

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 5/2009

**BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.**

**BETWEEN: GRACE KENNEDY REMITTANCE SERVICES LIMITED APPELLANT/
1st DEFENDANT**

**AND PAYMASTER (JAMAICA) LIMITED 1st RESPONDENT/
CLAIMANT**

**AND PAUL LOWE 2nd RESPONDENT/
2nd DEFENDANT**

**Michael Hylton Q.C., Kirk Anderson and Courtney Bailey instructed by
Dunn Cox for Appellant/1st Defendant**

**Miss Hilary Phillips Q.C. and Mrs. Denise Kitson instructed by Grant
Stewart Phillips and Company for 1st Respondent/Claimant**

April 23, 24 and July 2, 2009.

COOKE, J.A.

1. Audrey Marks is the principal shareholder and Managing Director of the 1st respondent/claimant (Paymaster). In 2001 the latter initiated proceedings against the appellant/1st defendant and the 2nd respondent/2nd defendant seeking damages for various alleged wrongs committed against it by both defendants either jointly or

severally. Subsequently, there will be a detailed reference to the statement of claim. Suffice it to say at this stage that Audrey Marks on behalf of the 1st respondent/claimant filed a supplemental witness statement. This was done on the 14th April, 2008. On the 3rd June 2008 the appellant filed a Notice for court orders seeking to have that statement struck out in its entirety on the grounds:-

“that the matters alleged in the Supplemental Witness Statement of Audrey Marks are irrelevant to the claim pleaded by the claimant herein and instead seek to adduce evidence in support of a claim not pleaded herein.”

Pusey J heard the application and in a written judgment delivered on the 9th January dismissed the application and further ordered –

‘That the claimant be permitted to amend its pleadings in relation to the damages claimed in the Witness Statement.’

This procedural appeal challenges the correctness of the decision of the court below.

2. The central issue in this appeal is whether or not the respondent company should be permitted to adduce the trial evidence contained in the impugned statement. Essentially the appellant contends:-

- “(a) that the statement contained matters that were not pleaded and were therefore irrelevant to the claim, and
- (b) that the claim for \$652,658,519.00 asserted in the statement is a claim for special damages which should have been specifically particularized and pleaded.

Paymaster countered that-

- (i) an examination of the pursuer's pleadings reveals that the causes of action claimed entitled paymaster to adduce the evidence contained in the supplemental witness statement. The evidence merely detailed the losses of the company, flowing directly from the actions of the defendants in the suit.
- (ii) There was no claim for special damages. The evidentiary material in the statement provided a preferred basis for the assessment of damages pursuant to Section 32 of the Copyright Act."

3. To put the rival contentions within the appropriate legal context, I will cite two passages which correctly set the stage for the debate. The first is from the judgment of Lord Woolf, M.R. at p. 16-17 in **McPhilemy v. Times Newspapers Limited & Ors** [1999] EWCA. Civ 1464.

"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 second is that of par. 3 of the speech of Lord Bingham of Cornhill in **O'Brien (Respondent) v. Chief Constable of South Wales Police (Appellant)** [2005]

UKHL 26.

"Any evidence, to be admissible, must be relevant. Contested trials last long enough as it is without spending time on evidence which is irrelevant and cannot affect the outcome. Relevance must, and can only, be judged by reference to the issue which the court (whether judge or jury) is called upon to decide. As Lord Simon of Glaisdale observed in *Director of Public Prosecutions v Kilbourne* [1973] AC 729,756, "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof ... relevant (ie. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable."

4. Pusey, J. in the introductory paragraphs of his judgment succinctly sets out, from the perspective of the respondent company the background to its claim. This I now reproduce:-

"Audrey Marks started a business known as Paymaster. The function of this company was to assist Jamaicans to pay their utility and other bills at one central location. In furtherance of this business she contends that she contracted Paul Lowe to develop computer software that would assist Paymaster's multipayment system.

While this was ongoing Ms. Marks entered into negotiation with Grace Kennedy Remittance Services Limited (GKRS) to invest in Paymaster. During these negotiations Paymaster shared with Grace Kennedy Remittance Service its business plan, operational procedures, technology,

architecture and marketing strategy. These negotiations broke down and Grace Kennedy Remittance Service subsequently started its own bill payment services. Paymaster contends that Grace Kennedy Remittance Service has used the information shared with it in confidence to set up its own competing bill payment services. Additionally, it is alleged that Grace Kennedy Remittance Service has induced Paul Lowe to breach his contract with Paymaster and sell to Grace Kennedy Remittance Service the software programme developed for Paymaster."

5. The respondent company in its statement of claim sought the following:

- "1. Against the Defendants jointly and/or severally damages for:
 - (a) Breach of copyright in the Plaintiff's computer software programme
 - (b) Breach of confidence
2. Against the First Defendant damages for:
 - (a) Passing off the First Defendant's Bill payment service as and for the Plaintiff's said service.
 - (b) Inducing the Second Defendant's breach of his contract for services with the Plaintiff.
3. Against the Second Defendant damages for Breach of Contract.
4. Against the First Defendant an Injunction restraining the First Defendant whether by itself, its officers, servants or agents or any of them or otherwise howsoever from doing any of the following acts:
 - (a) Reproducing or authorising the reproduction without the Plaintiff's consent of the Paymaster Business Plans received by the First Defendant in 1996 and 1998 respectively and in particular the

Paymaster Collection Network: Architecture and Operations contained in the 1996 Business Plan.

- (b) Using without the Plaintiffs licence or converting to its own use the contents of the Plaintiff's said Business Plans with annexures as aforesaid.
 - (c) Passing off its business as and for the business of the Plaintiff, by using any version of the Plaintiff's slogan "the easy way to pay", their get up, colours and the use of the \$ in similar manner and style in its trade name, in the First Defendant's advertising and promotional material or otherwise.
5. Against the Second Defendant an Injunction restraining the Second Defendant whether by himself, his servants or agents or any of them or otherwise howsoever from doing any of the following acts:
- (a) Reproducing or authorising the reproduction without the Plaintiff's consent of the Paymaster Collection Network: Architecture and Operations.
 - (b) Using without the Plaintiff's licence or converting to his own use the contents of the said Paymaster Collections Network: Architecture and Operations.
6. Against the Defendants an Injunction restraining the Defendants whether by themselves, their officers, servants or agents or any of them or otherwise howsoever from doing any of the following acts:
- (i) Reproducing or authorising the reproduction without the Plaintiff's consent of the Paymaster multi-payment collection software system of its computer software programme.
 - (ii) Possessing in the course of business or selling or offering for sale or using without the Plaintiffs licence any copies or materials of the said programme.
 - (iii) Converting to their own use infringing copies of the Plaintiff's said computer software.

7. An Order that the infringing copies of the Plaintiff's Business Plans including Paymaster's Collection Network: Architecture and Operations and the said computer programme be forfeited to the Plaintiff or destroyed or otherwise dealt with as this Honourable Court may direct.
8. (a) An Order that an account be taken pursuant to the Copyright Act.
- (b) An inquiry as to damages, or at the option of the Plaintiff, an account of profits.
- (c) Payment by the Defendants of all sums due upon taking such inquiries or account;
- (d) Interest
- (e) Costs
- (f) Further and/or other relief as this Honourable court deems just."
6. I cannot avoid setting out, almost in the full, the supplemental witness statement:

"3. I spent four years between 1994 and 1997 to conceptualize and introduce to the Jamaican market, the Paymaster Jamaica Ltd payment architecture — taking the project from concept to software development, to test trial to contract engagement and implementation. Nevertheless, I recognize that in a competitive market environment, no business pioneer is insulated from future competition, and as such, the window of opportunity to maximize the gains from an innovation is a function of the developmental time for the competing alternatives. However, like other entrepreneurial innovators I was willing to invest thousands of man hours and lifesavings in developing the Paymaster payment software program, because of my expectation that any new and competing entrant would also have to go through its own teething pains, and cost, thus

giving Paymaster a reasonable time to benefit from its innovation

4. Paymaster Jamaica Ltd was deprived of this crucial window of opportunity to recoup its investment and benefit from its innovation, because of the ruthless and unfair business practice of the 1st Defendant (GKRS) a capital-strong competitor that was willing to circumvent the developmental and teething stages by unlawfully acquiring Paymaster's intellectual property.
5. Having unlawfully acquired Paymaster's intellectual property and business plan to gain a fast-track to the market, GKRS compounded the economic injury to Paymaster by its subsequent actions:
 - (a) GKRS used its enormous capital base and profits to deliberately and strategically under-price and subsidize the cost of the service in the market, thus setting an uneconomic rate for the bills collection service. Paymaster's clients at the time which were mainly the National Water Commission, The Jamaica Public Service Company Limited and Cable and Wireless Jamaica Limited had been prepared, through our successful negotiation, to pay to the Claimant a rate of J\$ 15.00 to be increased to J\$20.00 for the service by 2002. That rate was close to the economic cost of delivery of that service to them, but they were subsequently induced by the artificially reduced price offered by GKRS, to revise the rate structure that had been negotiated with Paymaster. Instead Paymaster was forced to stay at a price per transaction of between \$10.00 and J\$ 15.00 up to 2007 with the utility companies There was therefore no rate increase for seven years. All other client-companies that were signed on after the utility companies were

signed at a rate of between J\$50.00 to J\$100.00 per transaction which equated to the economic delivery rate of the service. An apt example of the predatory activity of GKRS was the fact that GKRS induced the Super Plus Supermarket chain of companies to breach their agency contract with us by initially offering to pay them the entire sum of \$8.00 which they were receiving from at least one utility company as the transaction charge. Accordingly GKRS initially incurred no income whatsoever from those transactions while it incurred the capital cost of installing equipment in the Super Plus supermarkets.

- (b) Therefore, Paymaster's initial pricing arrangement coupled with its fair economic return, was scuttled by the unfair fast-track that GKRS gained to the market specifically by unfairly obtaining and using Paymaster's business plans and intellectual property. The result is that GKRS unfairly deprived Paymaster of the opportunity to recover its investment and benefit from its innovation.
- (c) Paymaster's conservative calculation as set out below is that it has lost J\$652,658,519.00 due to the combination of the unfair fast-track entry of GKRS to the market, and its predatory pricing practice that was specifically and by avowed policy, targeted at, and designed to drive Paymaster (the capital weak pioneer) out of the market.
- (d) The fact that GKRS was prepared to, and in reality gained a fast-track market entry, and significantly under-priced the service in a manner that was unsustainable and was therefore intended solely to drive the cash-weak competitor from the market, is manifested in two subsequent developments. Firstly, within 4 years of that

pricing model, GKRS was forced to introduce a J\$35.00 front end fee to paying customers to make up the shortfall - a price that is three times the artificial fee that GKRS itself established with the client companies in 2000 for the bills collection service. Secondly GKRS has had to write off in its accounts, over \$500 million in losses, reflecting in part, the under-pricing and losses incurred in the provision of its bills payment service.

- (e) The actions of GKRS resulted in Paymaster suffering \$652,658,519.00. in lost income because it was deprived of the ability to recoup its investment and generate capital to allow it to implement its full business plans. Paymaster has therefore been financially weakened by these unfair business practices.
6. GKRS' rapid entry into the local Bill Payments market in 2000 was facilitated by replicating Paymaster's multi-payment/multi-collection business model through their unlawful, improper and unethical acquisition of Paymaster's technology, systems and intellectual property. Their ability to avoid the normal business development cycle, and traditional investments of capital, time and research in a new business venture allowed GKRS to pursue a pricing strategy at entry that artificially depressed the transaction fees that the large Utility companies were able to pay the bill payment agencies.
 7. This enabled the large utilities to continue to pay Agency fees well below the economic cost of processing the bill payment transaction, which made it very difficult, if not impossible, for Paymaster to recoup the value and benefits from our "first move" advantage which took over three and a half years to be fine-tuned, and would normally have presented an initial hurdle for new competitors.

8. Accordingly the loss sustained by Paymaster as a result of the predatory pricing by GKRS may be computed by applying the Opportunity Cost which Paymaster would have realized but for GKRS' action for the period in question, 2000 - 2005 before the Industry moved to levy Customer Service fees in 2006 to mitigate the losses. This sum amounts to J\$652,658,519.00. This loss comes as a direct result of the breaches of both the 1st and 2nd Defendants and is due payable by both Defendants jointly and or severally.

9. Additionally GKRS has published in the media the fact that its international associate Western Union has paid US\$29.5 million for 25 per cent of GKRS, thus placing a value of approximately US\$120 million on this company. Western Union has publicly stated that this value was largely derived from the penetration of GKRS into the Caribbean markets. To the extent that GKRS entry into these markets was fast-tracked by its use of the Paymaster business model and intellectual property, Paymaster Jamaica says that at least ten per cent of the value of GKRS is directly attributable to gains resulting from the unlawful use of the Paymaster software, architecture and Business Plans. Paymaster is therefore entitled in addition to a sum calculated at 10% of the value of GKRS to compensate for this unjust enrichment using Paymaster's intellectual property amounting to US\$12 million.

Computation of Direct Losses

Cost per transaction in the 3rd Party Bill Payment industry averaged \$35 - \$60 per transaction depending on the efficiency of the Operator. Utility companies such as JPS have estimated their own Cost of Collections to be -\$80 per transaction, which forms part of their 2003-2008 Tariff submission. Paymasters claim is computed up to 2005 as in mid- 2006, Paymaster commenced charging paying customers a per transaction charge of J\$30.00.

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | |
|---------------------------------|------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Annual Transaction Volumes | 2,225,184 | 3,338,456 | 3,936,882 | 4,090,707 | 5,159,675 | 5,332,968 | |
| Paymaster's Revenue Opportunity | 66,755,520 | 100,153,680 | 157,475,280 | 163,628,280 | 257,983,750 | 266,648,400 | |
| Actual Transaction Fee revenues | 2,251,840 | 40,061,472 | 59,053,230 | 61,360,605 | 77,395,125 | 99,864,119 | |
| Opportunity cost | 44,503,680 | 60,092,208 | 98,422,050 | 102,267,675 | 180,588,625 | 166,784,281 | 652,658.519 |

I, AUDREY MARKS, hereby certify that all the statements contained herein are true to the best of my knowledge, information and belief and are within my personal knowledge."

7. I will now advert to the respective paragraphs of this statement. Paragraph 3 speaks to the conception and the efforts to bring into realization the appropriate software. Paragraph 4 concerns what the respondent company describes as the appellant's circumvention of the developmental and teething stages by acquiring Paymaster's intellectual property. Paragraph 5 asserts that by unlawfully acquiring Paymaster's intellectual property and business plan the appellant was able 'to gain a fast-track to the market' This paragraph gives room to assert the means by which the appellant caused harm to Paymaster. The loss in income is stated to be J\$652,658,519.00 (a computation of this loss is set out in paragraph 9). Paragraphs 6 & 7 further set out how the appellant was able to secure an unfair advantage over Paymaster. Paragraph 8 provides the methodology for the computation of the alleged loss, which "comes as a direct result of the breaches of both the 1st and 2nd defendants'. Paragraph 9 adverts to the financial benefit accruing to the appellant by its use of the Paymaster business model and intellectual property.

8. The appellant's attack on the supplemental witness statement is comprehensively set out in paragraphs 18 & 19 of its written submissions.

"18. On its pleadings, the 1st Respondent's case is that the Appellant wrongly used its computer program, business plans and colours/logo. In this witness statement, however, it seeks to advance new, additional causes of action. Paragraphs 4,5,6,7 and 8 of the supplementary witness statement not only raise new allegations which do not relate in any way to the pleaded causes of action, they allege activities that would amount to a breach of the Fair Competition Act and which would constitute additional causes of action. In particular, the 1st Respondent is claiming that the Appellant occupied a dominant position in the market, abused that dominant position, and engaged in uncompetitive practices price undercutting and conspiracy to eliminate or reduce competition in the bill payment market. These matters are not probative of the pleaded causes of action of breach of contract, breach of copyright, inducing breach of contract and passing off, and are therefore irrelevant. If allowed, however, they may be probative of the causes of action provided for under the Fair Competition Act.

19. The allegations therefore amount to a change of case and should be struck out."

9. The appellant has not specifically stated which particular paragraph of the supplemental witness statement is related to the provision of the Fair Competition Act which it identified. In respect of the abuse of its dominant position, the appellant relied on sections 19 & 20 (1) of the Fair Competition Act. These sections I will now set out.

"19. For the purposes of this Act an enterprise holds a dominant position in a market if by itself or

together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.

20. (1) An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular but without prejudice to the generality of the foregoing, if it –
- (a) restricts the entry or any person into that or any other market;
 - (b) prevents or deters any person from engaging in competitive conduct in that or any other market;
 - (c) eliminate or removes any person from that or any other market;
 - (d) directly or indirectly imposes unfair purchase or selling prices or other uncompetitive practices;
 - (e) limits production of goods or services to the prejudice of consumers;
 - (f) makes the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements."

10. A perusal of these sections, when read in conjunction with the supplemental witness statement, makes it clear that the respondent was not asserting any claim within the ambit of sections 19 and 20 (1) of the Fair Competition Act. At the time of the alleged breaches the market in Jamaica was yet nascent. The appellant

certainly did not hold a dominant position in the market. What the respondent company is asserting is that the appellant together with Mr. Paul Lowe committed various breaches against it, thus causing economic loss. The appellant further brought to the attention of the court, Section 17 of the Fair Competition Act, which deals with uncompetitive practices. Section 17 (1) states:

"17 (1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market."

This section is obviously beside the mark. There is no evidence of any agreement. It would seem to me that the appellant would seek to impose causes of action on the respondent company to which the latter is a complete stranger.

11. In any event, even if the Fair Competition Act could have provided Paymaster with a means of possible redress, it does not follow that, that is the only route which must be pursued. Aggrieved litigants are well aware of their desired destination and it is for them to choose the legal route which they hope will achieve that objective.

12. Paymaster submitted that the burden of the statement pertains to the amount of damages. In demonstrating the relevance of the supplemental statement to the issue of damages, reliance was placed on section 32 (1) and 2 of the Copyright Act. This states as follows:

"32 (1) An infringement of copyright shall be actionable at the suit of the copyright owner; and, subject to the provisions of this

section, in any action for such an infringement all such relief by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as is available in respect of the infringement of other proprietary rights.

- (2) Where in an action under this section an infringement of copyright is proved or admitted the court, having regard to any benefit accruing to the defendant by reason of the infringement, to the flagrancy of the infringement and to all other material considerations, shall have power to award such additional damages as the court may consider appropriate in the circumstances."

It was pointed out that Section 32 (1) provided for "relief by way of damages" and Section 32(2) addresses "additional damages". It is the contention of the respondent company that the witness statement is relevant "to say benefit accruing to the defendant". This submission is not without merit.

13. To revert to the formulation of Lord Woolf, M.R. in **McPhilemy** (see par. 3 supra). I would say that in this case the general nature of the case, in particular as it pertains to the claim for damages, had been made clear in the pleadings. The supplemental witness statement provided particulars as to the basis on which damages would be sought. Accordingly, the surprise element would be thereby obviated. In my view the respondent company was obliged to proffer this basis. The appellant company would then be in a position to prepare itself for the ensuing contest. Further, I would say that the evidentiary material in the supplemental witness statement is relevant within the guidelines set out by Lord Bingham in

O'brien (see par 3 supra). I recognize that I am dealing with a procedural issue. The trial is yet to come. Then, the adversarial combat will subject the proffered basis to close scrutiny. Success or failure of either side lies in the future. At this stage, I am concerned with whether or not the material in the supplemental witness statement is of potential significance to the issues joined. As to this, I have no doubt. In his judgment Pusey J. said:-

"It is my view that the Court should only rule evidence inadmissible in circumstances where it is clear that the evidence is in no way relevant or is in some way offensive or scandalous."

Pusey J. was correct in not striking out the supplemental witness statement.

14. In granting the order permitting an amendment (see par. 2 supra) Pusey J. was plainly wrong. As the applicant has submitted, there was no application for an amendment. Apparently the court proceeded to make this order on its own initiative. If so, the court should have been guided by Rule 26.2 of the Civil Procedure Rules, 2002. This states as follows:-

- "26.2 (1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.
- (2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations.
- (3) Such opportunity may be to make representations orally, in writing, telephonically or by such other means as the court considers reasonable.

- (4) Where the court proposes –
- (a) to make an order of its own initiative; and
 - (b) to hold a hearing to decide whether to do so,
the registry must give each party likely to be affected by the order at least 7 days notice of the date, time and place of the hearing.”

None of the mandatory prerequisites set out in this Rule were observed.

15. Although the court below was correct in refusing to strike out the witness statement, Pusey, J. made some statement in his judgment which lacked precision and provided grist for the appellant’s mill. He said -

“There is no doubt that the Witness Statement sets out claims for damages that were not pleaded in the Statement of Claim which was filed way back in October 2001”.

Based on this statement by the learned judge, the appellant submitted that this finding dictated that the supplemental witness statement should be struck out “as a matter of course.” As earlier indicated the “claims for damages” were set out in the Statement of Claim (see par 5. supra). The learned judge apparently failed to appreciate the distinction between claims for damages and the particulars pertinent to those claims. This failure, in my view accounts for another statement in the judgment. Pusey J. stated that:

“It cannot be said in this case that the general nature of this case has been set out in the pleadings”.

The appellant submitted that such a finding should have compelled the court to strike out the supplemental witness statement. The learned judge in his judgment cited the passage from **McPhilemy**, to which I have previously referred (see par. 3 supra). I assume that the words "general nature" is taken from that passage. I have no doubt that Paymaster's pleadings have made clear the general nature of its case.

16. The 2nd respondent/2nd defendant did not participate in these proceedings. Finally, I would dismiss the appeal. Paymaster should have its costs in the appeal.

HARRIS, J.A.

17. In this appeal, the appellant challenges an order of Pusey, J. made on January 9, 2009 dismissing an application by the appellant to strike out a supplemental witness statement by the 1st respondent and granting the 1st respondent leave to amend its pleadings.

18. The appellant is a company engaged in the business of foreign exchange trading, money transfer and bill payment services. The 1st respondent is a company carrying on business of bill payment services. The 2nd respondent although named a party to the appeal, with the permission of the court withdrew from the hearing as the appeal does not touch or concern that respondent.

19. Sometime between late 1994 and early 1995 multi-payment collection system software was designed and created by the 1st respondent, providing among other things, a unique multi-client, multi-function service. The copyright of the software is owned by the 1st respondent.

20. On August 25, 2000, the 1st respondent, by way of a Writ of Summons, which was subsequently amended, initiated proceedings against the appellant claiming damages for breach of copyright, breach of confidence, passing off and inducing breach of contract.

21. A statement of claim was filed on October 1, 2001. A defence was filed by the appellant. The 1st respondent on April 14, 2008 filed a supplemental witness statement, having been granted permission so to do at pretrial review.

22. On June 3, 2008, by a Notice of Application for court orders, the appellant applied to strike out the supplemental witness statement on the ground that the allegations therein were irrelevant to the claim pleaded.

23. The application was heard by Marva McIntosh, J. who, on June 20 2008, ordered, inter alia, that the application should be considered at the time of trial. On appeal, her order was set aside. The application was remitted for consideration by a judge of the court below and was heard by Pusey, J.

Ground 1

“Having correctly held that “there is no doubt that the witness statement sets out claims for damages that were not pleaded in the Statement of Claim

which was filed way back in October 2001" the learned judge erred, in failing to hold that the Supplemental Witness Statement and/or those claims for damages should be struck out."

Ground 2

"Having correctly held that the Supplemental Witness Statement presented a case "the general nature" of which "has not been set out in the pleadings" the learned judge erred in failing to hold that the Supplemental Witness Statement and/or the new claims set out in it should be struck out."

24. Michael Hylton, Q.C., submitted that the supplemental witness statement contained irrelevant, inadmissible material and the learned judge, having found that the contents of the supplemental witness statement include claims which were not pleaded, ought to have struck it out, or struck out such parts which are offensive. He argued that the 1st respondent's claims as pleaded relate to the appellant's wrongful use of its computer programme, business plans and colour/logo, however, paragraphs 4, 5, 6, 7 and 8 of the supplemental witness statement raise new causes of action, as well as allegations which fall within the purview of the Fair Competition Act.

25. Miss Phillips, Q.C., argued that the paragraphs of the supplemental witness statements, impugned by the appellant, do not rank as new causes of action but are particulars of claims which had been pleaded in the statement of claim. It was further submitted by her that the contents of those paragraphs of the supplemental witness statement of which the appellant complains are in conformity with the 1st respondent's claims. She further argued that although the statements of the 1st

respondent's principal, Miss Marks, are with reference to the acts of the appellant and may portray the characteristics of the Fair Competition Act, the 1st respondent did not seek to recover damages under that Act, as, the 1st respondent's quest is for the recovery of damages for breach of its copyright and breach of confidence which had been pleaded.

26. It is necessary at this stage to outline the findings of the learned judge. He said:

"This case is peculiar in that there is an Order of the court that the affidavits fields (sic) should stand as Witness Statements.

It cannot be said in this case that the general nature of the case has been set out in the pleadings. However the claim for economic loss was always a part of Paymaster's case as set out in some of the affidavits.

As early as August 2000 in the affidavit filed on the same day as the Writ of Summons Ms. Marks says in Paragraphs 45 and 46:

'That the significant amount of money invested was made on the basis of two key assumptions:

- (i) the rapid acceptance of the service that would see us achieving a critical mass of transaction levels that would eventually ensure profitability,
- (ii) the design and implementation of a technology that would create a sufficient head start on our competitors to ensure that we would have time to recover the initial investment.

... it is wrong for Paymaster's six years of technological development to be unlawfully used as a springboard for Grace Kennedy Remittance Service to enter the market by unfair advantage'.

In the circumstances of this case and based on the fact that a Case Management Conference is to be held, it is my view that the Witness Statement should be allowed to stand and the parties permitted to amend their pleadings to accommodate the damages set out in the Witness Statements."

27. The crucial issue in this appeal is whether the contents of the supplemental witness statement could have been properly included as part of the 1st respondent's claim for damages in keeping with the claim as pleaded in the statement of claim.

The real question is whether the averments in the supplemental witness statement of which the appellant complains are relevant to all or any of the claims pleaded.

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 and decided 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.

They state as follows:

- "8.9 (1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claim relies.
- (2) Such statement must be as short as practicable.

"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."

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.

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, 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 to 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.”

33. In ***Eastern Caribbean Flour Mills v Ormiston*** St. Vincent and the Grenadines Civil Appeal 12/2006, delivered July 16, 2007. Barron J.A. in dealing with the effect of the relevant rule, cited with approval the foregoing dicta of Lord Wolfe and stated:

“... 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 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. It is settled law that witness statement 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 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."

34. The main contention of the appellant is that the supplemental witness statement raises new causes of action. This propels me to inquire into the statement of claim and the supplemental witness statement to determine whether the material raised in the witness statement is a departure from the claim as pleaded and thus introduces new causes of action. It will be necessary to outline paragraphs 4, 5, 9, 11, 12, 14, 15, 19 and 25 to 29 of the statement of claim and paragraphs 4, 5, 6, 7, 8 and 9 of the supplemental witness statement.

35. **Statement of claim**

"4. The Plaintiff company in or about late 1994 to early 1995 designed and created multi-payment collection system software. This software (hereinafter called the Paymaster soft ware) inter alia, provides a unique multi-client, multi-branch function and greatly reduces the inconvenience of paying several bills by providing a "one stop shop" for bill payments thus increasing speed and efficiency.

5. The Plaintiff will say that the Plaintiff has expended substantial funds in researching, formulating, developing and fine tuning the Paymaster computer program copy which is the foundation on which the multi-payment system is built. The Plaintiff company owns the Copyright in the Paymaster computer program
9. The Plaintiff will say that in or about late 1998 or early 1999 the Plaintiff realised that the First Defendant was not in fact interested in investing in the Plaintiff's business as they had led the Plaintiff to believe, but under the guise of investment discussions was only interested in obtaining the Plaintiff's technology.
11. The Plaintiff discovered from in or about May 2000 that the Second Defendant without the Plaintiff's knowledge or consent and without lawful authority, had wrongfully sold and or licensed Paymaster's multi-payment computer program to the First Defendant for US\$20,000 in or about January 2000.
12. The Plaintiff says that the First Defendant knew or ought to have known that the Plaintiff had copyright in its said computer program and notwithstanding the same the First Defendant wrongfully and without the authority of the Plaintiff acquired the said computer program from the Second Defendant.
14. The Plaintiff avers and says that the First Defendant was well aware or alternatively ought to have been known that the information supplied to it by the Plaintiff as comprised in the business plans was confidential to the Plaintiff. At all material times therefore the First Defendant was under a duty of confidence to the Plaintiff in respect of all the confidential information supplied in the business plans.
15. By reason of the wrongful use of the information contained therein the First Defendant has

breached the duty of confidence owed to the Plaintiff.

19. In consequence of the matters aforesaid, the Plaintiff has been injured in its business and has suffered damage and loss.
25. The Plaintiff says that from and since in or about April 2000 the First Defendant has passed off its bill payment business as and for the business of the Plaintiff."

PARTICULARS OF THE FIRST DEFENDANT'S PASSING OFF

- (a). using the Plaintiff's distinctive green, yellow and blue colours, the dollar sign, in its graphics and logo in a manner imitative of the Plaintiff's logo mark and get-up and in manner calculated to deceive members of the public.
 - (b). using the same colours as does the Plaintiff and using the same bars of lines and slanting words as in the "PAYMASTER" logo and mark used by the Plaintiff.
 - (c). using the dollar sign to make up its name as does the Plaintiff in a manner calculated to deceive.
 - (d). using versions of the Plaintiff's slogan in the course of its business, namely, "the easy and convenient way to pay."
 - (e). producing receipts to members of the public which in all material respects are the same as that of the Plaintiff.
26. The Plaintiff says that the aforementioned acts of the First Defendant was calculated to and did deceive and confuse the public into believing that the First Defendant's bill Payment services was that of or connected with that of the Plaintiff.

27. The Plaintiff says that members of the public and client companies of the Plaintiff such as Cable & Wireless (Jamaica) Limited have been deceived and confused by the aforesaid acts of the First Defendant and have mistaken the First Defendant's services for that of the Plaintiff.
28. The Plaintiff says that by its aforesaid acts the First Defendant has capitalised on the reputation and goodwill of the Plaintiff, and that as a result of instances of delay of the First Defendant in notifying client companies such as Cable & Wireless (Jamaica) Limited, of the receipt of payment of customers bills, the Plaintiff has been wrongfully blamed for disconnection and its reputation has thereby suffered.
29. By reason of the aforesaid matters the Plaintiff has suffered loss and damage. Unless restrained by this Honourable Court, the First Defendant threaten and intend to continue their aforementioned acts."

Supplemental witness statement

- "4. Paymaster Jamaica Ltd was deprived of this crucial window of opportunity to recoup its investment and benefit from its innovation, because of the ruthless and unfair business practice of the 1st Defendant (GKRS) a capital-strong competitor that was willing to circumvent the developmental and teething stages by unlawfully acquiring Paymaster's intellectual property.
5. Having unlawfully acquired Paymaster's intellectual property and business plan, to gain a fast-track to the market, GKRS compounded the economic injury to Paymaster by its subsequent actions:
 - (a) GKRS used its enormous capital base and profits to deliberately and strategically

under-price and subsidize the cost of the service in the market, thus setting an uneconomic rate for the bills collection service. Paymaster's clients at the time which were mainly the National Water Commission, The Jamaica Public Service Company Limited and Cable and Wireless Jamaica Limited had been prepared, through our successful negotiation, to pay to the Claimant a rate of J\$ 15.00 to be increased to J\$20.00 for the service by 2002. That rate was close to the economic cost of delivery of that service to them, but they were subsequently induced by the artificially reduced price offered by GKRS, to revise the rate structure that had been negotiated with Paymaster. Instead Paymaster was forced to stay at a price per transaction of between \$10.00 and J\$ 15.00 up to 2007 with the utility companies (sic) There was therefore no rate increase for seven years. All other client companies that were signed on after the utility companies were signed at a rate of between J\$50.00 to J\$100.00 per transaction which equated to the economic delivery rate of the service. An apt example of the predatory activity of GKRS was the fact that GKRS induced the Super Plus Supermarket chain of companies to breach their agency contract with us by initially offering to pay them the entire sum of \$8.00 which they were receiving from at least one utility company as the transaction charge. Accordingly GKRS initially incurred no income whatsoever from those transactions while it incurred the capital cost of installing equipment in the Super Plus supermarkets.

- (b) Therefore, Paymaster's initial pricing arrangement coupled with its fair economic return, was scuttled by the unfair fast-track that GKRS gained to the market - specifically by unfairly obtaining and using Paymaster's business plans and intellectual

property. The result is that GKRS unfairly deprived Paymaster of the opportunity to recover its investment and benefit from its innovation.

- (c) Paymaster's conservative calculation as set out below is that it has lost J\$652,658,519.00 due to the combination of the unfair fast-track entry of GKRS to the market, and its predatory pricing practice that was specifically and by avowed policy, targeted at, and designed to drive Paymaster (the capital weak pioneer) out of the market.
- (d) The fact that GKRS was prepared to, and in reality gained a fast-track market entry, and significantly under-priced the service in a manner that was unsustainable and was therefore intended solely to drive the cash-weak competitor from the market, is manifested in two subsequent developments. Firstly, within 4 years of that pricing model, GKRS was forced to introduce a J\$35.00 front end fee to paying customers to make up the shortfall — a price that is three times the artificial fee that GKRS itself established with the client companies in 2000 for the bills collection service. Secondly GKRS has had to write off in its accounts, over \$500 million in losses, reflecting in part, the under-pricing and losses incurred in the provision of its bills payment service.
- (e) The actions of GKRS resulted in Paymaster suffering J\$652,658,519.00 in lost income because it was deprived of the ability to recoup its investment and generate capital to allow it to implement its full business plans. Paymaster has therefore been financially weakened by these unfair business practices.

6. GKRS' rapid entry into the local Bill Payments market in 2000 was facilitated by replicating Paymaster's multi-payment/multi-collection business model through their unlawful, improper and unethical acquisition of Paymaster's technology, systems and intellectual property. Their ability to avoid the normal business development cycle, and traditional investments of capital, time and research in a new business venture allowed GKRS to pursue a pricing strategy at entry that artificially depressed the transaction fees that the large Utility companies were able to pay the bill payment agencies.
7. This enabled the large utilities to continue to pay Agency fees well below the economic cost of processing the bill payment transaction, which made it very difficult, if not impossible, for Paymaster to recoup the value and benefits from our "first move" advantage which took over three and a half years to be fine-tuned, and would normally have presented an initial hurdle for new competitors.
8. Accordingly the loss sustained by Paymaster as a result of the predatory pricing by GKRS may be computed by applying the Opportunity Cost which Paymaster would have realized but for GKRS' action for the period in question, 2000 - 2005 before the Industry moved to levy Customer Service fees in 2006 to mitigate the losses. This sum amounts to J\$652, 658,519.00. This loss comes as a direct result of the breaches of both the 1st and 2nd Defendants and is due payable by both Defendants jointly and or severally.
9. Additionally GKRS has published in the media the fact that its international associate Western Union has paid US\$29.5 million for 25 per cent of GKRS, thus placing a value of approximately US\$120 million on this company. Western Union has publicly stated that this value was largely derived from the penetration of GKRS into the Caribbean markets. To the extent that GKRS entry into these

markets was fast-tracked by its use of the Paymaster business model and intellectual property, Paymaster Jamaica says that at least ten per cent of the value of GKRS is directly attributable to gains resulting from the unlawful use of the Paymaster software, architecture and Business Plans. Paymaster is therefore entitled in addition to a sum calculated at 10% of the value of GKRS to compensate for this unjust enrichment using Paymaster's intellectual property amounting to US\$12 million."

Computation of Direct Losses

Cost per transaction in the 3rd Party Bill Payment industry averaged \$35 - \$60 per transaction depending on the efficiency of the Operator. Utility companies such as JPS have estimated their own Cost of Collections to be —\$80 per transaction, which forms part of their 2003-2008 Tariff submission. Paymasters claim is computed up to 2005 as in mid-2006, Paymaster commenced charging paying customers a per transaction charge of J\$30.00.

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | |
|---------------------------------|------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Annual Transaction Volumes | 2,225,184 | 3,338,456 | 3,936,882 | 4,090,707 | 5,159,675 | 5,332,968 | |
| Paymaster's Revenue Opportunity | 66,755,520 | 100,153,680 | 157,475,280 | 163,628,280 | 257,983,750 | 266,648,400 | |
| Actual Transaction Fee revenues | 2,251,840 | 40,061,472 | 59,053,230 | 61,360,605 | 77,395,125 | 99,864,119 | |
| Opportunity cost | 44,503,680 | 60,092,208 | 98,422,050 | 102,267,675 | 180,588,625 | 166,784,281 | 652,658.519 |

36. Special reference must be made to paragraphs 12, 14, 18, 19, 25 and 29 of the statement of claim. Paragraph 12 pleads and particularizes allegations of the appellant's wrongful acquisition of the 1st respondent's programme, and architecture in breach of the Copyright Act. Paragraph 14 contains the plea and particulars of the appellant's unlawful acquisition of the 1st respondent's business plan. Paragraph

18 contains the averment together with particulars of the appellant's inducement of the 2nd respondent to break his contract of service with the 1st respondent. In paragraph 25 the averment of the appellant passing off the 1st respondent's service as its own is recited with particularity. Paragraphs 19 and 29 plead allegations of loss and damage with respect to each of the foregoing causes of action.

37. There can be no doubt that the quest of the 1st respondent is for the recovery of damages under all four heads of its claim. The claim for damages has always been an integral part of the 1st respondent's pleadings from the institution of the proceedings. What do the impugned paragraphs of the supplemental witness statement reveal when viewed against the background of paragraphs 12, 14, 18, 19, 25 and 29 of the Statement of Claim? In my view they outline specifics of the 1st respondent's claim for damages. Paragraphs 4, 5, 6 and 7 of the supplemental witness statement give additional particulars of the pleaded claims of the 1st respondent. They show that the 1st respondent intends to place before the court evidence that the appellant had, by its unlawful and improper acquisition of the 1st respondent's systems, intellectual property and business plan, caused it financial loss. They also demonstrate that the respondent intends to prove that the appellant, by utilizing its strong capital base, undersold the 1st respondent's bill payment services. The foregoing bolsters the 1st respondent's allegations as pleaded in paragraphs 12, 14, 18, 19, 25 and 29 of the statement of claim. Paragraphs 8 and 9 do not only specify with particularity the 1st respondent's losses but also furnish a computation of those losses.

38. The learned judge stated that it could not be said that the general nature of the case has been set out in the pleadings. He found that the pleadings did not give an outline of all claims. There may have been some presupposition on his part that there are other claims which the 1st respondent ought to have pleaded. An examination of the statement of case does not suggest that there are outstanding claims to be pleaded. Miss Phillips, Q.C., said that the learned judge's finding implies that the pleadings give no outline of competition claims or unjust enrichment claims. She went on to state that the 1st respondent's quest does not relate to recovery of damages under the Fair Competition Act or for unjust enrichment. She further contended that to invoke the provisions of the Fair Competition Act, a special procedural machinery must be engaged before litigation proceedings can be instituted. She argued that on the facts alleged, the 1st respondent can properly bring a claim under the Copyright Act.

39. I find merit in the submissions of Miss Phillips, Q.C. Section 32 of the Copyright Act confers on the owner of a copyright a right to bring an action for its breach and an entitlement to recover damages therefor, if proved. Subsections (1) and (2) of the Act state:

Section 32(1)

"An infringement of copyright shall be actionable at the suit of the copyright owner, and, subject to the provisions of this section, in any action for such an infringement all such relief by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as is available in

respect of the infringement of other proprietary rights.

- (2) Where in an action under this section an infringement of copyright is proved or admitted the court, having regard to any benefit accruing to the defendant by reason of the infringement, to the flagrancy of the infringement and to all other material considerations, shall have power to award such additional damages as the court may consider appropriate in the circumstances"

40. The Copyright Act empowers the 1st respondent to seek to recover such amount as the 1st respondent claims as having been lost as a result of the appellant's breaches as outlined in the statement of claim. It also gives the 1st respondent the right to obtain an account in respect of the profits procured by the appellant from the breach of the copyright. The 1st respondent is at liberty to pursue a claim under the Copyright Act. Although the pursuit of claims under the Fair Competition Act was an option open to the 1st respondent, it obviously elected to exercise the option which is also available under the Copyright Act. That Act affords it the right to bring the claim in the statement of claim as framed.

41. Every allegation in the statement of claim contains a plea in support of the 1st respondent's case. The statement of Claim clearly outlines the causes of action on which the 1st respondent intends to rely and the supplemental witness statement accordingly outlines details of the evidence in support of its claim. The contents of the supplemental witness statement flow directly from the claims as pleaded in that it provides details and particulars of the pleaded claims.

42. These grounds fail.

Ground 3

“The learned judge erred when he treated affidavits as constituting pleadings”

43. Mr. Hylton, Q.C., argued that the learned judge had implicitly relied on affidavit evidence as constituting pleadings and thereby failed to draw a distinction between pleadings and evidence. He also argued that although the learned judge held that the 1st respondent’s case was not outlined in the pleadings, the learned judge referred to a prior order of the court that affidavits filed should stand as pleadings and held “that the claim for economic loss was always a part of [the 1st respondent’s] case as set out in some of the affidavits.” He further submitted that the order that the previous affidavits filed should stand as witness statements, could only have been intended to mean that the affidavits should stand as evidence.

44. The affidavits to which the learned judge made reference were previously filed by the 1st respondent and the appellant in respect of an application for an injunction made earlier by the 1st respondent. At the case management conference an order was made that the affidavits should stand as witness statements at the trial.

45. The learned judge, in making reference to the previous order, could not be said to have treated the affidavits as pleadings. It cannot be accepted that he was declaring that the determination of the issues would have been dependent on an

examination of the affidavits. He would have been fully cognizant that the affidavits served to inform the appellant of the evidence which the 1st respondent proposed to advance at trial and clearly that they are not pleadings.

46. This ground is unsustainable.

Ground 4

“The learned judge erred in that he failed to recognize that the claim for \$652,658,519.00 is a claim for special damages which should have been specifically particularized and pleaded.”

47. It was submitted by Mr. Hylton, Q.C., that the learned judge failed to appreciate that the claim for losses, computed and claimed as loss of income in the supplemental witness statement, ought to have been specifically pleaded and particularized. In support of this submission he cited the cases of *Iikiw v Samuels* [1963] 2 All E R 879 and *Perestrello v United Paint Co. Ltd* [1969] 3 All ER 479.

48. Miss Phillips, Q.C., submitted that the damages which the 1st respondent seeks are for breach of copyright and that the damages as set out in detail in the supplementary witness statement are in accordance with that which the 1st respondent has a right to claim under the Copyright Act.

49. It is a well settled principle that special damages must be specifically pleaded and proved. It is also indisputable that it is impermissible to advance evidence of special damages if not pleaded.

50. In addressing the question of the recovery of special damages the learned authors of Mayne and McGregor on Damages (12th Edition 1961) at paragraph 976 said:

“Special damages consists in all items of loss which must be specified by [the plaintiff] before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary or useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial.”

51. The damages sought by the 1st respondent include those which it claims by reason of the appellant’s breaches of the Copyright Act. Its claims comprise a combination of factors which enables it to recover special and general damages. The statute provides for the recovery of damages. A specific sum of \$652,658,519.00 has been claimed as damages. The test as to whether the damages are special or general, as proposed by the learned authors of Mayne and McGregor, is whether particulars are necessary or useful to alert a defendant of the type of claim and evidence of it, or the amount claimed. In the case under review, damages have not only been particularized in the supplemental witness statement with clarity, its contents also constitute evidence bringing to the appellant’s attention information in support of the 1st respondent’s claims. This satisfies the basic test. In light of this conclusion, I will turn to the cases of *Iikiw v. Samuels* and *Perestello v. United Paint*. Neither case assists the appellant. They are distinguishable from the case under review. In *Iikiw v Samuels* the claimant sought but failed to recover

special damages as these had not been pleaded. In *Perestello v United Paint* the claimant's claim for special damages was disallowed for the reason that the claim as pleaded contained inconsistencies.

52. This ground is devoid of merit.

Grounds 5

"The learned judge erred in granting permission to the First Respondent to amend its pleadings in circumstances where there was no application for an amendment before him"

Ground 6

"The learned judge erred in that he failed to consider that the amendments were being granted after the end of a relevant limitation period and as they relate to new claims would have deprived the Appellant of a limitation defence."

Ground 7

"The learned judge erred in that he failed to recognize that the prejudice that would be caused to the Appellant by being deprived of a limitation defence could not be cured by the Appellant now having more time to respond to the allegations in the witness statement."

53. Mr. Hylton, Q.C., argued that the learned judge erred in granting the 1st respondent permission to amend its statement of claim in respect of damages notwithstanding an application for an amendment had not been made. In the alternative, he submitted that notwithstanding the court's power to grant an

amendment in the absence of an application, the appellant was not afforded the opportunity to respond before the order to amend was made. He further argued that the order for an amendment would permit the 1st respondent to plead new causes of action outside of the limitation period, thus depriving the appellant of the right to a limitation defence.

54. Part 20 of the Civil Procedure Rules 2002 sets out the conditions under which an amendment of a statement of case may be made. Rule 20.4(2) and 20.4 (3) states as follows:

- “(2.) Statements of case may only be amended after a case management conference with the permission of the court.
- (3) Where the court gives permission to amend a statement of case it may give directions as to:-
 - (a) amendments to any other statement of case; and
 - (b) the service of any amended statement of case.”

55. Rule 26.2 permits the court to make orders on its own initiative provided the affected party is given an opportunity to be heard. The rule reads:-

- “26.2(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.
- (2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations.

- (3) Such opportunity may be to make representations orally, in writing, telephonically or by such other means as the court considers reasonable.
- (4) Where the court proposes –
 - (a) to make an order of its own initiative; and
 - (b) to hold a hearing to decide whether to do so,
the registry must give each party likely to be affected by the order at least 7 days notice of the date, time and place of the hearing.”

56. The supplemental witness statement raised no new claims. The learned judge was empowered to order amendments of the pleadings. However, he ought to have given the appellant an opportunity to make representations prior to the making of the order. Nevertheless, in the circumstances of this case, in which the contents of the supplemental witness statement and the pleadings have been fully outlined, it was unnecessary for the learned judge to have made the order, as there would have been no need for an amendment of the statement of case. Miss Phillips, Q.C. said that she did not intend to amend the pleadings.

57. These grounds are unmeritorious.

58. I would dismiss the appeal with costs to the 1st respondent to be agreed or taxed.

DUKHARAN, J.A.

I agree.

ORDER

COOKE, J.A.

The appeal is dismissed with costs to the 1st respondent to be agreed or taxed.