JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 87/1999

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	**GRAINS JAMAICA LTD**	**DEFENDANT/APPELLANT**
AND	**THE PEPPERSOURCE LTD**	**PLAINTIFF/RESPONDENT**

Hilary Phillips Q.C., Dianne Edwards-Davis, Howard Pinnock instructed by Grant, Stewart Phillips and Co. for the Appellant.

Dr. Lloyd Barnett, Andrew Rattray, Clark Cousins and Sheryl Thompson instructed by Rattray, Patterson, Rattray for the Respondent.

April 23, 24, 25, 26, 27, 2001; January 14, 15, 16, 17, 18, 22, 2002; March 11, 2002 and July 30, 2004

DOWNER, J.A. (DISSENTING)

(i)

Introduction

The respondent, The Peppersource Ltd - an American company, succeeded before the late Clarke J. on the issue of damages with respect to a breach of contract and breach of confidence. On the merits of the case there are three issues to be decided. Firstly, assuming that there was a breach of the terms of the contract by Peppersource, did the appellant Grains Jamaica Ltd

"Grains" waive those breaches so as to disentitle it to claim repudiation of the contract? Secondly, if the contract was for a trial period of one calendar year but the course of dealing continued for some two years, was the appellant Grains entitled to terminate the contract without the proper period of notice? Thirdly, was there a breach of confidence or wrongful interference of contract by the appellant Grains if it used the specific knowledge it acquired from its dealings with Peppersource to entice Durkee, a client of Peppersource, to enter into a contract with it at the expense of Peppersource? These issues are relevant to the main contract for the appellant Grains to supply four types of hot pepper to Peppersource.

There were subsidiary contracts by way of a joint venture agreement for the appellant Grains to supply other products if Peppersource found a market. In this instance there was to be a sharing of the profit and loss on each transaction. Also to be determined, is the jurisdictional issue concerning the capacity of Peppersource to institute or defend legal proceedings in this jurisdiction.

(ii)

How was the main contract formed?

The initial document was a Letter of Intent, at page 2 of volume II of the Supplementary Record, which reads as follows:

> "It is the intention of GRAINS JAMAICA LIMITED to grow up to 150 acres of hot peppers for CARIBE CROWN and-or JERRY MARCHESE. The 150 acres

will be for the first crop and then expanding up to 350 acres as CARIBE CROWN calls for additional acres.

GRAINS JAMAICA LIMITED AGREES to produce four varieties, of which two of the varieties will be Red Cayenne and Jalapeno.

CARIBE CROWN AGREES to pay GRAINS JAMAICA LIMITED US$.10 per pound farm gate and an additional US$.02 for delivery of the product to the processing plant in Yallas.

The payment of US$.10 per pound will be for all grades of pepper, excluding rotted or insect damaged.

SIGNED: BILL TAYLOR DATE Oct 11, 1985
MANAGING DIRECTOR
GRAINS JAMAICA LIMITED

SIGNED: JERRY MERCHESE DATE 10/15/85
CARIBE CROWN
Also, DBA – The Peppersource."

There was a letter which accompanied this Letter of Intent and as it explains the background, it is appropriate to set it out. It is at page 1 of Volume 11 of the Record and it reads:

"October 15, 1985

Mr. Bill Taylor
GRAINS JAMAICA LTD.
Shop 14, Montego Freeport
MONTEGO BAY, JAMAICA

Dear Bill:

I have enclosed the letter of intent, properly executed.

I would like to add, and have understood, that we are willing to pay the 10 cents (US) excluding rotted,

Insect . . . or otherwise damaged, or in other words only quality pepper as will be accepted by John Fletcher or his representatives.

Also, it is my intention to start out with 100 acres, and then build up to 150 and onward to 350 acres. So, I guess what I am asking is for me to control the amount of plantings, etc. and, under no circumstances should we over-produce. I hope you will recall I do still have a large plantation in Haiti, which I plan on phasing out but is impossible to phase down immediately.

Another concern is the keeping of the pepper until you would have enough of a load to bring to John all the way in Yallas, as well as the very long and 'bumpy' trip all that way. I will assume you will ship in field crates and do everything else necessary to assure a good delivery.

Lastly, we will do business in Jamaica under the new name of THE PEPPER SOURCE so as not to mix our entities, finance, etc. I have signed accordingly.

I will be sending the seed to John later this week via air freight. I am hoping they can clear customs and can be given to you so you can start them in the nursery immediately. We are already one month late.

I will plan on being in Jamaica to meet with you, visit the fields and otherwise get to know each other about the time you would be making the transplants, I guess to be about early to mid November. Therefore, my suggestion would be to meet on November 28th (Thanksgiving), or at least that Friday. I would like to finalize all our thoughts over that week end and be back in my office by Monday the 2nd of December. If it will be more convenient, we can meet in Montego Bay, if acceptable to John and the Agro representative.

> I will await your immediate reply, look forward to meeting with you and a good and profitable business relationship.
>
> Sincerely
> Jerry J. Marchese."

The phrase "first crop" in the Letter of Intent was explained in the evidence of Mr. Marchese at page 90 of Volume I of the Record. He stated that it was when the crop was ready for harvest as to be determined by the growers. Also to be noted is that the name Peppersource is a mere trade name but it is stated as a new name.

The other document was prepared by the appellant Grains. It was dated February 6, 1986, some four months after the Letter of Intent. It must be understood against the background of the initial letter of Mr. Marchese, which indicated that he anticipated that both parties would come to an agreement over the week-end of November when they met in Jamaica. The letter is to be found at page 7 of Volume 2 of the Record. One significant feature of this letter is that John Fletcher and Yallahs had dropped out of the picture. Initially, the peppers were to be processed at his plant in Yallahs. The peppers were later to be processed at Holland in St. Elizabeth and the appellant Grains had by this time acquired machinery to set up a processing plant at the farm in Holland, St. Elizabeth. The letter reads as follows:

"February 6, 1986

Mr. Jerry Marchese
The Peppersource
P.O. Box 750
643 South Route 83
Elmhurst, III. 60126

Dear Jerry:

It looks as though your pepper plant in Haiti is going to remain there for quite a long period of time, or at least it will not be shipped before our first pepper crop.

We can supply all of the equipment that is needed for bringing and making mash here, with the exception of the hammer mill.
We agreed that for this first crop, we would have a pre-marital arrangement. The Peppersource would provide all the necessary equipment and Grains Jamaica Limited would provide the labour and utilities. It was further agreed that the Peppersource would pay Grains Jamaica US 10¢ per pound for the peppers as they are delivered to the plant. Peppersource will also pay Grains Jamaica US. 03¢ per pound for the labour and utilities used in processing, plus US. 25¢ per 5 gallon bucket for filling the buckets.

We would like the following arrangement for the pre-marital crop year.

1. Peppersource to pay for all of the equipment and expense for installing the plant equipment.

2. Peppersource will bring your man in Haiti down to operate the processing plant.

3. The final product will belong to "The Peppersource" and is responsible for the quality and transportation.

4. The Peppersource will pay Grains Jamaica Limited for the peppers as they are delivered to the plant.

5. The Peppersource will pay Grains Jamaica for the processing fee and all the ingredients purchased for the processing in U.S. Dollars before the final product is shipped.

6. The Peppersource will place in effect a banker's guarantee or escrow account or some suitable instrument that will guarantee the payments to Grains Jamaica Limited.

7. If after the pre-marital crop year, Grains Jamaica and the Peppersource finds each other compatible, then they will form a company together for processing peppers and other products. This new company will then share the cost of processing as well as the profits in marketing.

Sincerely,
GRAINS JAMAICA LIMITED

Bill Taylor
Managing Director

WMT/mj."

At pages 203-208 of Volume 11 of the Record there is a very long letter of 15th April 1987, from Mr. Marchese to the appellant Grains when Grains had terminated the contract. Some of the provisions in this letter differ from the contract of February 6, 1986, but I take it that Mr. Bill Taylor's letter was an accurate record of the oral agreement between the parties.

It is important to note at this early stage that the course of dealing between the parties differed from the letter of February 6th and some of these differences are reflected in the numerous telexes during the contract period. Also important are the specific problems encountered in this venture. Problems with customs, irrigation, flood rains and one of the type of peppers, (jalepeno) was never grown. Further, only one load of serranos pepper was actually exported to Peppersource.

There can be no doubt that a Letter of Intent indicates the intention of the parties in this case. Here is how **The Law of Contract** by Treitel, Tenth Edition put it on page 154:

> "On the other hand, where the language of such a document does not in terms negative contractual intention, it is open to the courts to hold the parties bound by the document; and they will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it ***cf. Turiff Construction Ltd. v. Regalia Knitting Mills*** (1971) 22 E.G. 169 (letter of intent held to be a collateral contract for preliminary work); ***Wilson Smithett & Cape (Sugar) Ltd. v. Bangladesh Sugar and Food Industries Ltd*** [1986] 1 Lloyd's Rep. 378 (letter of intent held to be an acceptance); ***Chemco Leasing S.p.A. v. Rediffusion*** [1987] 1 F.T.L.R. 201 (letter of intent held to be an offer but to have lapsed before acceptance). The fact that the parties envisage that the letter is to be superseded by a later, more formal, contractual document does not, of itself, prevent it from taking effect as a contract."

On this issue the authority of **British Steel Corp. v. Cleveland Bridge Engineering Co. Ltd.** [1984] 1 All E.R. 504 is also pertinent. The relevant part of the head-note reads at pages 504-505:

> **Held** - A contract could come into existence following a letter of intent, either by the letter forming the basis of an ordinary executory contract under which each party assumed reciprocal obligations to the other, or under a unilateral contract (ie an 'if' contract) whereby the letter amounted to a standing offer which would result in a binding contract if acted on by the offeree before it lapsed or was validly withdrawn."

(iii)

How the main contract was terminated

Items 5 and 6 of the letter of February 6, 1986, dealing with payment are of cardinal importance on the issue of repudiation of the contract. It was contended by the appellant Grains that the failure of Peppersource to comply with the method of payment went to the root of the contract. The failure, it was contended was an effective repudiation of the contract by Peppersource and as a result the appellant Grains accepted it by terminating the contract orally on April 4, 1987, and confirming it in writing on April 19, 1987. Grounds 4 and 5 of the Amended Notice and Grounds of Appeal speak to the issue of repudiation. These grounds read as follows:

> "4. The Learned Trial Judge erred in law in determining that the Defendant/Appellant breached the contract between the parties as the evidence adduced at the trial clearly showed that it was the Plaintiff/Respondent who had repudiated the contract and was

therefore in breach of the same in that the Plaintiff/Respondent had failed and or refused to fulfil his contractual obligations set out in the letter of the 6th February 1986.

5. The Learned Trial Judge erred in law and fact in failing to determine that the Plaintiff/ Respondent had breached fundamental terms of the contract by failing and or refusing to pay for all produce which were processed, delivered to the plant and exported to the Plaintiff/Respondent and by failing to comply with all other obligations imposed on the Plaintiff/Respondent pursuant to the contract."

Ground 2 reads:

"2. The Learned Trial Judge erred in law and in fact in finding that two (2) separate contracts existed when the evidence clearly showed that only one contract existed."

Clarke J. rightly found that there were two contracts; the initial contract envisaged by the Letter of Intent and the letter of February 6, 1986. The Letter of Intent was for four types of hot peppers and the second contract was for a series of joint ventures between the parties concerning products for which Peppersource had found a market in the United States. A bone of contention between the parties on this aspect of the case was that while Peppersource insisted on samples being forwarded before shipments were sent, Grains, a government company, subject to the Crown Property Vesting Act, sent supplies which were available in Jamaica without ascertaining if Peppersource found a market. Also the appellant Grains admitted that it sent no samples. This is the basis of the incompatible relations between the partners despite the

courteous tone of the exchanges between the two Americans, Mr. Marchese for Peppersource and Mr. Bill Taylor, the Managing Director for the appellant Grains. In this context it is necessary to state that from the evidence, the appellant Grains had a board of directors, but the status of Peppersource is unknown in this jurisdiction.

As regards the issue of payment for the main contract the authorities support the appellant Grains. The case which governs this issue is **Withers v Reynolds** 1831 2 B & Ad. 882 or 109 E.R. 1370. Here is how Lord Blackburn in **Mersey Steel & Ivan Co. v. Naylor Benzon & Co.** [1884] 9 App. Cases 435, 442 or [1881-5] All E.R. Rep. 365 at pages 369-370 put it:

> "As to the other point, I have no doubt that **Withers v. Reynolds** (1831), 2 B. & Ad. 882; 1 L.J.K.B. 30; 109 E.R. 1370; 39 Digest 423, 554, correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect: "If you go on and perform your side of the contract, I will not perform mine" (in **Withers v. Reynolds** it was: "You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you"), that in effect amounts to saying: "I will not perform the contract." In that case the other party may say: "You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary will sue you for damages, but at all events I will not go on with the contract." That was settled in **Hochster v. De la Tour** (1853), 2 E & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 W.R. 469; 1 C.L.R. 846; 118 E.R. 922; 12 Digest (Repl.) 877, 2960 in the Queen's Bench, and has never been doubted since; because there is a breach of the

> contract although the time indicated in the contract has not arrived."

Lord Bramwell approved of **Withers** at page 371. It is clear that Peppersource did not comply with the payment terms of the contract with respect to the one shipment of serrano pepper. At page 172 of Volume II of the Record in a letter of March 9, 1987, they wrote to the appellant, Grains. Here is the following extract:

> "However, the serranos and that type of peppers are not Capsica, so I will pay you for those received. You were to let me know where to send the checks here. Pls. Telex this info and account number, address, etc., and I will do so for lot 1."

In this letter capsica is referred to twice both as a joint venture and the proposed joint venture company. So Mr. Marchese was correct that Mr. Bill Taylor fully understood the two fold meaning of capsica.

The most important case on this issue is **Decro-Wall International S.A. v. Practioners in Marketing Ltd** [1971] W.L.R. 361 at 368, Salmond L.J. said:

> "Mr. Ross-Munro relied upon **Withers v. Reynolds** (1831) 2 B. & Ad. 882 in support of his skilful argument that the failure to pay the bills on time amounted to a repudiation of the contract. In **Withers v. Reynolds** there was an instalment contract of sale which called for cash on delivery of each instalment. The time came when the buyer refused to pay cash but insisted on credit for each instalment until the next was delivered. The court held that the seller was not obliged to go on with the contract on the terms which the buyer sought to dictate. This decision is explicable on the basis that the stipulation as to time of payment was intended by

> the parties to be of the essence of the contract; alternatively, that the buyer was seeking to alter the nature of the transaction by turning a cash into a credit transaction."

Then at page 380 Buckley L.J. said:

> "Mr. Ross-Munro, for the plaintiff company, placed considerable reliance on **Withers v. Reynolds** (1831) 2 B. & Ad.882. In my view, Lord Tenterden C.J. in that case proceeded upon the basis that by the terms of agreement there under consideration the plaintiff was to pay for the straw as they were delivered and that this was an essential term of the contract. In the present case, in my judgment, punctual payment of bills was not, for reasons which I have endeavoured to indicate, an essential term of the contract."

Turning to **Withers v Reynolds** 109 E.R. 1370 all four judges (Lord Tenterden C.J., Parke, Tauton, Patteson JJ) stressed that the provision in the contract obliging the purchaser to pay on delivery at farm gate meant that the failure by the purchaser to do so entitled the seller to treat the contract as repudiated.

However, the appellant Grains did not insist that a bank guarantee be put in place or that there be any machinery in the contract to inform Peppersource when the peppers were delivered to the processing plant and there is no evidence that the appellant sought the processing fee before the product was shipped.

There were three other breaches by Peppersource. The man from Haiti, who Peppersource promised to bring to Jamaica to operate the processing plant, never came and stayed. However, the appellant Grains operated the

processing plant without complaint. The appellant Grains also bought and assembled a processing plant and employed a chemist to do the necessary testing to ensure that the final product ("mash") met the required standard for export. The appellant Grains never claimed the processing fee with respect to the contract peppers.

The appellant Grains complained in ground 3 that:

> "The Learned Trial Judge erred in law by failing to consider the contractual effect of terms 1-7 of the letter from the Defendant/Appellant to the Plaintiff/Respondent dated the 6th February 1986 and in finding that the Letters of Intent formed part of the Contract."

It is true that Clarke J did not deal specifically with ground 3 but in his findings of fact he referred to the contract being partly oral and partly in writing. He also noted that the writing included "voluminous correspondence" among which were telexes between the parties. These telexes dealt with both the contract peppers and the joint venture for other products called the "capsica deal". When the written agreement of February 6, the course of dealing by telephone, and the telexes are considered it will be seen that the learned judge did deal with items 1-7 and the implication from his judgment is that he found in favour of the respondent on this issue.

The following passage in the judgment in the Court below reveals that the basis for the judge finding in favour of the respondent Peppersource was that Grains had waived the breaches of the contract. At page 131 of Volume I of the Record Clarke J. said:

> "I accept Gerald Marchese's evidence that prior to April 4, 1987 no request was made by the defendant for payment and that the only invoices presented to the plaintiff by the defendant were the three invoices handed over to him on that date. I also find that the plaintiff did agree to pay and promised to provide a letter of credit or banker's guarantee as had been agreed and which should have been done earlier in terms of the defendant's letter of February 6th 1987 (supra)."

Also, on the issue of the failure of Peppersource to supply equipment with promptitude, at page 133 of Volume I of the Record the learned judge found that there was no complaint by the appellant Grains for over a year and when the complaint was made it was an afterthought.

Although some of these features seem to favour the appellant Grains at this stage of the contract with Peppersource, at the end of the pre-marital year the appellant Grains exercised its right to terminate the contract. Both parties continued their course of dealing and the presumption is that the appellant Grains had waived its rights to repudiate the contract. See **The Law of Contract Cheshire and Fifoot** sixth edition at p 773-774, and **Central London Property Trust Ltd. v High Tree House Ltd.** [1947] K.B. 130. As for the relevant pleading it must be found in the Reply and Defence to Counter-claim. Paragraph 7 at page 20 of Volume I of the Record reads:

> "7. With regard to paragraph 6 of the Defence and Counterclaim, the Plaintiff says that the Agreement can also be inferred from numerous telexes between the parties sent on divers days between April 1986 and June 30, 1987."

The Defence and Counter-claim reads at page 12 of Volume 1 of the Record:

> "6. The Defendant admits sub-paragraphs (b) and (c) of paragraph 6 of the Statement of Claim, but as regards sub-paragraph (c), the Defendant states that the Agreement in so far as it was in writing is also to be inferred from numerous telexes sent on divers days to and from the abovementioned parties between April, 1986 and the 19th day of April, 1987."

Then paragraph 6 of the Amended Statement of Claim reads at pp. 47-48 of Volume I of the Record:

> "6. In so far as it was in writing, the said Agreement was contained in or is to be inferred from the following documents or some or one of them:-
>
> (a) Letter of Intent dated the 10th and 15th days of October, 1985;
>
> (b) Letter dated the 6th day of February, 1986 From the First Defendant to the Plaintiff.
>
> (c) Numerous telexes sent on divers days between October, 1985 and April, 1986 from the Plaintiff to the First Defendant and vice versa
>
> In so far as it was oral, the said Agreement was made during telephone conversations and interviews between Mr. Gerald J. Marchese, the president of the plaintiff company and Mr. William Taylor, the Managing Director of the First Defendant Company. The said telephone conversations and interviews took place on divers dates between October, 1985 and April, 1986."

Then paragraph 28 at page 23 of Volume I of the Record reads:

> "28. The Plaintiff admits that it has made a payment in the sum of US$2,481.68 and says that the

> said sum represents payment for the quantity of Serrano pepper received from the Defendant which had been contracted for. All other products sent by the Defendant to the Plaintiff were of poor quality, improperly processed or not contracted for. Under the Agreement the Plaintiff was not obliged to make any payment for same."

Grains' response to this plea is to be found at paragraphs 12 and 13 of its counterclaim at page 17 of Volume 1 of the Record. It reads:

> "12. Save and except payment in the sum of US$2,981.68, the Plaintiff has made no payment whatsoever to the Defendant in respect of delivery or processing of the said products despite repeated requests by the Defendant for the same.
>
> 13. The Defendant states that further in breach of the aforesaid agreement the Plaintiff failed to deliver to the Defendant any items of machinery in order to carry out the growth and/or processing of the said products, and in further breach of the said agreement failed to provide a substantial portion of the materials required for production. In addition, the Defendant was forced to purchase a quantity of materials and items of machinery and the Defendant also had to pay all non-sea freighting with costs incurred. The Defendant performed the above with the knowledge and acquiescence of the Plaintiff."

The evidence discloses that there was no request for payment in terms of the agreement of February 6 and the payment adverted to was accepted without protest.

With respect to the pleading, evidence and law the learned judge ruled at page 132 of Volume I of the Record:

> "Dr. Barnett correctly, in my view, submitted that in the case before me the plaintiff's position was that of affirming not repudiating the agreement, that it maintained a willingness to fulfil its obligations and that certainly there was no refusal to pay."

To terminate the contract on April 19, 1987 required reasonable time which in the circumstances of this case would be at least three months. The notice given was fifteen days. So my finding is that if the appellant Grains wrongly terminated the contract it is liable in damages to Peppersource. Grounds 4 and 5 in Notice of Appeal have not been successful.

The following letter from Mr. Bill Taylor at pages 211-212 of Volume II of the Record demonstrates that between the period February 6, 1986 and April 19, 1987 the appellant Grains waived the breaches of contract with Peppersource. This is the letter:

> "Mr. Jerry Marchese
> The Peppersource
> P.O. Box 750
> 643 South Route 83
> Elmhurst, Illinois 60126
>
> Dear Jerry:
>
> Thank you for your letter that I received by Fed-Ex on April 18. Enclosed you will find a copy of the letter of intent that was signed when we had John Fletcher as a third processing partner. Also enclosed is a letter that was drafted after you, Paul Billings, L.J. Stephens and I agree to the contents.
>
> I am personally very sorry things had to end as they did. I would like to review the reasons this project failed.

First, was the baby eggplant. They turned out to be the wrong color, but you sent the seed. We dumped 14,000 pounds, all at our expense. However, we did use your vinegar.

Second, it was agreed that Peppersource was to pay all expenses except for labor and utilities. You asked us to buy sweet peppers and process them in brine. We shipped fourteen containers, and have borne all of the expense that Peppersource agreed to pay.

Third, Peppersource was to buy the processing equipment. The only piece of your equipment that was usable is the $3,000.00 sea land tanker. Grains Jamaica has invested an enormous amount of money on the processing equipment. We have remodeled the plant building at a great expense, which we agreed to do. The project has become very unstable since we are making all of the investment. This makes our return on investment an unprofitable situation.

The board of directors of Grains Jamaica instructed me to break our relations if you did not pay for the items you agreed to. Since you refused, I had no other choice.

The reason for the pre-marital agreement was to see if we could do business together in a stable and profitable manner. The board reasoned that the two companies were not compatible.

Again, I am sorry the venture took this path, and I hope you and I can remain friends.

Sincerely

W.M. Taylor

P.S. I am glad to hear that the sweet pepper price has risen to 69¢. It looks as though something good is coming out of the sweet peppers after all."

Here Mr. Bill Taylor assumes there was one contract where Clarke, J correctly found that there was one contract for hot peppers and the capsica or joint venture for other products.

iv)

Did the wrongful termination of the main contract deprive Peppersource of its opportunity to perform its contract with Durkee?

The response of Peppersource at page 213 of Volume II of the Record must be cited:

> "4-21-87
>
> ATTN BILL TAYLOR
> FROM JERRY MARCHESE
>
> HAVE RECEIVED YOUR LETTER OF APRIL 19 AND ALTHOUGH I DISAGREE WITH SOME OF THE POINTS YOU MAKE, I FEEL THE MATTER THAT IS AT HAND NOW IS WHAT IS THE INTENTION OF GJ WITH RESPECT TO PEPPERSOURCE CROPS IN THE FIELDS, I.E. CAYENNE, SERRANO AND SPORT?
>
> PEPPERSOURCE WILL PUT UP LETTER OF CREDIT OR IN SOME OTHERWAY PAY FOR THIS PEPPER. WE HAVE WAITED FOR HARVEST A LONG TIME AND IT, TOO, HAS COSTLY TO US AS WELL. BUT, IT IS VITAL THAT WE RECEIVE PRODUCT WHICH WAS GROWN AND IS TO BE PROCESSED BY GJ FOR OUR ACCOUNT AND WE WISH TO MAKE IT CLEAR THAT WE WILL PAY FOR THIS PRODUCT BY LC OR IN SOME WAY GUARANTEE PAYMENT AS OUTLINED IN PAR 6 OF YOUR LETTER DATED FEB. 6. 1986.
>
> WE FEEL IT WOULD BE FOOLISH AND IMPRACTICAL NOT TO SHIP US THE PRODUCT NOW, AFTER SUCH TRYING TIMES AND HERENDOUS EXPENSES ON BOTH OUR COMPANIES PART, AND NOW THAT THE PRODUCT IS FINALLY READY TO HARVEST.

I WILL ANXIOUSLY AWAIT YOUR REPLY AND INTENTIONS.

REGARDS
JERRY J. MARCHESE
PRESIDENT
PEPPERSOURCE LTD.
AND DATED 16 APRIL 1987"

The two grounds of appeal which address this issue are grounds 7 and 8 which read as follows:

> "7. The Learned Trial Judge erred in law in awarding Special Damages to the Plaintiff when the claim was not specifically proved as no supporting documentation was tendered at the trial.
>
> 8. The Learned Trial Judge erred in law in awarding General damages to the Plaintiff/Respondent for prospective losses although the evidence adduced confirmed that the contract between the parties was for a premarital crop year only."

In his "undisputed" findings of fact at pages 125-127 of Volume I of the Record the learned judge includes the fact that the agreement was partially in writing and partially oral. Further, the defendant agreed to grow on its Holland Farm in St. Elizabeth 150 acres of hot peppers namely red cayenne, jalepeno, serrano and sport peppers for the plaintiff. The defendant also agreed to process them at the processing plant then ship, "freight collect" to Peppersource in the United States. It must be reiterated that item 3 of the letter of February 6, 1982 states that:

> "3. The final product will belong to "The Peppersource" and is responsible for the quality and transportation."

The summary of undisputed facts stated that none of the cayenne peppers grown for the plaintiff was ever shipped to it. Some serrano pepper was sent and there was some payment. The pepper seeds were supplied by Peppersource.

Of prime importance on this aspect of the case was that Peppersource informed the appellant Grains that it had a substantial contract with Durkee to supply that company with cayenne peppers. On 1st April 1987 representatives of Durkee, Gerald Marchese of Peppersource, Bill Taylor, Anthony Hart and others inspected Holland Farm and processing plant and Durkee Foods was impressed with the farm and plant. During the period April 1-3 Anthony Hart on behalf of the appellant Grains secured a contract for the appellant Grains with Durkee Foods to supply that entity with the cayenne peppers it had grown for Peppersource. It is beyond dispute that the appellant Grains knew of the contract between Durkee and Peppersource and in these circumstances Grains by an unlawful termination of the contract was liable to pay damages.

It must be emphasised that the premarital contract was for a year which was defined as when the first crop was ready for harvest. So in assessing the damages it must be on the basis that the joint venture contemplated would probably not be implemented. The sudden termination of the contract is evidence that the appellant Grains found Peppersource incompatible. The

conduct of the appellant Grains would be incompatible with the manner in which Peppersource conducted its business. The issue of incompatibility embraced both contracts. The appellant Grains was forwarding sweet peppers and other products without sending samples in the first instance. All this emphasizes that any notice in respect of both contracts must be within a reasonable time. It seems to me that three months would be the minimum, although six months would be preferable. I so find that because of the supply of seeds and other bits of knowledge Peppersource gave to the appellant Grains and the difficulties of agricultural production adverted to by Peppersource in their letter of 5th May 1987 at page 203 of Volume II of the Record, shows that flexibility on both sides was necessary in this case.

It must be stated at this stage that the letter of termination dated April 19, 1987, by Grains even if it were proper, required at least three months notice to terminate the contract. The appellant Grains treated both contracts as one and treated the letter as applicable to both contracts. The reality was the joint venture or capsica deal was a separate contract so the letter properly construed must be confined to the contract for four types of hot peppers.

The classic formulation on contract damages is the case of **Hadley v. Baxendale** (1854) 9 Exch. 341 or [1843-1860] All E.R. Rep. 461. Alderson B. said at p 465:

> "We think the proper rule in such a case as the present is this. Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of

> such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

To my mind the loss of the Durkee and Acadiana Pepper Company contracts would be the special damages which Clarke J. in applying **Hadley v. Baxendale** to the circumstances of this case at page 134 of Volume I of the Record was referring to when he said:

> "It is common ground in the case before me that the plaintiff made it clear to the defendant that the defendant was its only source of pepper supply especially after the plaintiff was forced to terminate its Haitian operations. And I find that the defendant was also fully aware that Durkee Foods was the plaintiff's primary customer in respect of red cayenne pepper mash and that any interruption or disturbance

> of the contractual relationship between Durkee Foods and the plaintiff would result in substantial loss to the plaintiff. The evidence and the pleadings also make it plain that despite that knowledge the defendant through its officers and agents solicited and secured a separate contract with Durkee Foods to the exclusion of the plaintiff using (a) pepper grown exclusively for the plaintiff for supply to its customers,(b) equipment supplied by the plaintiff which was intended to be used solely to execute the agreement between the parties."

Then the learned judge continued thus at pages 134-135 of Volume I of the Record:

> "Furthermore, I find that the plaintiff had a ready market for the other three varieties of "contract peppers" and that the plaintiff also suffered substantial loss by the defendant's termination of the contract and of supplies to it. Not only was the plaintiff unable to recover or find a substitute supplier, given that much time was required to sow seeds, transplant, mature and harvest the peppers, but as a foreseeable result of the defendant's breach, the plaintiff suffered damages over and above those directly flowing from the breach of contract. There is no escaping the fact that the particular circumstances surrounding the agreement and subsequent breach left the plaintiff without a supplier, without its major customer Durkee Foods, and without any means of carrying on its business or generating revenue. In my judgment the defendant must have known of the special circumstances constituting the plaintiff's normal business operations. So, in the result the defendant is liable for all consequential damages resulting from its breach."

Then turning to loss on the contract peppers at page 135 of Volume I of the Record Clarke, J. said:

> "1. **<u>The losses on the "contract peppers"</u>**

> I hold that special damages claimed for losses relating to the red cayenne pepper mash have been proved. Prior to the defendant's breach the plaintiff had firm purchase orders with both Acadiana Pepper Company and Durkee Foods dated August 4, 1986 and October 8, 1986 respectively to supply them with red cayenne pepper mash. Because of the defendant's breach these orders were never filled by the plaintiff."

The firm purchase orders and the relevant affidavit evidence are exhibited at page 258 and pages 261-265 of Volume II of the Record. Also relevant was the evidence of Mr. Richard Valleau at page 78 of Volume I of the Record which was rightly admitted by the learned judge pursuant to sec. 31e of the Evidence Act.

The learned judge summarized his findings on damages firstly at page 135 and then at page 138 of Volume I of the Record thus:

> **"Summary of damages awarded**
>
> Special Damages US$220,800.00 ($92,250.00+$128,550)
>
> General damages
> (a) breach of confidence 30,000.00
> (b) prospective losses 370,000.00
>
> Total General Damages US$400,000.00"

The learned judge awarded prospective losses at $370,000.00 which I would disallow because it could have been properly terminated after the first pre-marital crop year. It was terminated although to reiterate the notice period was too short. I would award special damages of US.$92,200 with interest at

the rate of 5% from April 19, 1987 to 5th June 1994, and general damages of $30,000 with interest at the rate of 5% from May 1987 to 5th June 1999.

The learned judge then dealt with the competence of Peppersource to institute proceedings thus at page 138 of Volume I of the Record:

> "The losses and expenses were incurred by the plaintiff, a company incorporated and based in the United States. It would but for the defendant's breach have earned United States Money. Accordingly the damages have been awarded in United States currency as has been claimed."

In so stating the learned judge was reiterating the stance he took at the very outset of his judgment. He said at page 125 of Volume I of the Record:

> **"Factual background**
>
> The plaintiff is a company incorporated in the United States of America. It operated initially under the name Caribe' Crown, and in the course of its business over many years it would supply two American companies, the S.C.M. Corporation (Durkee Foods) and Acadiana Pepper Company, with hot peppers of the red cayenne variety. It had had extensive farming operations in Haiti from which the necessary supplies of pepper were obtained and where the peppers were also processed. Due to political upheavals in that country the plaintiff found it necessary to establish a new source of supply and, accordingly, entered into an agreement with the defendant, Grains Jamaica Ltd. that was background evidence given by Gerald Marchese, president of the plaintiff. It went unchallenged and I accept it."

The issue of the competence of Peppersource to institute proceedings in this jurisdiction will be addressed later.

(v)

The Capsica or joint venture deal

On this issue the learned judge found at page 130 of Volume I of the Record:

> "I find that the other arrangement, (designated as a 'capsica' deal by Gerald Marchese in the voluminous correspondence between parties) referred not to specified products but to any items that could be produced or processed in suitable quantities, quality and at a feasible price and for which a market could be found by the plaintiff. This, I find, was a separate arrangement whereby the defendant was to procure and/or process such products. The plaintiff was not required to pay a price on delivery of same, but only to advance the shipping and distribution expenses. And I also find that any profits or losses in relation to such products were to be shared equally. One such product was sweet peppers. It was clearly part of the 'capsica' arrangement. The plaintiff, I find, demanded that sweet peppers should not be shipped before samples were sent. Samples were however, never sent. The fact is that in spite of the plaintiff's unfulfilled demand for samples and changing market conditions for that product the defendant prematurely shipped several containers of the product, to the great loss of both parties."

Of the numerous references in the telexes to the capsica deal one of the earliest is to be found at page 35 of Volume II of the Record dealing with sweet peppers. It was dated 7th May, 1986.

Here is how Mr. Marchese described the Capsica deal at page 79 of Volume I of the Record:

> "Capsica deal referred to – means a deal outside of our written agreement to grow and process the previously mentioned four varieties of hot pepper.

> Capsica is a Latin term for pepper (Capsica) was just a term for a specific deal based previously on the rule of the U.S. Department of Agriculture. Specifically under PACA (Perishable Agricultural Commodities Act). Under that Act the parties, vendor and receiver, would agree, sometimes in writing, sometimes not-where the vendor a shipper would ship the commodity paying all the expenses for example to the port and the receiver or marketer would pay all the other expenses which would include things such as a shipping customs duty, inland transportation, handling and marketing. The marketer would sell the product and commodity for the very best price, would deduct all the expenses to include the shipper's expenses and the net return would be shared either as a profit or a loss. Bill Taylor and I were both Americans and familiar with U.S. Department of Agriculture procedures because a licence is required to handle produce under U.S.D.A. rules and I had a licence. I assumed Taylor had one."

At page 80 of Volume I of the Record Mr. Marchese said:

> "The arrangement I have described was discussed with Bill Taylor. We both agreed to Capsica arrangement and to a deal per deal basis. In respect to the Capsica production an undertaking was given by me to provide machinery for that arrangement. Sometimes would advise me as to which produce or product that may be available from Jamaica. I then would seek a market to establish a price for the product. This would cover not only pepper but for example, bat guana a fertilizer used by consumers for home plants."

Further the witness continued at page 81 of volume I of the Record:

> "It was my duty under the Capisca arrangement to seek new markets other than the hot pepper. So I would know the pulse of that market and advise from time to time what was needed. I had to find out from the customer whether they approved of the quality of the product, to ascertain the price and

> quantities that the market would accept. I would then communicate that to Mr. Taylor and then we both have to decide whether it made sense to market the product. The customer would normally request a sample first, much like the Serrano exercise when we discovered it had no heat and was soft. The product should not be shipped until the sample was approved and both agreed that there was a profit to be made."

There was clear evidence of the capsica deal in a telex from Maxine, Bill Taylor's Secretary at page 120 of Volume II of the Record over and above the four contract peppers. One point to be noted was that there was insistence on a Letter of Credit and she was asking that the prices she quoted be paid. It is clear that Maxine was not aware of the capsica deal

Even on Mr. Marchese's evidence the capsica deal was in trouble from the start. Here is an example from his evidence at page 82 of Volume I of the Record:

> "... At page 134 on 3rd February 1987 advised Taylor that we would be losing money if he did not ship up to 48,000 lb. in a container. Reason is that the maximum weight that could be put into a container is 48,000 lbs. The freight carrier Sealand would charge a flat rate whether or not you ship 48,000 lbs. So if it was a light container under 48,000 lbs. – I said we – Grains and Peppersource would be losing money because it was a capsica arrangement. If the procedure advised were to be followed it would be to the advantage of both sides as it would reduce the costs. When we opened the shipment I noticed many of the pails had fallen down, were broken and leaking. Plywood in my experience were used to blocked the pails. No plywood was in the container we received. At page 142 Vol. 3 on 10th February 1987 – advised Taylor that we received 14lb pails and that it should be closer to 25lbs. At page 146 Vol. 2 telex from Taylor to me – the peppers referred to

> were capsica peppers – the reference to green and red would mean that it was a sweet pepper."

Here is another aspect of incompatible arrangements at page 83 of Volume I of the Record:

> "Most of the pails were in poor condition. The Jamaican pails were not opaque, they were transparent therefore the light would get in, cause further deterioration to the pepper and further cause us to put this to the content of the pail into a barrel (a 55 gallon drum). It cost Peppersource a considerable amount of money to carry out that operation. We had to use labour from a temporary service. We never got any of the sweet pepper prepared in the manner I said it should be prepared."

On this sample there is enough evidence to show the incompatability between the parties and it should have been obvious that it was unlikely that the premarital period would be regarded as a success by either of the parties.

The authority cited on this aspect of the case is **Robinson v Anderson** (1853) 20 Bev. 98 Sir John Romilly M.R. said at page 103:

> "If the case rested there, it appears to me that the presumption of law is, that the profits were to be divided equally. But if it is alleged that a different contract was come to at the time, who is it that is required to prove it? Why the person who alleges it, namely, Mr. *Anderson*. I have, therefore, looked through the evidence carefully, and my opinion is, that he fails in proving that any different contract was come to, and the documents appear to me to furnish evidence, to some extent, confirmatory of the view, that this was a joint business, and that the profits were to be equally divided."

Damages was not the remedy for a breach of the joint venture agreement. If it were necessary I would order the taking of an account on this

aspect of the case. The damages of US$128,500 awarded by the learned judge cannot stand.

For completeness the following extracts from the evidence of Mr. Bill Taylor showed why the learned judge found that there was a capsica deal and that the evidence of Mr. Marchese was preferred to that of Mr. Taylor.

Here is the relevant evidence for Mr. Bill Taylor at page 108 of Volume I of the Record:

> "Ques. Are you familiar with the phrase capsica deal?
>
> Ans. Yes, I see the phrase in telexes to me and to Grains Jamaica. It was my understanding that capisca deal was to be the name of a joint venture between Peppersource and Grains Jamaica after the first year of the pre-marital agreement. Yes I heard evidence given of the perishable. Agricultural Communities Act (PACA) given in this court. No, I did not have any discussions with Mr. Marchese under the Act. I didn't even recall hearing of PACA before I came to this Court. Previous to the agreement with Peppersource I had never been engaged in agricultural export to the U.S.A. To my knowledge Grains Jamaica had never been engaged in exporting agricultural produce to the U.S.A."

This was the answer in chief. A significant answer under cross-examination is to be found at page 114 of Volume I of the Record:

> "Ques. In relation to the non-contractual pepper the profit was to be shared fifty: fifty between Grains Jamaica and Peppersource?

Ans. That could possibly be so. But I don't remember. We were buying all these products and we were growing the eggplants we were doing all the processing at our expense we never got payment for anything.

Ques. Do you recall giving instructions to Marchese to send the cheque to Arkansas.

Ans. We do have office in Arkansas.

Ans. We do have a home office in Arkansas. Don't recall that but it could have easily happened."

As for Durkee and the evidence of the terms of the contract the evidence at page 108 of Volume I of the Record is instructive:

Ques. Did you take part in the negotiation of the agreement with Durkee which was entered into by Grains Jamaica?

Ans. I don't recall if I had direct negotiation with them. They agreed to take the balance of the crop that we had in the field. Don't recall taking part in negotiating that agreement. Yes, this was a very important agreement to Grains Jamaica. Yes the contract with Durkee brought to Grains Jamaica immediate foreign exchange earnings. Yes for almost a year I was at the center of the agreement between Grains Jamaica and Peppersource for the Peppersource fulfilling its contractual arrangement with Durkee. Yes, I probably knew more about it than anybody else at Grains Jamaica. Yes, I participated in breaking off the contractual relationship between Grains Jamaica and Peppersource."

These aspects of the evidence demonstrated that there were two contracts as the learned judge found and that the notice to terminate the

contract by Grains meant that Peppersource lost the opportunity to supply Durkee with pepper mash.

(VII)

Breach of confidence

Ground 9 of the grounds of appeal is relevant to this issue. It reads:

> "9. The Learned Trial Judge erred in law and fact in finding that the Defendant/Appellant misappropriated information, equipment, knowledge and trade secrets from the Plaintiff/Respondent and in awarding damages relative thereto."

Peppersource supplied the appellant Grains with trade secrets, seeds for the four types of contract peppers and brought representatives from its client Durkee to the farm and plant at Holland, in St. Elizabeth.

The Appellant Grains used the confidential information to grow the contract peppers and then sold the final produce to Durkee. This was a great disadvantage to Peppersource who lost their contract with Durkee. Here is direct evidence from Mr. Marchese on this issue at page 77 of Volume I of the Record:

> "The Cayenne pepper seeds were from Durkee Company. Durkee would from time to time send Peppersource seeds for us to plant. The Cayenne pepper seeds could only be obtained from Durkee. Re the other seeds for the special contract peppers sport pepper we had a special franchise from which we paid a royalty to a company called, Vlasic who would supply that special seed. We would sell some of that pepper back to Vlasic. The pepper was used for hot dog sold on the Chicago market. The Serrano seeds were purchased from Peto company a major

> manufacturer of seed products. Jalepeno seeds were purchased mostly from Peto Company as well."

In this context it must be recalled that the appellant Grains was a company which specialized in milling rice. They had no expertise in growing pepper or of the marketing of peppers. All the confidential information was to be used for the joint endeavours of Peppersource and Grains.

The following passage in **Cranleigh Engineering v Bryant** [1964] 3 All E.R. 289 is illustrative of trade secrets and the protection the law gives to those secrets. At page 295 Roskill J. said:

> "In my judgment the plaintiffs are correct in their contentions on this issue. I think that the knowledge that this particular clamping strip was the right type of clamping strip to use for this particular purpose, coupled with the knowledge of how to define to a plastics manufacturer what was required for this particular purpose and what plastics manufacturer could readily supply this particular form of strip, is and was a trade secret of the plaintiffs."

In another passage towards the end of his judgment Roskill J. said at page 302:

> "I have dealt with this question at length, for the matter was argued at length before me. Applying the law as I conceive it to be, I have no doubt that Bryant acted in grave dereliction of his duty to the plaintiffs in concealing from the plaintiffs' board the information which he received from the plaintiffs' patent agents, and in taking no steps whatsoever to protect the plaintiffs against the possible consequences of the existence and publication of the Bischoff patent. I also have no doubt that Bryant acted in breach of confidence in making use, as he did as soon as he left the plaintiffs, of the information regarding the Bischoff patent which he had acquired

> in confidence and about its various effects on the plaintiffs' position, for his own advantage and for that of the defendant company. Any other conclusion would involve putting a premium on dishonesty by managing directors."

By parity of reasoning the appellant Grains used the trade secrets it obtained from Peppersource, grew contract peppers, and sold it to Durkee whom it knew to be Peppersource's client for many years. Another case which sets out the principles in this area of law is **Indata Equipment Supplies Ltd. v. ACL Ltd** [1998] Fleet Street Reports 248. Otton L.J. said at page 257:

> "There is an established equitable remedy for breach of confidence. In **Seager v. Copydex Limited** [1967] 1 W.L.R. 923, Lord Denning M.R. at page 931 said:
>
> > The law on this subject . . . depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent.
>
> In **Coco v. A. n. Clark (Engineers Limited)** [1969] R.P.C. 41 Megarry J. (as he then was) stated at page 46:
>
> > The equitable jurisdiction in cases of breach of confidence is ancient . . . the obligation of confidence may exist where . . . there is no contractual relationship between the parties.
>
> He listed three elements of the cause of action:
>
> 1. The information must be of a confidential nature.
>
> 2. It was communicated in circumstances importing an obligation of confidence.

3. There was an unauthorized use of the information.

4. The information must be judged in the light of the uses and practices of the trade or industry."

There was no separate claim for Unlawful Interference of contract. If such a claim had been made the comments of Otton L.J. at pages 259-260 would have been appropriate. In view of the foregoing analysis Ground 9 has not been successful.

The jurisdictional point

From the very inception of this case in the letter of October 15, 1985 at page 1 Volume II of the Record Mr. Marchese wrote:

> "Lastly, we will do business in Jamaica under the new name of THE PEPPER SOURCE so as not to mix our entities, finances, etc. I have signed accordingly."

The pleader for the appellant Grains realized this and in response to the averment that Peppersource was a Limited Company put the respondent Peppersource to proof. Here is how the pleading appears at page 47 of Volume I of the Record.

> "1 The Plaintiff is Limited Liability Company duly incorporated under the Laws of the State of Illinois in the United States of America with registered office and principal business office at 643 South Route 83, Elmhurst, Illinois, United States of America."

The appellant Grains responded thus at page 11 of Volume I of the Record:

> "1. The Defendant makes no admission as to paragraph I of the Statement of Claim."

The learned judge's reasons for ruling in favour of the respondent Peppersource on this issue has been adverted to earlier. In those two passages cited the learned judge treated the issue as if it were to be decided by the oral evidence of Mr. Marchesse when it was an issue of documentary evidence and statute law of which the judge should have taken judicial notice: See section 21 of the Interpretation Act. Section 28 of this Act also addresses the issue of incorporation and the competence of a corporate person to sue and own property.

The Companies Act is the statute of which judicial notice ought to have been taken. Part X is captioned "**Companies Incorporated outside the Island carrying on Business within the Island.**" There was no proper evidence that Peppersource was incorporated anywhere, and certainly no proof that there was compliance with part X of the Companies Act. The evidence demonstrated the extensive business carried on in Jamaica by Peppersource both in relation to contract peppers and under the capsica deal. There was also property transferred to Jamaica.

Durayappa V Fernando [1967] 2 A.C. 337, although a case in administrative law, illustrates the principle where the party instituting proceedings had no competence to do so. The point was taken by their Lordships for the first time before the Privy Council: See also **White Book Vol. II** 1970 paragraph 2034.

If on the merits of the case the appellant Grains had been successful and the order for damages and costs had been awarded how would this Court's order be enforced against an entity unknown to law? Equally can an entity unknown to the law as Peppersource enforce a judgment? See section 589 of the Judicature (Civil Procedure Code) Law. Pepeprsource had no competence to institute proceedings in this jurisdiction. Had security for costs been sought from the inception of these proceedings, the error would have been detected. It is noteworthy that all the correspondence from Peppersource is without the customary "Inc." or the statement that Peppersource is a corporation: See pages 3,19,48,66, 155 and 172 of Volume II of the Record.

On the other hand, it may be that the instructing attorneys-at-law of Peppersource may have omitted to place the proper Certificate of Incorporation or Registration under the Companies Act before counsel. If that is so the matter can be remedied by Liberty to apply.

Conclusion

My decision is therefore that the appeal is allowed on the jurisdictional ground, and that the order below be set aside. Liberty to apply is granted. Having regard to this decision and the way this case has been conducted there should be no order as to costs.

BINGHAM, J.A.

Having examined in draft the judgments prepared in this matter by Downer and Harrison, J.J.A., I am to state that I am in full agreement with the reasoning and the conclusions arrived at by Harrison, J.A. and the orders as proposed by him.

Downer, J.A. in his judgment has raised the question of the competence of the respondent company to bring the claim. While it is correct that the appellant by the general traverse made in paragraph 1 of the defence and counter claim (page 11 of the record), has raised the matter of jurisdiction, this question was not relied on by them neither in the arguments below before Clarke, J nor before this Court. Given the position taken by the appellant I do not regard this question adverted to by Downer, J.A. as a matter falling for the determination of this Court.

HARRISON, J.A:

This is an appeal from the judgment of Clarke, J. on June 25, 1999, giving judgment for the respondent for damages for breach of contract, to grow and sell hot peppers to the respondent, in the sum of US$620,800.00 with interest of 5% on general damages from the date of service of the writ to March 11, 2002 and costs to be agreed or taxed. The appellant denied liability contending that the respondent had repudiated the contract.

The facts are; The Peppersource Ltd. (the respondent) is a limited liability company incorporated under the laws of the State of Illinois in the United States of America, and, Grains Jamaica Ltd. (the appellant) is a limited liability company incorporated under the laws of Jamaica with registered office at Montego Freeport in the parish of St James. Both parties entered into agreements partly oral and partly in writing.

The respondent, formerly known as Caribe Crown, was involved in the processing of hot peppers in Haiti, where such peppers were grown. Because of political unrest in the latter country the respondent discontinued that operation.

By letter dated October 15, 1985, from one Jerry J. Marchese to Bill Taylor of Grains Jamaica Ltd., on letterhead "Caribe Crown," Marchese stated, inter alia:

"I have enclosed the letter of intent, properly executed.

I would like to add, and have understood, that we are willing to pay the 10 cents (US) excluding rotted, insect ... or otherwise damaged, or in other words only quality pepper as will be accepted by John Fletcher or his representatives.

Also, it is my intention to start out with 100 acres, and then build up to 150 and onward to 350 acres. So, I guess what I am asking is for me to control the amount of plantings, etc. and, under no circumstances should we over-produce. I hope you will recall I do still have a large plantation in Haiti which I plan on phasing out but is impossible to phase down immediately.

Another concern is the keeping of the pepper until you would have enough of a load to bring to John all the way in Yallahs, as well as the very long and 'bumpy' trip all that way. I will assume you will ship in field crates and do everything else necessary to assure a good delivery.

Lastly, we will do business in Jamaica under the new name of THE PEPPER SOURCE so as not to mix our entities, finances, etc. I have signed accordingly."

The letter indicated further that he would "be sending the seed to John late this week .....they can be given to you so you can start them in the nursery immediately". It continued:

"I will plan on being in Jamaica to meet with you, visit the fields and otherwise get to know each other about the time you would be making the transplants, I guess to be about early to mid November. Therefore, my suggestion would be to meet on November 28th (Thanksgiving), or at least that Friday. I would like to finalize all our thoughts over that weekend and be back in my office by Monday the 2nd of December. If it will be more convenient, we can meet in Montego Bay, if acceptable to John and the Agro representative."

The letter of intent enclosed read:

"Letter of Intent

It is the intention of GRAINS JAMAICA LIMITED to grow up to 150 acres of hot peppers for CARIBE CROWN and/or JERRY MARCHESE. The 150 acres will be for the first crop and then expanding up to 350 acres as CARIBE CROWN calls for additional acres.

CARIBE CROWN AGREES to produce four varieties of which two of the varieties will be Red Cayene and Jalapeno.

CARIBE CROWN AGREES to pay GRAINS JAMAICA LIMITED US$10 per pound farm gate and an additional US$.02 for delivery of the product to the processing plant in Yallahs.

The payment of US$10 per pound will be for all grades of pepper, excluding rotted or insect damaged.

Signed: Bill Taylor Date; October 11, 1985
Managing Director
GRAINS JAMAICA LIMITED
Signed: Jerry Merchese Date: 10/15/85
CARIBE CROWN
Also OBA – The Peppersource J.M."

Jerry Marchese was the President of the respondent (formerly Caribe Crown).

The appellant wrote a letter dated February 6, 1986, to the Jamaica National Investment Promotions Ltd. seeking tax exemptions, in respect of the agreement. It read:

"Grains Jamaica Limited is now in the process of planting 150 acres of hot peppers to be made into hot pepper mash and whole green peppers in brine. The acreage will be expanded to produce 5 million pounds of hot peppers, which we already have contracts in hand.

Mr. Jerry Marchese of the "Peppersource" Box 750, 643 South Route 83, Elmhurst, Illinois 60126, U.S.A., owns a hot pepper processing plant in Haiti and wishes to move the plant to Jamaica.

I am applying for the Industrial Incentives for both tax-free holiday and duty-free status. This plant will be owned 50% by Grains Jamaica Limited and 50% by the Peppersource.

This is a processing plant only, and all its products will be for export.

The Peppersource will pay Grains Jamaica Ltd. US$.10¢ per pound farm gate for the peppers. They will also pay Grains Jamaica US$.03¢ per pound for processing, and an additional US.25¢ per 5 gallon bucket for placing green hot peppers in 5 gallon bucket.

> Growing 350 to 500 acres of hot peppers will employ approximately 1000 persons for harvest. Without the processing plant, we cannot grow the peppers and so consequently we cannot create 1,000 jobs."

A response by letter dated February 27, 1986, indicated that the project did not qualify for exemptions sought. The appellant on the said February 6, 1986 wrote to the respondent a letter in the following terms:

> "Dear Jerry:
>
> It looks as though your pepper plant in Haiti is going to remain there for quite a long period of time, or at least it will not be shipped before our first pepper crop.
>
> We can supply all of the equipment that is needed for bringing and making mash here, with the exception of the hammer mill.
>
> We agreed that for this first crop, we would have a premarital arrangement. The Peppersource would provide all the necessary equipment and Grains Jamaica Limited would provide the labour and utilities. It was further agreed that the Peppersource would pay Grains Jamaica US.10¢ per pound for the peppers as they are delivered to the plant. Peppersource will also pay Grains Jamaica US.03¢ per pound for the labour and utilities used in processing, plus US.25¢ per 5 gallon bucket for filling the buckets.
>
> We would like the following arrangements for the pre-marital crop year.
>
> 1. Peppersource to pay for all of the equipment and expense for installing the plant equipment.
>
> 2. Peppersource will bring your man in Haiti down to operate the processing plant.

3. The final product will belong to "The Peppersource" and is responsible for the quality and transportation.

4. The Peppersource will pay Grains Jamaica for the peppers as they are delivered to the plant.

5. The Peppersource will pay Grains Jamaica for the processing fee and all the ingredients purchased for the processing in U.S. Dollars before the final product is shipped.

6. The Peppersource will place in effect a banker's guarantee or escrow account or some suitable instrument that will guarantee the payments to Grains Jamaica Limited.

7. If after the pre-marital crop year, Grains Jamaica and the Peppersource finds each other compatible, then they will form a company together for processing peppers and other products. This new company will then share the cost of processing as well as the profits in marketing.

Sincerely,
Grains Jamaica Limited
Bill Taylor
Managing Director."

Durkee Foods Inc. and Acadiana were two companies in the United States of America to which the respondent indicated it supplied hot pepper mash from its operations in Haiti and which it would still supply from Jamaica.

Initially, the peppers were to be grown by the respondent and sent to one John Fletcher at his farm in Yallahs, St Thomas, to be processed there. John Fletcher withdrew from the project and the growing of the pepper and the processing were to be effected by the appellant.

John Fletcher was responsible for the registration of a company, Capsica Ltd. on behalf of himself, the appellant and the respondent for the purpose of the operations concerning the hot peppers. Fletcher's notification of his withdrawal is contained in a letter to Messers: Myers, Fletcher and Gordon Manton and Hart dated April 10, 1986. It reads, inter alia:

> "I have now decided to withdraw as a shareholder. The other two parties would like to go ahead with formation of the company which will operate as grower, processor and exporter in Jamaica. The parties are:
>
> Grains Jamaica Limited (Mr. Bill Taylor) c/o National Investment Bank of Jamaica, Scotia Centre, Kingston.
>
> The Peppersource, Ltd.
> P.O. Box 750
> Elmhurst, Illinois 60126
>
> Both have expressed their intention of requesting you to complete the work you have started on Capsica Limited, and the detail of changes will come from them."

The respondent shipped to Jamaica from its operations which were discontinued in Haiti, equipment and machinery for use by the appellant under the agreement.

By telex dated April 1, 1986, the respondent advised the appellant of the intended shipment of machinery and equipment from Haiti and the expected visit of the representative from Durkee Foods to Jamaica, stating:

> "Hoping to impress Durkee people next week".

Steve Hudson, purchasing manager of Durkee Famous Foods Corporation, one of the two major customers of the respondent, visited Jamaica from April 10, 1986 to April 12, 1986, and saw the pepper farming operations of the appellant and respondent at Holland. He wrote to the respondent on May 1, 1986, requesting detailed information of the components included in the growing and ultimate processing of cayenne peppers. The letter reads:

> "Dear Jerry:
>
> This letter is to thank you for your generous hospitality during our visit to your operation and fields earlier this month.
>
> There is some additional information I need from you. Please send the following to my attention:
>
> 1. Certificate of analysis showing salt to be food grade.
>
> 2. Certificate of analysis showing water used in mashing operations is potable
>
> 3. Complete list of fertilizers, pesticides and herbicides used to grow and treat cayennes.
>
> Thank you.
> Sincerely,
> Steve Judson
> Purchasing Manager."

The respondent, consequently, by letter dated May 6, 1986 wrote to the appellant, in these terms:

> "Bill
>
> Here is a letter from Durkee which is self-explanatory.

> WE CAN PLANT DURKEE SEED AND USE FOR ACADIANA, ETC.
>
> WILL BE SENDING SEED AND OTHER ITEMS VIA EASTERN TOMORROW MAY 30TH."

By telex dated June 17, 1986, the appellant requested of the respondent:

> "Please send several pounds of sport, cherry, jalepeno and cerano pepper seeds."

By telex dated June 18, 1986, the respondent (Marchese) advised the appellant (Bill Taylor):

> "Re your telex:
>
> On May 17 Sprint Bill 91-452314, I had sent sport and cayenne seeds along with 1 lb of pepperoncini which turned out to be pimento.
>
> I requested in a telex dated May 16 that you only plant about 4 lbs. of sport and the cayenne was for future use.
>
> Winston told me we had 30 acres of Serrano and 5 of cherry which should be enough unless we lost them all in the flood. I do not want to over produce and destroy a market."

The letter then stated the amount of pepper seeds the respondent had in stock and requested information on the pepper trees in the field and the amount of seedlings in the nursery and continued:

> "We will – and can – propagate the sport for our own seed according to Peto. Since I have a registration and it is no hybrid, we can do it ourselves. I believe Winston knows how to do this. They need to be treated with captan or thiram afterwards. I will await your reply."

> Could you please get the information required and send it to me. I will notify our good friend Steve.
>
> As stated in our telex, the tank is on its way via Sea-land. If we can get the real hot red pepper (native stuff), into our hammer mill which I hope we have soon, we can get the product and cash flow-flowing. The native pepper mash is a Capsica deal, and for your information, I am able to get 27 lbs. For it FOB New Orleans. For your record, I have given you a typical data (profit) sheet for you to see. The profit is appealing.
>
> If you have any question on this, please let me know." (Emphasis added)

The respondent consistently made enquiries of the appellant who correspondingly provided information on the progress of the plantings and pepper seeds required, in furtherance of their agreement. Telex dated May 16 1986, from Marchese to Bill Taylor, reads, inter alia:

> "I have also included more seeds but plant only about 4 lbs. of sport, starting August, spaced about 2 weeks apart. For some reason the Serrano market is hot and the sport has cooled off. Fortunately, according to Winston, we have about 20 acres of Serrano. The cayenne seed for our future requirements, and have included 1 lb. of very expensive pepperoncini for trial."

The appellant received the items. By telex dated May 29, 1986, the respondent advised the appellant:

> "ON THE CAYENNE, IT APPEARS WE NOW NEED A TOTAL OF 1,500,000 LBS. PER YEAR WITH CONTRACTS WE HAVE IN HOUSE. I BELIEVE YOU HAVE 25 ACRES PLANTED. FOR YOUSL.
>
> YO, WE WILL NEED A PRODUCTION OF 125-130,000 LBS PER MONTH, ONE-HALF OF WHICH IS DURKEE.

By telex dated June 18, 1986, the appellant responded indicating the amount of hot pepper seeds in stock, "namely" 27 lbs Durkee ... sport ... Serrano ...," the number of plants in the nursery"... to be planted in next 2 weeks ..., and the acreage.

The respondent, by telex dated June 19, 1986, commented to the appellant:

> "From your telex it appears we have no product ready for harvesting and processing, which really puts us way behind our commitments. For a moment, I thought I had the timing between Haiti and Jamaica just perfect.
>
> According to your information, we ..... have only cayenne and only .....in 60-75 days. It also puts .....badly need Serrano 75-70 days away.
>
> ..... Only shipping that may be possible now lies with the extra hot native pepper and some sweet pepper if you can find any.
>
> .... your thoughts on above.
>
> Meanwhile your friend at Durkee has imperatively requested that we get the iodine out of the salt and advise him of what fertilizers, pesticides and herbicides we use in the growing and treating of the cayenne BM.
>
> Can you telex this back to me A.S.A.P.?
>
> Here is what I have in seed to ship to you:
>
> 4 lbs sport for 16 acres approx 192M
> 15 lbs Serrano for 60 acres approx 720M
> 10 lbs. Jalepen for 40 acres approx 480M
> 50 lbs sweet cherry for 20 acres approx 240M
>
> You now have:

> 25 lbs. Cayenne for 116 acres approximately 1.4MM
> 4 lbs. Sport for 16 acres approximately 192M
> 3 lbs Serrano for 12 acres approximately 144M."

and on June 24, 1986 by telex the respondent told the appellant that the Durkee representative "... was bugging me about every other day" for a certificate of analysis that the water used for washing the peppers was potable and a list of the fertilizers, herbicides and fungicides used in growing the peppers. The appellant responded on June 26 1986 stating the amount and brand of pepper seeds required, the fact that the salt used in the processing was iodine free, and the fertilizers, pesticides, and herbicides used, per acre. On July 14, 1986, the appellant requested information on the "... contents of trailer shipped from Haiti ... now on the docks in Kingston." This information was supplied by the respondent on July 24, 1986, detailing the machinery transferred from Haiti.

Consequent with its ongoing enquiries in respect of the plantings of pepper seeds and the expected harvesting of peppers, the respondent, by telex dated August 4, 1986, wrote:

> "Durkees requires a report on:
>
> How many acres presently planted (Durkee cayenne), how many in nursery, expected harvest time.
>
> Await reply on Durkee and general update on crops, machinery clearance etc."

The appellant by telex dated August 18, 1986, replied:

> "Grains Jamaica Limited – Holland Farms Pepper Production

Planted to date:

Cayenne	24 acres (approx.)
Assorted	4 acres

Nursery:

Cayenne	24 acres (approx.)
Jalapeno	12 acres
Serrano	18 acres
Sport	12 acres

In Stock (8.14.86)

Cayenne (approx)	45 acres or 15 lbs.
Jalapeno	12 acres or 4 lbs.
Serrano	42 acres .....

Egg plant:

Pepper production:

Planted in nursery: ....

Cayenne	3 lbs	.... acres
Jalapeno	4 lbs.	42 acres
Serrano	3 lbs.	
Sport	.....	12 acres

Regards
Bill Taylor."

The response by telex dated August 18, 1986 to the appellant reads:

"Can not determine from telex when we can expect first harvests – also portion on Serrano was received garbled.

Serrano is highest pepper in demand at present time, have orders for 200 drums (2 trailers) right now, plus our own usage for giardiniera.

> On a quick glance, plantings to date appear very disappointing and will definitely have a detrimental effect on our future sales.
>
> Can you also advise status on any of the other items sent you – such as grape leaves sweet pepper, etc."

The respondent requested an "updated crop report" on September 11, 1986 and by telex dated September 16, 1986 stated:

> "Durkee's is placing contract for only 500,000 lbs. to be delivered between January and June 1987. This interprets to 400,000 lbs. pepper, since we will use 100,000 salt.
>
> I also owe them 345,000 lbs. from last contract which must be shipped before the end of the year. This equates to 276,000 lbs. of cayenne.
>
> Can we accomplish this in 3 months time?
>
> On the Jamaican country pepper, we have a contract for 4 loads, that is, 128,000 lbs. of pepper balance salt.
>
> On regular cayenne (other than Durkee) we have contracts for 300,000 lbs. starting immediately and through this represents 240,000 lbs. of cayenne.
>
> In summary we need:
>
> 276,000 Durkee cayenne – now – December 31
> 400,000 Durkee cayenne – January - June
> 300,000 cayenne – January – June
> 40,000 native country pepper – as we get it (A.S.A.P)."

and on September 23, 1986:

> "Contract received from Durkee for 500 M mash (400 M pepper) from January 1, 1987 to June 30, 1987 is contingent upon:

1. A certification of potable water (requested on May 16)

2. Sample of non-iodized salt we will be using.

PH factor will be important as well. Needs to be 4 plus or .4. details to follow by mail.

Lastly, will we require more Durkee special seed to fulfil contract of 500 M as well as the 250 M I still own them from now to December 31, if so, advise immed.

Need your immediate reply on above. Thks."

The respondent received from Durkee Famous Foods SCM Corporation, purchase order contract no. 5725-9891 dated October 8, 1986, for 500,000 lbs. of cayenne pepper mash "... for deliveries from January 1, 1987 through June 30, 1987" with certain requisite specifications.

The respondent, on October 13, 1986, again requested "certification of water being potable and sample of non-iodized salt by October 15, 1986 or they will cancel the contract" and acknowledged that the appellant said it did not "need any Durkee seed." The appellant provided the said report and samples of salt which the respondent sent to Steve Hudson (Durkee) on October 23, 1986.

In response to the query of respondent on January 5, 1987, namely:

"Can I also request a crop report on cayenne and when you expect to make first shipment of product", the appellant replied by telex dated January 7, 1997:

"Dear Jerry:

We have planted in the fields 30 acres of cayenne and 8 acres of serrano.

> We have in the nursery 37 acres of cayenne, 12 acres halepeno, 6 acres sport, 9 acres of Serrano and 5 acres of perminto."

The projected date of the first harvest of the peppers being grown by the appellant, was of significance to the parties and to the respondent in particular.

By telex dated January 20, 1987, the respondent wrote to the appellant:

> "The following is an important letter recvd. from Durkee on Jan. 15.
>
> You must use 3/4" holes in the screen to be in specification. Too slow speed RPM on your hammer mill may be the cause of the problem. I'm sending you a copy of our own equipment specifications as well as another copy of our product specifications. If you have further questions, no not hesitate to call me or Tom Dobbs. This matter must be resolved before you start processing.
>
> When we spoke, you mentioned that the harvest would be in three or four weeks. Tom Dobbs will be making plans to be down during the processing. I will be calling you for an update as to when the harvesting will take place. Please keep us in mind when communicating to Jamaica.
>
> May I have your comments on this, Bill? Also, I suggest we send a sample as soon as we have the first cayenne so I can get an approval before we ship."

By telex dated January 28, 1987, the respondent, inter alia, queried:

> "When will we be ready for cayenne? Durkee awaits there (sic) trip."

Again by telex dated February 3, 1987, the respondent stated to the appellant:

> "Lastly, I will need answers to the questions raised in telex of:

1.28.87 Re taste and samples
1.20.87 Re cayenne and visit from Durkee."

The appellant by telex dated February 4, 1987, responding to the respondent's telex stated, inter alia:

> "... will process cayenne according to Durkee specifications."

Again further by telex dated February 10, 1987, the respondent asked of the appellant:

> "When can we start harvesting cayenne? Durkee want to come down."

On February 16, 1987, the respondent by telex commented:

> "The cayenne would seem that they are two weeks away from red. I will schedule a trip for about March 10 or 11, but I need to get a regular progress report for Durkee's scheduling."

and,

> "It appears I will have to get down there. Does the beginning of March look good for you and for the cayenne mash? Await your reply."

By undated letter to the appellant, the respondent advised:

> "On the cayenne and the visit by Durkee it might be a good idea to dry-run some of the red Serrano thru the hammer mill and mixing with salt so as to get a 20% mix. This will give us a shakedown cruise before the people from Durkee arrive. Also, please be sure that all their fields are marked "DURKEE CAYENNE". All the Serrano we mash can be mixed with the cayenne, but no one is to know. We are already two months behind (4-6 containers) behind on shipping just Durkee let alone the others.

> Durkee and I will plan on being in Mobay about the week of the 23rd but will depend on cayenne harvest and the equipment working O.K."

The appellant by telex dated March 5 1987, to the respondent, said:

> "Cayenne pepper looks good in the field. We have some 150 acres of peppers growing. Marvin could only harvest enough ... cayenne (100 pounds) to make hot sauce. I don't think there will be enough red to mash by the 10th."

By letter dated March 9, 1987, the respondent again stated:

> "Now, our trip depends on when we will have Serrano, Durkee called again today to ask when they can plan the trip. I will have to hear from you about this. I would hope it will be the end of the month. Please let me hear from you."

The continuing desire by the respondent to visit the appellant's farm in Jamaica was again expressed in a telex message dated March 10, 1987, to the appellant. It read:

> "Time of trip really depends on when we will have cayenne enough to run for Durkee ..."

The respondent commented by telex dated March 11, 1987, to the appellant, on the time of delivery of the pepper, namely:

> "Re Maxine's question as to when I am coming down It again is dependent upon when we have cayenne ready to go.
>
> Our order to Durkee is 500,000 lbs. to be delivered by 6.30.87. That represents 16 loads or 3 loads per month. We are now 6-8 loads behind schedule.
>
> Can we make this schedule? What is your honest opinion. I am already losing our other accounts on sport and cayenne."

The appellant by telex dated March 20, 1987, advised the respondent in respect of the hot pepper crop. It read, inter alia:

> "Pepper crop looks extremely good to me. The fruit set is heavy. Peppers in the first field are beginning to turn red. We think that there will be enough to mash in a week or ten days, so try to come the first week of April. The plant is set up ready to go."

and also advised on the "price on cukes" having stopped processing sweet pepper, but "now processing eggplant and serrano pepper".

The respondent's anxiety in respect of the hot pepper crop was reflected in its telex message dated March 20, 1987, to the appellant. It read, inter alia:

> "Durkee people getting very nervous about our being able to meet commitments in their 500,000 lb contract for cayenne, as a matter of fact, I am also.
>
> What stage are we at present?
>
> When do expect harvest?
>
> When can we plan on being there for inspection and mashing of cayenne?
>
> Pls reply Durkee people standing by ..."

Further by telex message dated March 24, 1987, the respondent asked the appellant, inter alia:

> "Can you pick exact date for Durkee and cayenne?
>
> We plan on April 1 departure. They would like to be there on March 30. All depends on red cayenne. Can you advise Durkee people? Awaiting reply".

On April 1, 1987, Jerry Marchese, on behalf of the respondent, and Tom Dobbs and Al Jantzen, representatives of Durkee all came to Jamaica and on April 2, 1987, visited and inspected the farm and processing plant at Holland, St Elizabeth along with Tony Hart and Bill Taylor on behalf of the appellants. They observed several acres of growing red cayenne pepper in the fields, with signs marked "Durkee". At the processing plant they observed the mash as also the processing equipment, namely, storage containers, washers, pumps, hammer mill and other items. Satisfied with what they saw the Durkee representatives told the respondent's representative Marchese in the presence of Taylor and Hart that they would increase the order for the pepper mash from 500,000 lbs to 1,500,000 lbs. in respect of one crop year. After lunch on the said April 2, 1987, the Durkee representatives were taken back to Montego Bay by Tony Hart, while Marchese remained in a hotel in Black River. He returned to Montego Bay on April 3, 1987. On April 4, 1987, in Montego Bay, at his office, Taylor told Marchese that he Taylor had been instructed by his board of directors:

> "... not to ship anymore product to Peppersource until full payment was received for everything shipped previous to that date."

Marchese offered to pay for all contracted peppers received in good condition, if the appellant would share all the other expenses related to the Capsica arrangement.

Prior to that date the respondent had received no demand for payment, had received no bill or invoices, nor had he received a full load of peppers. On

April 4, 1987, Taylor for the appellant handed to Marchese, prior to his departure from Jamaica, three invoices in respect of Serrano peppers supplied by the appellant to the respondent. On April 9, 1987, the respondent paid to the appellant the sum of US$2,981.68, on the said invoices, having discounted a sum for a quantity of the peppers which were of inferior quality.

Taylor on behalf of the appellant, communicating by telephone with Marchese, repeated the intention of the appellant to ship no more peppers to the respondent, demanded payment for peppers shipped and explained that the appellant intended to dump the crop of peppers already grown. On April 15, 1987, Marchese wrote to the appellant detailing the nature of their contractual relationship since 1985.

An affidavit of Al Janszen a former operations manager of Durkee Foods dated June 23, 1997, was admitted in evidence as exhibit 3. It read, inter alia:

> "I reside in Cincinnati, Ohio, in the U.S.A., that I was the former Operations Manager of Durkee Famous Foods –S.C.M. Corporation and that the contents of this affidavit are true to the best of my knowledge, information and belief.
>
> That during the 1980's Durkee Foods was a major manufacturer of several varieties of hot cayenne pepper sauce.
>
> That one of its suppliers was the Peppersource Limited whose principal was Mr. Jerry Marchese who sourced the said hot cayenne peppers from growers in the Dominican Republic, Haiti and Jamaica.
>
> That Durkee's initial contract with the Peppersource Limited from Jamaica required 500,000 pounds at U.S.0.26¢ per pound for the period January-June

1987, attached hereto is a true copy of the purchase order dated October 8, 1986, marked "A" for identity.

That on or about the 1st of April 1987, at the invitation of Mr. Marchese I visited and inspected approximately 100 acres of cayenne pepper at a farm in Holland, Saint Elizabeth, Jamaica, which crop conformed to Durkee's specifications and was to fill the above mentioned purchase order.

That on or about the 2nd of April, 1987, after inspection Mr. Dobbs (also of Durkee) and myself had discussions with Mr. Anthony Hart of Grains Jamaica. Mr. Hart asked if we did business directly with growers or did we work only through brokers. I indicated that we did both. He replied that that was good because he had just fired his broker, and Mr. Marchese no longer represented Grains Jamaica. He then asked if we would enter into a contract for 1,000,000 lbs. of pepper mash with Grains Jamaica. We agreed and Purchase Order 5725-11184 dated April 7, 1987, was issued and sent to Mr. Hart's attention. Purchase Order 5725-11184 is attached hereto as Exhibit B for identification purposes.

That between 1987-1988 Grains Jamaica supplied Durkee with several containers of cayenne pepper mash. A copy of Purchase Order 5725-12838 dated January 15, 1988, is attached hereto as Exhibit C for identification purposes. None was supplied by the Peppersource Limited.

That the Peppersource Limited has agreed in consideration of my making this affidavit to extend me the release given to Durkee from all claims by the Peppersource arising out of the dealing between Durkee and Grains."

Purchase order No: 5725-11184 dated April 7, 1987, was issued by Durkee Famous Foods for the supply of 1,000,000 lbs of Cayenne pepper mash

by Grains Jamaica Ltd. "(Att'n Mr. Tony Hart)", during the period "January 1, 1987, thru' June 30, 1987."

Purchase order No: 5725-12838 dated January 15, 1988, was issued by Durkee Foods for the supply of 2,500,000 lbs of Cayenne pepper mash by Grains Jamaica Ltd. "Att'n Tony Hart" during the period "January 1, 1988 'thru' July 31, 1988."

The contract between the respondent and Durkee Foods was evidenced by Purchase Order dated October 8, 1986, from Durkee Famous Foods to Peppersource for the supply of 500,000 lbs of Cayenne pepper mash, "Att'n Jerry Marchese" on certain terms and conditions during the period January 1, 1987, thru' June 30, 1987. The same terms and conditions were stipulated in the later purchase orders Nos: 5725 -11184 and 5725 -12838 to the appellant.

Consequently, the respondent filed suit against the appellant claiming damages and an injunction for breach of contract to plant, grow and reap and deliver Cayenne, Serrano and Sport peppers to the respondent. Clarke, J found for the respondent, hence the instant appeal.

The grounds of appeal were:

> "1 The learned trial judge erred in law and in fact in giving judgment for the plaintiff/respondent on the claim as those findings are not sustainable in law and are upon an evaluation of all the facts against the weight of all the evidence.
>
> 2. The learned trial judge erred in law and in fact in finding that two (2) separate contracts existed when the evidence clearly showed that only one contract existed.

3. The learned trial judge erred in law by failing to consider the contractual effect of items 1-7 of the letter from the defendant/appellant to the plaintiff/respondent dated the 6th February 1986 and in finding that the Letters of Intent formed part of the Contract.

4. The learned trial judge erred in law in determining that the defendant/appellant breached the contract between the parties as the evidence adduced at the trial clearly showed that it was the plaintiff/respondent who had repudiated the contract and was therefore in breach of the same in that the plaintiff/respondent had failed and\or refused to fulfil his contractual obligations set out in the letter of the 6th February 1986.

5. The learned trial judge erred in law and fact in failing to determine that the plaintiff/respondent had breached fundamental terms of the contract by failing and\or refusing to pay for all produce which were processed, delivered to the plant and exported to the plaintiff/respondent, and by failing to comply with all other obligations imposed on the plaintiff/respondent pursuant to the contract.

6. The learned trial judge erred in fact in finding that Jerry Marchese was a credible witness.

7. The learned trial judge erred in law in awarding Special Damages to the plaintiff when the claim was not specifically proved as no supporting documentation was tendered at the trial.

8. The learned trial judge erred in law in awarding General Damages to the plaintiff/respondent for prospective losses although the evidence adduced confirmed that the contract between the parties was for a premarital crop year only.

9. The learned trial judge erred in law and fact in finding that the defendant/appellant misappropriated

> information, equipment, knowledge and trade secrets from the plaintiff/respondent and in awarding damages relative thereto.
>
> 10. The learned trial judge erred in law in not addressing his mind to the plaintiff/respondent's failure to mitigate damages.
>
> "11. The learned trial judge erred in law and in fact in relying on the affidavit of Al Jansen and ought to have given little if any weight to the same."

Grounds 1, 2, and 3, were argued together. Miss Phillips, Q.C., for the appellant contended that the learned trial judge was in error to find that there were two contracts between the parties, namely: one to grow the four varieties of hot peppers and the other to deal in other products by way of a partnership between them. She maintained that there was one contract partly in writing and partly oral, that the letter of intent of October 15, 1985, was superseded by the letter dated February 6, 1986, which was substantially different from the former and that the previous arrangement envisioned the involvement of John Fletcher, which arrangement was changed to the appellant being responsible for the building of the processing plant at Holland. The parties, based on the contract of October 15, 1985, had agreed to grow, process and sell other products.

Clarke, J in respect of the agreements between the parties, said, at page 128 of the record:

> "I find that there was an initial arrangement which concerned only the "contract peppers", namely, Serrano, red cayenne janapeno and sport. The quantities to be grown, the price for growing, processing and packing were agreed and fixed as at the point of delivery. These peppers were to be

> grown and processed by the defendant and only by the defendant. Letter of Intent dated October 11, 1985, commenced the correspondence between the parties and deals exclusively with four varieties of hot pepper including red cayenne."

and at page 129:

> "The letter of intent is complemented by the defendant's letter of February 6, 1986."

and further at page 130:

> "I find that that letter builds on, but does not replace, the letter of intent. The basic prices for the four varieties of hot peppers was fixed and the parties agreed therein that 150 acres of the said hot peppers were to be grown for the first crop year and then expanded up to 350 acres. The letter of February 6, 1986, sets out contractual terms, but in my judgment it was never agreed that the plaintiff would pay for the processing of produce other than the "contract peppers," i.e. the said four varieties of hot peppers. The February 6 letter does not suggest otherwise and, indeed, Bill Taylor made no response when asked in cross-examination whether he could find in the documentary evidence anything showing that the plaintiff would pay for processing of any product other than the "contract peppers." The fact is that it was these peppers that the plaintiff was obliged to take at pre-determined prices when produced and processed."

A "letter of intent" by its very wording may convey the element of future conduct negativing contractual relationship. However, in some circumstances, it may be construed as devoid of such uncertainty and operate as a contract binding on the parties. In an examination of letters of intent the author in ***Chitty on Contract*** 27th edition, paragraph 2-089 at page 141, said:

> "Where the language of such a document does not in terms negative contractual intention, it is open to the courts to hold the parties bound by the document; and they will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it. The fact that the parties envisage that the letter is to be superseded by a later, more formal contractual document does not, of itself, prevent it from taking effect as a contract."

The effect of the letter of intent was considered in ***British Steel Corporation v Cleveland Bridge and Engineering Co. Ltd.*** [1984] 1 All E.R. 504. The defendants, in the process of constructing a building, after discussions with the plaintiffs, iron and steel manufacturers, sent to the plaintiffs a letter of intent, expressing, the intention to enter into a contract with the plaintiffs, made proposals in respect of the type of contract and requested that the plaintiffs commence manufacturing "cast-steel nodes" for the construction project. Prices and times of delivery were never agreed and the specifications discussed were later extensively changed by the defendants. The plaintiffs manufactured and delivered all the steel nodes except one because of an industrial dispute at the plaintiff's plant. Several contractual terms were never agreed. The defendants sent to the plaintiffs a written claim for damages for late delivery or delivery of the nodes out of sequence, and refused to make any payment. The plaintiffs sued for the value of the nodes on a quantum meruit basis. Goff, J. held that the plaintiffs were entitled to succeed on its claim. The headnote to the case inter alia, at page 504, reads:

> "A contract could come into existence following a letter of intent, either by the letter forming the basis of an ordinary executory contract under which each party assumed reciprocal obligations to the other, or under a unilateral contract (i.e. an 'if' contract) whereby the letter amounted to a standing offer which would result in a binding contract if acted on by the offeree before it lapsed or was validly withdrawn. ... the letter of intent had requested the plaintiffs to commence work, which they had done in order to expedite performance under the anticipated contract. Since the parties had ultimately been unable to reach final agreement on the price or other essential terms, the contract was eventually not entered into and therefore the work performed in anticipation of it was not referable to any contractual terms as to payment or performance. In those circumstances, the defendants were obliged to pay a reasonable sum for the work done pursuant to their request."

The Court held, on the facts, that no contract had been created, because the parties were still in negotiations and the material terms were uncertain.

In the instant case, the letter of intent was signed on October 11, 1985, by Bill Taylor on behalf of the appellants and by Jerry Marchese on October 15, 1985, on behalf of the respondents (then known as Caribe Crown) for the growing only of 150 acres of pepper by the appellants for the respondents. This was to be the "first crop". The appellants would be paid US10¢ per pound "from the farm gate" and US.02¢ per pound, for transportation from Holland farm, "for delivering the peppers to the processing plant in Yallahs." The processing of the peppers, after being grown by the appellants, would be effected by one John Fletcher in Yallahs, St Thomas. The letter dated October 15, 1985 in which was enclosed the "letter of intent" anticipated an "immediate" planting of the pepper

seeds by the appellants. John Fletcher having terminated his arrangements with the appellants, that which was only a contract between the appellant and the respondents for the growth of peppers by the appellants, was expanded by the letter dated February 6, 1986 into a contract for the growth, delivery and processing of peppers by the appellant for the respondent. The letter of February 6, 1986 written by the appellant's Bill Taylor to the respondent's Jerry Marchese, acknowledged in paragraph 3, the reference in the letter of intent to the "first crop". It reads:

> "We agreed that for this first crop, we would have a pre-marital arrangement."

The said letter of February 6, 1986 continuing, reiterated the farm gate price for peppers as previously stated in the letter of intent. Paragraph 4 reads:

> "It was further agreed that the Peppersource would pay Grains Jamaica US.10¢ per pound for the peppers as they are delivered to the plant."

The payment, contained in the letter of intent as payment of "... an additional United States two cents (US2¢) per pound for delivering the pepper to the processing plant in Yallahs" was omitted from the letter of August 6, 1986, because the peppers were now to be grown and processed at Holland, obviating the payment of transportation costs by the respondent.

Clauses 1 to 6 of the letter of February 6, 1986 accordingly, incorporating the existence of the letter of intent, are concerned with the processing of the peppers contracted to be grown by the appellant. Clause 7 of the said letter, which reads:

> "If after the pre-marital crop year, Grains Jamaica and the Peppersource find each other compatible, then they will form a company together for processing peppers and other products. This new company will then share the cost of processing as well as the profits in marketing."

provides for a probable contractual relationship between the parties involving "... the processing of peppers and other products (emphasis added)," but not within the "pre-marital crop year," and only if the parties "find each other compatible," and through the medium of a company to be formed for that purpose.

Clarke, J. was correct to find that the letter of intent and the letter of February 6, 1986 together constitute one contract between the parties, in respect of the growth, delivery and processing of the four varieties of contracted hot peppers.

A letter dated February 4, 1986 from J.O. Fletcher to "Mr. Bill Taylor Grains Jamaica Limited" and copied to Mr. Jerry Marchese, inter alia, reads:

> "I brought back a carton of pepper seeds from Gerry which I left at NIBJ on Monday 27th January. I hope you received them."

This is evidence that the parties had acted on the letter of intent document in respect of the growth of the four varieties of hot peppers and thereby may be seen as regarding themselves as bound by it, even prior to the letter dated February 6, 1986.

The documentary evidence in the case, inclusive of letters and telexes over the period October 1985 to April 1987, reveal an ongoing communication between the parties, in relation to the provision of hot pepper seeds, the

progress of their growth, the specification and constituents of the production of pepper marsh, the projection of the time of harvesting of the contract peppers, the anxiety of the customer Durkee and the visit and viewing of the growing pepper fields prior to the harvesting. This is evidence of conduct of the parties referable to the performance of the contract to grow and process the four varieties of hot peppers, as contained in the letter of October 15, 1985, and February 6, 1986.

In addition, Clarke, J in respect of a further contractual relationship of the parties, at page 130 of the record, said:

> "I find that the other arrangement, (designated as a Capsica deal" by Gerald Marchese in the voluminous correspondence between parties) referred not to specified products but to any items that could be produced or processed in suitable quantities, quality and at a feasible price and for which a market could be found by the plaintiff. This, I find, was a separate arrangement whereby the defendant was to procure and/or process such products. The plaintiff was not required to pay a price on delivery of same, but only to advance the shipping and distribution expenses. And I also find that any profits or losses in relation to such products were to be shared equally."

The learned trial judge was here correctly interpreting the meaning and effect of clause 7 of the letter dated August 6, 1986.

Despite the fact of postponement of the operation of the contract, until after the "pre-marital crop year", the condition in respect of compatibility and the formation of a company, the parties seemed to have been in contractual relationship with each other in respect of "other products" from the inception.

The correspondence from October 1985 to April 1987, reveals this. For example, by telex dated February 26, 1986, from the respondent to the appellant, the" results of Bloody Harry ingredients" were stated, advising that:

> "... Carmel colour is used to get colour from bright red to dull tomato look ... I can get glass cheaply from Honduras ... We cannot use plastic ... I have several brands of mix purchased here ... I would hope we could go with the most popular unit ... we must set on target at that 7.50 dollar mark if we are to get the volume."

Subsequently, the parties were involved in transactions in relation to:

(i) "native local -very hot-pepper" for Acadiana, with a specific notation: "This is a Capsica deal," (telex dated April 24, 1986, - respondent to applicant),

(ii) "several tanks of sweet pepper ... This is a Capsica deal" (telex dated May 7, 1986, respondent to appellant),

(iii) "eggplant and grape leaves" (telex dated May 21, 1986 – appellant to respondent); and

(iv) telex dated May 26, 1986, appellant to respondent, namely:

"Jerry,

What kind of market could you find for hearts of palm packed in brine.

I have access to 50,000 hearts of palm trees."

In addition, there were transactions between the parties, in respect of cucumbers, hot guano and heliconias.

None of these "other products" were the subject of the contract contained in the letter of intent dated October 15, 1985 and the letter of February 6, 1986. Curiously, by letter dated February 6, 1986, from the appellant to JNIP Ltd., the appellant, applying for tax free and duty free incentives, advised that the appellant:

> "... is now in the process of planting 150 acres of hot peppers to be made into hot pepper mash and whole green peppers in brine." (emphasis added)

Neither was the process of "green peppers in brine" embraced by the said contract of October 1985 and 6th February, 1986. Clarke, J was correct in finding that these "products" other than the contract for the four variety of hot peppers, was a separate arrangement.

The parties in that arrangement would "share the cost of processing as well as the profits." This was an arrangement in the nature of a joint venture where losses would be borne equally and profits would be shared equally. The respondent sought to differentiate that arrangement as a "Capsica deal". There was no record of any challenge by the appellant of that designation. The arguments in support of grounds 1, 2, and 3 therefore fail.

In respect of grounds 4 and 5 learned Queen's Counsel argued that the learned trial judge erred in finding that the appellant breached the contract by refusing to honour its obligations. It was the respondent which repudiated the contract by committing various breaches of its obligations under its oral agreement and the contract of February 6, 1986, in that it failed to provide all

the equipment for processing the peppers or pay for its installation, sent useless items of equipment, minus the vital piece of equipment, the hammer mill, from Haiti, failed to cause the manager from Haiti to remain in Jamaica supervising the processing continuously, rather than for two days and failed to provide the banker's guarantee or similar instrument to ensure payment to the appellant as soon as the product was delivered, as required by clause 6 of the said contract.

In addition, it was argued that the respondent repudiated the contract, in that it failed to ensure the proper composition and quality of the mixture in the processing failed to send initially proper instructions in respect of the labeling of the products, thereby causing delay in Customs clearance, failed to obviate spoilage of the products and the wrong colour in the egg plants. All these omissions were in breach of the obligations of the respondent as set out in paragraph 3 of the said contract. The respondent did not pay for peppers on delivery nor for products when they were received. The respondent breached fundamental terms of the contract thereby causing the appellant properly to treat it as having been repudiated. Consequently, the appellant did indicate to the respondent on April 4, 1987, that it would no longer pursue the contractual relationship confirmed this in writing on April 19, 1987, and entered into a contract with Durkee Foods on April 7, 1987.

Where a party to a contract commits a breach which by his words or conduct so unmistakably demonstrates that he has no intention to fulfil his

obligations thereunder the other party not at fault may treat the contract as repudiated and at an end.

The operation of this principle occurred in the case of ***Mersey Steel & Iron Co. Ltd v Naylor Benson & Co.*** [1881-5] All E.R. Rep. 365 where the respondents ordered a quality of steel from the appellant company, delivery to be in installments and payment for which was to be made within three days after receipt of the shipping documents. After delivery of a portion of the first installment and before payment, a petition was presented to wind up the appellant company and the respondents wrote that they were advised (erroneously) that they could not safely pay while the petition was pending. The appellant treated the refusal to pay as a repudiation, refused to make any further deliveries and sued for the price of the steel already delivered. It was held, in the House of Lords that the respondents' conduct did not amount to a repudiation of the contract. The Earl of Selborne, Lord Chancellor, at page 367, said:

> "I am content to take the rule as stated by Lord Coleridge, C.J., in ***Freeth v Burr*** (29 L.T. 773) which is in substance that you must look at the actual circumstances of the case in order to see whether one party to a contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part. Nothing more is necessary in the present case than to look at the conduct of the

> parties, and see whether anything of that kind has taken place here."

and referring to the respondents, at page 369, said:

> "I cannot ascribe to their conduct, under these circumstances, the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse. The purchashers were desirous of fulfiling the contract; they were advised that there was a difficulty in the way, and they expressed anxiety that that difficulty should be as soon as possible removed, by means which were suggested to them, and which they pointed out to the solicitors of the company.
>
> The appellant company evidently took up the attitude of treating the default as one which released them from all further obligations."

It is imperative that one looks at the conduct of the party complained against and the whole circumstances of the case to see whether or not such conduct amounts to an absolute refusal to perform the contract, so as to amount to a repudiation of his obligations, such that the innocent party may accept it as absolving him from performing his part: ***(Mersey Steel)*** (supra).

In ***Woodar Investment Development Ltd v Wimpey Construction (U.K.) Ltd*** [1980] 1 All E.R. 571, ***Wimpey*** the purchasers of a portion of land slated for the grant of planning permission sought to rescind a contract of sale by relying on a provision of the contract that it was entitled to rescind the contract, if before completion the Minister responsible sought to acquire the said land, compulsorily. Both parties were aware that such an application for compulsory acquisition was in existence prior to the signing of the said contract.

Land prices had fallen, the purchasers wished to withdraw from the contract and consequently sent a notice of rescission to the vendors relying on the action of the Minister stating "... the contract is now discharged." The vendors refused to accept the rescission and brought an action seeking a declaration that the purchasers were not entitled to rescind and a second action claiming that the notice of rescission and the defence and counterclaim to the first action amounted to a repudiation of the contract which they accepted entitling them to damages. The trial judge held that the purchasers were not entitled to rescind the contract because they were relying on the Minister's compulsory purchase order which did not arise after the signing of the contract to entitle them to rescind, but by wrongly seeking to rescind they had repudiated the contract. Their Lordships in the House of Lords by a majority, held that the purchasers' conduct did not amount to a repudiatory breach. The headnote, at page 571, reads:

> "Unjustified rescission of a contract did not always amount to repudiation, and, although a party who had withdrawn from a contract might have had every motive for so doing, it was necessary, when deciding whether he had in fact repudiated it, to consider the circumstances and the party's conduct as a whole. On that basis, because the purchasers in attempting to rescind were in fact relying (albeit erroneously) on the contract itself rather than refusing to be bound by it and because there was no evidence that they intended to abandon it or refuse future performance if the court decided against them, their erroneous and unsuccessful attempt at rescission did not amount to a repudiation."

Dr Barnett for the respondent argued that no monies were payable by the respondent for the "non-contracted products" because that venture was operating at a loss and in any event no invoices were submitted. In particular, the appellant over-shipped the supply of green peppers and it was the appellant, knowing of the contract which the respondent had with Durkee Foods who entered into a contract directly with Durkee Foods, thereby repudiating its contract with the respondent. The respondent's action in paying for the small quantity of peppers received as evidenced by three invoices was thereby affirming the contract which if breached, was a minor one not amounting to a repudiation.

In the instant case, the obligations of the respondent under the contract of October 15, 1985, and February 6, 1986, was to pay the appellant:

(1) US10¢ per pound for the peppers as they are delivered to the plant (emphasis added);

(2) for all the equipment and expense for installing the plant equipment;

(3) for the processing fee and all the ingredients purchased for the processing in US Dollars before the final product is shipped;

(4) for US.03¢ per pound for the labour and utilities used in processing, plus US25¢ per 5 gallon bucket for filling the buckets.

Only the appellant, and not respondent would have been aware of the quantity of peppers "delivered to the plant" or the amount of pepper actually processed. In addition, the final cost of all the other monetary obligations in Jamaica would be peculiarly within the knowledge of the appellant. There is no evidence that the respondent was advised by the appellant or received any invoices from the appellant, at any time prior to April 4, 1987, detailing the sums of money due to the appellant under the said contract.

With regard to these obligations therefore there was no refusal to pay nor any breach committed, nor was any repudiatory act performed by the appellant to give rise to any complaint that the appellant demonstrated by words or conduct that it did not intend to honour its obligations when they fell due in the future: (***Heyman v Darwins*** Ltd [1942] A.C. 356). Significantly, when the appellant did present the three invoices to the respondent on the fateful April 4, 1987, in respect of "less than one load of peppers" received by the respondent on February 23, 1987, the respondent made a prompt payment in full on April 9, 1987. The payment of US$2,981.68 by the respondent, representing a sum inclusive of a diminution for spoilage, was in accordance with the contract. The final paragraph of the letter of intent dated October 15, 1985, which reads:

> "The payment of US10¢ per pound will be for all grades of peppers, excluding rotted or insect damaged (emphasis added)."

although referable specifically to the peppers deliverable at the "farm gate", shows that the parties contemplated diminution in payment due to possible poor quality product.

In respect of the equipment and the expense for installing the plant equipment, the obligation was that of the respondent, under the contract, as contained in the appellant's letter dated February 6, 1986. Paradoxically, the said letter read, in the second paragraph.

> "We can supply all of the equipment that is needed for bringing and making mash here, with the exception of the hammer mill".

and in the third paragraph:

> "The Peppersource would provide all the necessary equipment and Grains Jamaica Limited would provide the labour and utilities."

The respondent did deliver to the appellant the equipment it sent from Haiti, although the hammer mill was built by a man in Jamaica, based on specifications supplied by the respondent. In the cross-examination of Marchese on behalf of the respondent, when asked if he paid for "all the equipment and the plant," he replied:

> "Some of the equipment were our own and as to the equipment supplied by Grains Peppersource was never made aware of the cost of that equipment and therefore could not have agreed to it without knowing the cost and Grains never requested payment of same. No, Peppersource never asked for those details. No, we were never asked to pay and therefore never offered."

and when asked if he paid for "the expense of installing the plant/equipment," he replied:

> "We were never asked and therefore could never pay. No Peppersource never agreed to bringing a man down from Haiti to open the processing plant."

There was no evidence led in contradiction of these bits of evidence by the respondent.

The only other obligations of the respondent in respect of the contract for the four variety of peppers in the pre-marital crop year were those contained in clauses numbered 2 and 6 of the appellant's letter dated February 6, 1986. They read, along with the appellant's introductory words:

> "We would like the following arrangement for the pre-marital crop year ...
>
> 2 Peppersource will bring your man in Haiti down to operate the processing plant ...
>
> 6. The Peppersource will place in effect a banker's guarantee or escrow account or some suitable instrument that will guarantee the payments to Grains Jamaica Limited." (Emphasis added)

Gilbert Dennis was the respondent's manager and supervisor of its facility in Haiti, Marchese said in examination-in-chief, at page 79 of the record:

> "I arranged for his attendance in Jamaica for him to observe and assist the new operation in Jamaica."

and at page 90:

> "Mr. Dennis managed and oversaw. The processing was physically accomplished by another entity or company. It was Dennis' responsibility to see that it was done properly. His responsibility in terms of

> shipment was only to prepare the papers for customs. No, he did not have the responsibility of determining what produce went to the processing plant."

The respondent had advised the appellant by telex dated March 17, 1986, that Dennis would come to Jamaica from April 10 to April 15, 1986. The appellant by telex dated March 20, 1986 confirmed to the respondent that the former had made reservation at the Seawind Hotel for Gilbert Dennis for the period "April 10 'thru' 15". Although the appellant, relying on clause 2 of the letter dated February 6, 1986, complains in the evidence of Bill Taylor, that:

> "the arrangement was that a man from Haiti would come down to operate processing plant ... would be responsible for the quality of the product. But he never managed the plant; ..."

he did admit in cross-examination:

> "I do recall Mr. Marchese telling us that the man was not coming to stay."

The appellant, throughout the pre-marital year made no complaint in respect of the operation of the plant without supervision nor of the processing of the contract peppers. It is of telling significance that by telex dated March 20, 1987, from the appellant (Taylor) to the respondent (Marchese), the respondent was advised:

> "Pepper crop looks extremely good to me. The fruit set is heavy. Peppers in the first field are beginning to turn red. We think that there will be enough to mash in a week or ten days, so try to come the first week of April. The plant is set up ready to go."

Even, on a strict construction of the appellant's words in the contract of February 6, 1986:

> "We would like the following arrangement for the – pre-marital crop year ...
>
> 2. Peppersource will bring your man in Haiti down to operate the processing plant."

and assuming that the respondent had agreed, the presence of Dennis in Jamaica for a few days only created no material breach on the respondent's part.

Similarly, assuming that the respondent had agreed to clause 6 of the said letter, the absence of:

> " a banker's guarantee or escrow account or some suitable instrument ... (to) guarantee the payments to Grains Jamaica Ltd."

did not create a material breach. At no time prior to April 4, 1987 did the appellant present a bill of its cost of products for payment, nor suffer a rejection of such bill, nor complain of non-settlement of its claim for payment. On the contrary, the said three invoices were paid relatively promptly on presentation on April 4, 1987.

The complaints by the appellant of breaches by the respondent in respect of the baby egg plants, the sweet peppers, the Giardiniera sauce and the light coloured pails in which the sweet peppers were packed and shipped, are not referable to the contract in respect of the four contract peppers, but rather to the agreement in clause 7 concerning "other products". Consequently, because those breaches if any, are irrelevant to the contract concerning the four peppers,

they cannot be relied on by the appellant as repudiatory conduct on the part of the respondent. Grounds 4 and 5, therefore, also fail.

In support of ground 6, Miss Phillips submitted that Marchese for the respondent, in evidence, erroneously intimated that all the processing equipment had been sent by the respondent, that he gave conflicting accounts in respect of the hammer mill shipped to Jamaica and that he contradicted himself in respect of his request that the appellant purchase and ship sweet peppers to him. In contradiction of his evidence-in-chief, the documentary evidence is that the wrong seeds for the baby egg plants were chosen by him, and that contrary to his assertion in evidence-in-chief, he did avoid paying and refused to pay for products received by him. He wrongly stated that he was not advised in August, 1987, that there was a market for sweet peppers. The documentary evidence contradicts his assertion that he made no sales of the Capsica products. Although he gave evidence of the possible yield of 8,000 lbs per acre of pepper, he admitted in cross examination that he had no formal training in agriculture, nor any experience in growing peppers in Jamaica.

The credibility of a witness is a question of fact for the trial judge. He may accept a part of what a witness says and reject a part. He may accept the whole of what a witness says or reject the whole. Discrepancies are inevitable in the testimony of a witness, in particular in circumstances where, as in the instant case, the witness was giving evidence in 1998 of events which occurred as far back as 1985. If the discrepancies are in respect of a major matter which

goes to the root of the issue, then the trial judge will have to examine whether or not there is any evidence from the witness explaining the reason for the discrepancy. If no explanation is given by the witness or the explanation given is one which the trial judge rejects, then he will have to decide whether he will accept the evidence of the witness on that point or at all. It is the sole province of the trial judge. The Writ and Statement of Claim in the instant case concerned the contract "to plant, grow, reap" and process the various varieties of peppers. Discrepancies involving issues concerning that contract could be classified as major discrepancies. Consequently, his evidence that he sent two hammer mills to Jamaica is supported by the suggestion, in cross-examination, to him by counsel for the appellant, on page 99 of the record:

> "I suggest that the hammer mills sent from Haiti were unworkable."

Marchese said that "the hammer mill was modified in Jamaica by one Albert Francis ... a machine maker ..." This fact is supported by telex dated April 16, 1986 from the appellant to the respondent. It reads:

> "Jerry,
>
> Please call Albert Francis (809) 962-2383. He is the man that will make our hammer mill. There is no specification on the drawing you left me. You need to give him instructions on how to build the hammer mill.
>
> Regards
> Bill Taylor."

In addition, although it seems less than accurate to say that all the processing machinery was sent by the respondent, the documentary evidence of a list supports the fact that the major items were sent to the appellant.

Clarke, J cannot be faulted, having seen and heard the witness, to have found Marchese to have been a credible witness in the circumstances. There is no merit in this ground.

In support of ground 7, learned Queen's Counsel argued that no award for special damages should have been awarded because there was no credible evidence of the net profits of 31% and 36% and the expenses of 2% in respect of the two contracts, particularly where, as Marchese stated, he had never done business in Jamaica and therefore had no historical information or experience in the trade in that regard. Such damages must be strictly proven and there was no documentary evidence in support of the claim. The learned trial judge therefore erred in allowing the claim.

The principle governing the award of damages in contract being, to restore the plaintiff to the position he would have been in, if the contract had been performed – restituto in integrum, obliges a court to require strict proof of such plaintiff's losses. In the often quoted Jamaican case of ***Lawford Murphy v Luther Mills*** (1976) 14 JLR 119, relying on the dictum of Lord Goddard in ***Bonham-Carter v Hyde Park Hotel Ltd*** (1948) 64 T.L.R. 177, the Court of Appeal maintaining that damages must be strictly proved, re-iterated that it was undesirable to:

> "... write down particulars, and, so to speak throw them at the head of the Court, ...", (per Lord Goddard at page 178).

Rowe, P., in ***Harris v Walker*** SCCA No. 40/90 delivered December 10, 1990, restated the requirements of strict proof in a claim for damages. However, in ***Central Soya of Jamaica Ltd v Freeman*** (1985) 22 JLR 152, while not resiling from the requirement for strict proof of special damages, with reference to casual work claims, at page 158, he said:

> "... it is always difficult for the legal advisers to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages the court has to use its own experience in these matters to arrive at what is proved on the evidence."

In the instant case the claim for loss of profits was based primarily on the existing orders from known longstanding customers of the respondents, *Durkee Foods and Acadiana Pepper Co.* The respondent's agent Marchese was not without experience "...in the marketing of food products ... since 1968." He acknowledged that the said companies were his customers and said:

> "We also had major users for the Sport, Serrano and Jalapeno varieties – they were used mostly by an ethnic group in Chicago. In order to supply the orders of these customers we established operations originally in Haiti. There we leased land and contracted with growers to grow the products and paid upon harvest of all good pepper free of insect and disease. There we would process the peppers in our processing plant in Haiti. About 350 to 450 acres were under cultivation in Haiti. From the Cayenne variety we got mash from processing. The "mash" was 80 percent pepper and 20 percent salt. And that mash was then turned into hot sauce. We shipped

> from Haiti one million pounds of mash between 1985 and 1986."

Although there was a major challenge in cross-examination, in respect of the technical knowledge of Marchese in the processing of peppers, his marketing ability seemed to have remained intact.

The claim for special damages was based primarily on two existing orders for pepper mash from *Durkee Foods and Acadiana Pepper Co.* The quantity of each order was known to the respondent. Each company required 500,000 pounds of pepper mash at a cost of US$0.27 cents and US$0.28 cents per pound, respectively. There was documentary proof of such orders. The appellant was made aware of these business transactions. The respondent advised the appellant that its Haitian operation had become unreliable and it needed another source which would grow and supply pepper mash to it, in order that the respondent could supply its customers. Marchese said in examination-in-chief:

> "I described to him (Bill Taylor of the appellant company) the nature of the Haitian operation. They visited the operation. Following on the visit we agreed that Grains would be able to grow the products ..."

There was therefore unchallenged evidence that the respondent was previously involved in the marketing of cayenne pepper mash, in that its processing plant in Haiti produced pepper mash from "about 350 to 450 acres under cultivation." The respondent and its agents had years of exposure in the trade and its management, as well as a working knowledge of its costs and charges and

percentage profit margins. There was therefore ample evidence from which the learned trial judge could find that the special damages were proved. Clarke, J at page 135 said:

> "I hold that special damages claimed for losses relating to the red cayenne pepper mash have been proved. Prior to the defendant's breach the plaintiff had firm purchase orders with both Acadiana Pepper Company and Durkee Foods dated August 4, 1986 and October 8, 1986 respectively to supply them with red cayenne pepper mash. Because of the defendant's breach these orders were never filled by the plaintiff. In this regard I allow the plaintiff's claim for US$92,250.00 arrived at as follows:
>
> Acadiana Pepper Company = 500,000 lbs at $00.28c =$140,000.00 x 36% (net profit taking into account 2% for overheads) = $50,400.00 Durkee Foods – 500,000 lbs at $00.27c = $135,000.00 x 31% (net profit taking into account 2% for overheads) = 41,850.00
>
> US$92,250.00."

Liability for damages in contract arises where parties, such as reasonable businessmen, at the time of the making of the contract reasonably contemplate that in the event of a breach of the contract, losses would occur: (***Hadley and Another v Baxendale and Others*** (1854) 9 Exch 341, [1843-1860] All ER, 461). In addition, because of the appellant's knowledge of the two existing contracts with *Durkee Foods and Acadiana*, which the respondent was obliged to honour, the appellant's liability extended to such loss of profits suffered by the respondents. In the ***Heron II, Koufos v C. Czarnikow, Ltd*** [1967] 3 All ER 686, Lord Reid, maintaining, in his speech that it was not enough that the plaintiff's loss was directly caused by the defendant's breach said:

> "The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realized that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."

The gross selling price of cayenne pepper mash to Durkee Foods and Acadiana quoted at US$0.26¢ and US$0.28¢ respectively totalled US$270,000.00. The respondent's costs of the pepper at farm gate and the product after processing, together with other charges and expenses would on his evidence allow him a profit of 31% and 36% respectively on the transactions. This projection was not controverted. Seeing that the conduct of the appellant prevented any factual completion of the project, in order to provide actual documentary proof, the learned trial judge cannot be faulted in his acceptance of the evidence proffered of loss of profits.

The award of US$92,250.00 special damages for loss of profits should stand.

On the contrary, however, the award of special damages of "US$128,550.00 as the half share of losses proved" cannot be supported. This latter award was based on the Amended Statement of Claim of the respondent to represent the loss of profits on Capsica transactions. The Capsica agreement was an ongoing activity between the parties, between the period October 1985 to April 1987. It involved the delivery, receipt and sales of numerous products, such as sweet peppers, Jamaican hot peppers, baby egg plants and other items.

The trade between the parties in these products involved a great deal of documents, particularly telexes. However, the respondent submitted no settled statement of account nor did either party seek to produce to the Court any documentary evidence of profits or losses on the Capsica agreement. Unfortunately, the respondent failed to substantiate in what respect the sum of US$128,550.00 represented "half share of losses (sic)" as Clarke, J described it. There was no prior dealing involving either party in transactions of this kind. This portion of the award of special damages is therefore expressly caught by the lack of strict proof, and the stricture attendant on throwing them "at the head of the Court" (***Murphy v Mills*** supra). The appellant succeeds in this respect. The award of US$128,550.00 should not be allowed.

In her argument in support of ground 8, learned Queen's Counsel reasoned that the award of general damages, being for prospective losses should not have been allowed. The contract was for a pre-marital year only and would only continue if the parties were compatible – a subjective consideration. Dr. Barnett, argued, in response, that the evidence showed that there being no tension between the parties prior to the breach they were compatible. Relying on ***F & G Sykes (Wessex) Ltd v Fine Fore Ltd*** [1967] 1 Lloyd's L.R 53, he argued that the breach by the appellant was not as a result of any disagreement between the parties, and in order to recover prospective damages the respondent need not show that renewal of the contract was guaranteed but only that it was a reasonable business prospect.

Clarke, J examined the relevant clause in letter dated February 6, 1986 and said:

> "So, the basis was compatibility. I find that the basis existed at all material times between the parties. In the submissions on the documentary evidence and on what can reasonably be inferred from the evidence of Bill Taylor and his son, Minor Taylor, I find that there was no tension between the parties. On the contrary, they unquestionably had a very cordial relationship and in matters relating to the agreement operated on the basis of a very friendly and co-operative attitude. Even in the letter of April 19, 1987 announcing the termination of the agreement there was not the slightest indication of any conflict or incompatibility."

He rejected the submission of counsel for the appellant that there was no guarantee of a long term agreement, preferring the submission of Dr. Barnett, that in commercial transactions damages are not to be assessed on the basis of guarantees but on reasonable probabilities. He found that there was a continuation of the contract for the sale of contract peppers and that the increase of the order by Durkee Foods to the appellant on January 15, 1988 demonstrated:

> "... clear indication of the development of the project in relation to Durkee Foods alone and therefore clear evidence in respect of the prospective losses being multiplied as indicated by those subsequent agreements."

In my view the learned judge was correct.

The relevant clause of the contract letter dated 6th February 1986 which reads:

> "7. If after the pre-marital crop year, Grains Jamaica and the Peppersource finds each other

> compatible, then they will form a company together for processing peppers and other products. This new company will then share the cost of processing as well as the profits in marketing."

does point to the future formation of a contract.

It is vital to observe that the clause commences with the conditional "if", and continues to indicate that this condition will only arise after the end of the "pre-marital crop year." I agree with Miss Phillips, Q.C., as far as she suggests that the question of "compatibility" is subjective. "If" the parties "... finds (sic) each other compatible" required, that, the parties indicate or demonstrate whether each finds the other to be compatible.

Only then they will form a company together. It is no business of the Court to make a determination of the compatibility of businessmen to be engaged in contractual relationship, an objective assessment, without any known competence in a Court to do so or full knowledge of the parties. There is no evidence that the parties proclaimed their compatibility nor formed a joint company after the pre-marital year. The recital of the clause continuing, indicated that their contractual relationship would differ from that which existed in the pre-marital year, in that the parties would then be:

(a) joint processors of contract peppers, instead of processor and purchaser,

(b) sharing the cost of processing, whereas previously it was the obligation of the appellant, and

> (c) sharing the profits in marketing, which previously was to the benefit of the respondent solely.

In my view this clause properly interpreted was a contract to enter into a contractual relationship after the end of the pre-marital year. Such a contract is not recognized in our law. The new contract never materialized. In ***F & S Sykes v Fine Fare*** (supra) the parties had in fact in 1961 formed a contract for a definitive period of five years and thereafter to continue from year to year with a requirement of prior notice of four years in the event of termination. As a consequence after a year of operation the repudiation by the defendants in 1963, which was accepted by the plaintiffs, did not prevent the parties being bound for the full period of five years up to 1968. The latter case is not entirely unhelpful in the instant case.

There was in fact, as Clarke, J found a continuation of the contract, increase in the orders from Durkee Foods, indicative of clear evidence of prospective losses to the respondent. He found further on page 138, that:

> The defendant's repudiation of the agreement with the plaintiff a few days later resulted in a mere substitution of the defendant for the plaintiff and an increase from 500,000 lbs to 1,000,000. I also accept the evidence that on January 15, 1988 some 8 months afterwards, the quantity to be supplied by the defendant to Durkee Foods increased to 2,500,000 lbs."

The loss of profits to the respondent would be evident and clearly in the contemplation of the appellant in view of the increased orders from Durkee Foods. Clarke, J probably inferred, that the increased orders were based on the

satisfied view of the pepper crop seen by the Durkee representatives, as presented by the appellant. The loss to the respondent of prospective profits, due to the increased orders by Durkee Foods are,

(a) 500,000 lbs of cayenne mash during period January 1, 1987 to June 30, 1987

500,000 x 31% including 2% overheads - US$41,800.00

(b) 2,500,000 lbs of cayenne mash during period January 1, 1988 to July 31, 1988

2,500,000 x 31% including 2% overheads - US$209,000.00

Total - US$250,800.00

The award of US$370,000.00 general damages for prospective loss, should be set aside, and a sum of US$250,800.00 should be awarded in substitution.

In support of ground 9 Miss Phillips Q.C., argued that no award should have been made for breach of confidence because there was no unlawful use of trade secrets, because the respondent's witness had no specialized knowledge to qualify as trade secrets.

In ***Cranleigh Precision Engineering Ltd v Bryant et al*** [1964] 3 All ER 289, Roskill, J sitting in the Queen's Bench Division, in an action for breach of confidence, held that the plaintiffs were entitled to and issued injunctions to restrain the defendant, a former employee of the plaintiffs, from using or disclosing confidential information acquired during the course of his employment. Roskill, J, accepted as a true statement of the law, dicta of Lord Greene M.R. in

Saltman Engineering Co., Ltd. and Others v. Campbell Engineering Co., Ltd [1963] 3 All E.R. 413, who, at page 414, said:

> "I need not go into the law, which I think is correctly stated in a formula which leading counsel for the defendants himself accepted. I will read it:
>
> > 'If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's rights'."

and at page 415:

> "I think that I shall not be stating the principle wrongly, if I say this with regard to the use of confidential information. The information, to be confidential, must I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge."

In the instant case, the respondent's representative Marchese, admitted that he had no technical knowledge relative to the processing of the peppers, however, he obtained technical data and specifications concerning the processing of the contract peppers both from Durkee Foods and other sources, which he made available to the appellant. This was confidential information acquired, directly by the appellant during the currency of the contract. In addition, Durkee was a major customer of the respondent. Durkee's existence as a customer of the respondent and to whom cayenne mash could be sold, is confidential information acquired by the appellant from the respondent. By dealing directly with Durkee Foods and obtaining initially an order for the supply of 500,000

pounds of cayenne pepper mash, to the exclusion of the respondent, it was action which was a breach of confidence and accordingly an infringement of the respondent's rights. The award of US$30,000.00 as damages for breach of confidence was a proper award in the circumstances.

Ground 10 is a complaint that the respondent did not seek to mitigate its loss as it is required to do and therefore the damages awarded should be reduced. This submission was confined to sweet peppers under the Capsica agreement.

It is an accepted principle of law that a plaintiff claiming damages for loss must show that he sought to mitigate his loss: (***British Westinghouse Electric v Underground Electric Railways Co. of London*** [1912] AC 689). In the circumstances of the instant case, the respondent having declared that the cultivation by the appellant was its only source of supply of such contract peppers and in such quantities, to its customers, the respondent could not reasonably be expected to mitigate loss caused by the conduct of the appellant. It is my view, also, that because no damages are recoverable by the respondent under the Capsica agreement, the issue of mitigation does not arise thereon, and in any event the Capsica agreement is irrelevant to the contract concerning the contract peppers. This ground therefore fails.

In support of ground 11, Miss Phillips Q.C., argued that because the witness Al Jansen had received, as it were, immunity from Durkee Foods, as a result of which he gave the affidavit, his credibility was in question.

The affidavit evidence of Al Jansen was admitted under the provisions of section 31 E of the Evidence Act, it having been proved to the court by the evidence of Richard J. Valleau, that he Jansen was:

> "... outside Jamaica and it ... (was) not reasonably practicable to secure his attendance" (Sub-section (4) (c))."

The notice of intention to adduce and the affidavit itself were filed and served in July 1997, on a date far in excess of the statutory "... at least twenty-one days before the hearing. ..." (Subsection (2)). The hearing commenced on the 20th day of April 1998. Section 31E (3) provides that:

> "3... every party so notified shall have the right to require that the person who made the statement be called as a witness."

The record of the trial does not disclose that any request was made for the attendance of the witness Jansen nor was any objection taken to the admission of his statement, exhibit 3.

The evidence of Al Jansen, supports the evidence of Gerald Marchese as to the repudiation of the contract with the respondent by the appellant through Tony Hart and the simultaneous agreement between the appellant and Durkee Foods to supply to the latter 1,000.000 lbs. of pepper mash. The agreement was made "on or about the 2nd of April 1987" at a time when the contract between the respondent and the appellant was still in force. There is no valid reason why the learned trial judge should not have accepted the evidence of Al Jansen as credible. This ground also fails.

Clarke, J was correct to find that it was the appellant who had repudiated the contract causing substantial losses to the respondent, who is accordingly, entitled to damages for his losses.

For the above reasons, I would allow the appeal in part. The award of damages should be varied. The award of damages should be:

Special damages - US$92,250.00 plus interest at 5% as from April 4, 1997 to June 25,1999.

General damages - US$280,800,00 (being prospective loss – US$250,000.00 and breach of confidence US$30,000.00) plus interest at 5% from the date of service of this writ to June 25, 1999,

and half costs of the appeal to the respondents to be agreed or taxed.

ORDER

DOWNER, J.A:

By a majority appeal allowed in part. Order of the Court below as to damages varied. Damages to be in accordance with that proposed in the judgment of Harrison, J.A. Half costs of the appeal to the respondent to be agreed or taxed.