

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 5/2009

MOTION NO. 11/2009

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.**

**BETWEEN GRACE KENNEDY APPLICANT
REMITTANCE SERVICES LTD.**

**AND PAYMASTER (JAMAICA) RESPONDENT
LIMITED**

**Michael Hylton, Q.C. and Courtney Bailey, instructed by DunnCox for
the applicant**

**Dr. Lloyd Barnett and Mrs. Denise Kitson, instructed by Grant, Stewart,
Phillips & Co., for the respondent**

September 22 and 25, 2009

PANTON, P.

1. Before us is an application for an order to grant the applicant conditional leave to appeal to Her Majesty in Council in respect of a judgment of this Court delivered on July 2, 2009. There is also a companion application for a stay of the trial of the claim in the Supreme Court pending the determination of the appeal to Her Majesty in Council. The Supreme Court trial is scheduled for ten days, commencing October 12 and ending October 23, 2009.

2. The parties are before the Supreme Court in a suit wherein the respondent is claiming from the applicant damages for breach of copyright, breach of confidence, passing off, and inducing a breach of contract for services. The respondent is also seeking an order that an account be taken pursuant to the Copyright Act and payment of such sums found due upon the taking of the account.

3. The action has not moved at a pace that can be described as quick or even steady. In April, 2008, a supplemental witness statement was filed by one of the respondent's main witnesses. That statement has been vigorously challenged and the applicant sought to have it struck out. The application was heard by Pusey, J. who dismissed it. The order of Pusey, J. was appealed on the basis that the statement contained matters that had not been pleaded and so were irrelevant to the claim. This Court dismissed the appeal.

4. It is agreed that the matter is procedural in nature, in that it is an appeal from a decision which does not directly decide the substantive issues in the claim. This application is made under section 110(2)(a) of the Constitution which reads:

“(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following case(s) –

(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings;”

5. The applicant, through Mr. Michael Hylton, Q.C., has argued that the judgment of the Court of Appeal raises questions of great general and public importance, namely:

- Whether the changes effected by the Civil Procedure Rules 2002 have done away with or altered the following common law rules, and if so, to what extent:
 - (a) Special damages must be pleaded and particularized in the claimant’s pleadings;
 - (b) Evidence at trial is limited by the claims pleaded;
 - (c) A party cannot raise new claims in evidence which were not made in the pleadings;
- Whether and to what extent the rule that special damages must be pleaded and particularized can now be satisfied by particulars given in a witness statement;
- Whether and to what extent parties are allowed by the Civil Procedure Rules 2002 or otherwise to expand upon the claims in their statement of case;
- Whether the disputed supplemental witness statement raises new claims that were not pleaded in the statement of case;

- Whether the said statement is a particularization of damages being claimed as a result of the causes of action pleaded in the statement of case; and
- Whether the sum of money mentioned in the said statement amounts to a claim for special damages which, not having been pleaded, should be struck out.

6. The Court of Appeal has ruled that the supplemental statement is not a new claim; it is merely providing particulars of the existing claims. Harris, J.A. said at para. 41 of the judgment:

“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.”

Cooke, J.A. said at para. 13:

“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.”

In the light of these clear statements by the learned judges, it is rather surprising therefore that the applicant is maintaining that the witness statement has introduced a new claim. (see para. 10 written submissions). It is not to be forgotten that the trial is to come. Admitting the statement is one thing; proof is

a completely different matter. Therefore, I can see no basis for a further appeal on this question of whether the statement is a claim or not.

7. On the question of whether the common law rules have been affected by the Civil Procedure Rules, the point may be dealt with in this way. Prior to the current Rules, as Dr. Barnett has observed, the rules that were in force were statutory in form. To be precise, the Judicature (Civil Procedure Code) Law governed the situation. As everyone involved in this case knows only too well, the 2002 Rules came into operation on January 1, 2003, having been made by the Rules Committee of the Supreme Court. They revoked

"All Rules of Court relating to the procedure in civil proceedings in the Supreme Court, save for those relating to insolvency (including winding up of Companies and bankruptcy) and matrimonial proceedings."

So, the answer to the first question is known, and is ascertainable in the Rules themselves. This is a question that certainly does not require the opinion of Her Majesty in Council.

8. The other questions all flow from the first and are procedural. To say that they are of "great general and public importance" would require an unwarranted stretching of the meaning of those words. This suit has been on the Court's list for far too long. The trial is overdue. The very Civil Procedure Rules 2002 were aimed at speeding up the trial process of cases within this jurisdiction. For decades, there has been the cry that justice is being denied because it is being

delayed. The 2002 Rules seek to deal with that cry. To grant leave for a further interlocutory appeal in this matter would amount to an unnecessary waste of time, especially with the trial scheduled to begin less than three weeks from now. When the trial has ended, there will be ample scope for the pursuit of appeals. It is high time for this trial to begin. Consequently, I would dismiss this motion.

COOKE, J.A.

I agree.

DUKHARAN, J.A.

I agree.

ORDER

PANTON, P.

Motion dismissed.