricane period, the October event. In any event, the Claimant has laid claim for destruction of a flock during the hurricane season, some three years after Broilers had taken the decision."

[94] It appears therefore that the learned judge accepted that the decision to reduce the number of flocks given to Mrs Hanson was directly related to the episodes of flooding that had affected her farm from 2002 onwards. The inference from the evidence led by the respondent, is that these episodes of flooding, albeit, some occurring in the hurricane season, were caused by the actions of the appellant. It cannot be said that the learned judge misunderstood the evidence on this point.

[95] According to Mrs Hanson, as of 2002, she was reduced to three flocks per year instead of the usual seven. Mr Bailey's evidence essentially supported that of Mrs Hanson. He stated that she was a contract farmer with Jamaica Broilers from 1976 to 2006, that in November 2002, Jamaica Broilers took the decision as a result of the flooding and the magnitude of losses suffered by Jamaica Broilers on the farm, that there would be no placement of birds between the months of June and October.

[96] He stated also that Mrs Hanson's farm grew about an average of 27,147 birds per flock at an average number of six flocks per year. The computation table referred to at paragraph [43] herein sets out her gross earnings for each year:

Year	Gross earnings	# of flks	Avg. wgt. (kg/lbs)	Pay per bird
1999	$2,452,220.00	7	1.91/4.21	13.23
2000	$2,062,134.50	6	1.92/4.23	13.13
2001	$2,052,738.69	5	2.01/4.43	16.52
2002	$1,003,272.56	2	2.13/4.69	19.59
2003	$1,025,032.62	3	1.94/4.27	13.74
2004	$989,635.85	3	2.08/4.58	13.64
2005	$659,974.41	3	1.97/4.34	8.40
2006	$832,677.31	2	1.87/4.12	16.94

[97] The learned judge therefore compensated her for loss of income for each of the years 2002 to 2006 by awarding her the difference between six flocks and the actual

amount produced for each particular year. Once the trial judge had concluded that the reduction of the flock each year was due to the reduction of flocks allotted her by Jamaica Broilers for the reasons as alleged, he would have been correct in his methodology. He cannot be faulted for his assessment in light of the evidence. She would have lost income due to the reduced flocks for the years 2002 to 2006 as a result of the decision taken by Jamaica Broilers based on the history of flooding.

[98] In relation to the years 2007 to 2010, the learned judge used the same method of computation but applied the figure used as "pay per bird" for 2006 which was the final year computed by Mr Bailey (as shown by the table in paragraph [96]) as her last flock was delivered in 2006.

[99] It is to be noted that the "pay per bird" for 2006 was neither the highest nor the lowest for the period reflected in the table. Mr Panton contended that the trial judge erred in this regard as there was no evidence in relation to the pay per bird post 2006. The court acknowledges that the figure used was not an average deduced from all the preceding years, albeit, the last figure used by Jamaica Broilers. The court, however, does accept the submissions of counsel, Mr Panton, that it would have been prudent to use the average figure of the years 1999 to 2006 as the figure for "pay per bird" for the actual computation. That average figure is 14.40. Therefore, the computation for the year 2007, using the average figure would be (27,140 x 6 x 1-year x 14.40) $2,344,896.00).

[100] This ground of appeal therefore fails save and except as it relates to the amount of the award for the year 2007 which has now been calculated using the average figure for "pay per bird". As previously indicated, the award for the years 2008 to 2010 will be disallowed.

Issue E: whether the award of $10,000,000.00 made for the restoration of the chicken houses should be disallowed and, if not whether there is any justification for increasing the award to $30,000,000.00 or more.

Submissions of counsel for the counter-appellant

[101] In relation to the counter appeal, Mr Stewart took issue with the award of $10,000,000.00. He submitted that while this was claimed for the replacement cost of three chicken houses, he asked the court to note that the learned judge used the term "restoration" in making his award. He stated therefore, that even if it could be argued that the claim for the replacement of chicken houses was neither pleaded nor particularized, the award was properly made, albeit inordinately low.

[102] He submitted that the respondent's case had consistently maintained that the chicken houses were damaged by virtue of the appellant's conduct and that the award was contrary to the evidence that the replacement cost of each house was $16,000,000.00. This would have been supported by the evidence of Mr Bailey that the cost of a chicken house would be approximately $18,000,000.00. He referred to the learned judge's finding that the appellant had not disputed the damage to the property and that the respondent had pleaded damage to the chicken houses as well as other property after each flood.

[103] Counsel further stated that, in spite of the pleadings and the evidence that there was property damage including the chicken houses relevant to the floods, the learned judge had given no consideration to any of the claims for such, except in so far as the award was made for restoration of the chicken houses. The entire claim for property damage and loss of livestock due to the floods was pleaded in the amount of $11,487,530.00. From that amount, $2,709,820.00 would have been awarded in relation to the livestock. There was, therefore, a further claim of $8,777,710.00 that represented losses in relation to property that was never considered.

[104] However, Mr Stewart's contention is that based on the evidence in relation to the cost of chicken houses, the award of $10,000,000.00, which would represent approximately $3,300,000.00 for each chicken house, would be unreasonable. He adopted the submissions of counsel below, who requested a discount of $12,000,000.00 for each chicken house and asked that this court increase the award under this head to $36,000,000.00.

Submissions of counsel for the counter-respondent

[105] Counsel relied on his earlier submissions in relation to the absence of any pleadings or particulars as to the amount of $10,000,000.00 for replacement of chicken houses. Counsel stated that there was no application for an amendment and that the counter-appeal should be dismissed.

Discussion and analysis

[106] There is no issue that both the pleadings and the witness statements speak to and quantify losses due to damage to property including the chicken houses in relation to each episode of flooding. The witness statement of Mrs Hanson quantifies money expended by her to restore her property.

[107] In May 2002, this amounts to over $6,000,000.00 plus $800,000.00 to construct a perimeter wall. In October 2002, the amount stated is $1,700,000.00 plus a further cost of $250,000.00 to dig deeper trenches around the chicken houses. In October 2005, the amount of $550,000.00 is stated. The total amount expended by her, therefore, is approximately $9,300,000.00 relative to property damage. There is no evidence in relation to specific expenditure as it related to the three chicken houses after each flood, neither was any such breakdown sought by the counter-respondent during the trial.

[108] The learned judge referred to some of these expenditures in his judgment at paragraphs [60] and [61]. Also at paragraph [64]:

> "The Claimant has testified that the cost of replacing the three poultry houses is in excess of $16,000.00. [sic] The Hydrologist Report opines that the post-development flooding would cause complete flooding in the chicken houses. Mr Bailey, an employee of Jamaica Broilers, gave evidence of the financial outlay involved in the operation. He opines that there were three chicken houses, each of 19,000 square feet, with a capacity of 10,000 chickens. Cost of the house is $18,000,000.00. A claim for the replacement cost of these houses for an award of $36,000,000.00 has been made. The Court has evidence that the houses operated at a reduced level in 2006, after the last flooding. I therefore

> make an award of $10,000,000.00 for restoration of the houses."

[109] The learned judge appeared to have rejected that there had actually been replacement of the three chicken houses but he accepted the evidence that there had been damage which would have led to some form of restoration in order for Mrs Hanson to continue producing the flocks of chicken after each flood and up to 2006. What is important also is that he described the award as "restoration" and not "replacement".

[110] Based on the above and the fact that there was no other award made for damage to property (including the chicken houses), any contention that there was double compensation cannot be sustained. Mrs Hanson would have been entitled to an award for any damage to the chicken houses directly attributable to the floods. Based on the monetary figures set out in the pleadings and the evidence, this court is not minded to conclude that the award is inordinately high. On the other hand, the amount of $3,300,000.00 for each chicken house is not unreasonably low, as Mr Stewart is contending.

[111] Phillips JA in **Jamalco (Clarendon Alumina Works) v Lunette Dennie**[22] set out the approach of this court with regard to award of damages at paragraph [52] of her judgment:

> "[52] The law with regard to the approach of the Court of Appeal to an award of damages made in the court below is

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well settled. Wolfe JA (Ag) (as he then was), on behalf of the court stated with clarity in **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173 at 178 b-d that:

> 'An appellate court, notwithstanding that an appeal from a judge trying a case without a jury is a rehearing by the Court of Appeal with regard to all the questions involved in the action including the question what damages ought to be awarded, will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because the judges of appeal think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that the Court of Appeal should be convinced either that the trial judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.'

This statement of the law endorsed the dicta of the Court of Appeal in England in **Flint v Lovell** [1935] 1 KB 354 at 355."

[112] This court is therefore not minded to interfere with the award of $10,000,000.00 that has been made in this regard.

[113] Both the ground of appeal and the counter notice of appeal in relation to this award therefore fail.

Conclusion

[114] In light of the above, the court finds that the learned judge did not err in awarding damages of $10,000,000.00 for restoration of the chicken houses as set out at item 3 of his order. The court also finds that the learned judge's award of damages for loss of income for the years 2008 to 2010 under item 5 was an error under the

circumstances and must be disallowed. Also, the actual amount awarded under item 5 of his orders for the year 2007 is to be adjusted downward using the average rate for "pay per bird" to reflect the amount of $2,344,896.00.

PHILLIPS JA

ORDER

1) Appeal allowed in part.

2) The orders of Campbell J made on 18 October 2012 appealed against are varied in relation to order 5 and shall now read as follows:

"(1) For birds lost in the three flooding events at an average flock of 27,140 at $21 per bird.	$1,709,820.00
(2) Livestock (17 goats, pigs, 6 cows)	$1,000,000.00
(3) Restoration cost of chicken houses	$10,000,000.00
(4) Loss of contract at an average of 6 flocks per year	
(a) 2002 4 at 19.59 (27140 x 4 @ 19.59)	$2,126,690.40
(b) 2003 3 at 13.74	$1,118,710.80
(c) 2004 3 at 13.64	$1,110,568.80
(d) 2005 3 at 8.40	$683,928.00
(3) [sic] 2006 4 at 16.94	$1,839,006.40
(5) Contract for 2007 (27,140 x 6 x 1 year x 14.40)	**$2,344,896.00**
Total Award	21,933,620.40

(6) Interest on the above at the rate of 3% from October 2, 2008 until October 18, 2012.

(7) Costs to the Claimant to be taxed if not agreed."

3) Half costs of the appeal to the appellant to be taxed if not agreed.

4) There shall be no costs on the counter-appeal.