

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 22/08

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
The HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.**

**BETWEEN NATIONAL COMMERCIAL BANK
JAMAICA LIMITED 1ST APPELLANT**

**AND JAMAICAN REDEVELOPMENT
FOUNDATION, INC. 2ND APPELLANT**

**AND SCOTIABANK JAMAICA TRUST AND
MERCHANT BANK LTD. RESPONDENT**

October 27, November 21 and December 19, 2008

Mr. Charles Piper for the Appellants.

**Dr. Lloyd Barnett and Ms. Daniella Gentles, instructed by Livingston,
Alexander and Levy for the Respondent.**

PANTON, P.

I have read in draft the reasons for judgment written by Harris, J.A. I agree with them and have nothing to add.

HARRIS, J.A.

1. This is an appeal from an order of Cole-Smith, J, refusing an application by the appellants to amend several paragraphs of their particulars of claim.

2. The 1st appellant, as bankers, extended loan and credit facilities to two companies, namely Caldon Finance Group ("CFG") and MSC Investments Limited ("MSC"). Share Certificates for 69,515, 972 Jamaica Flour Mills stock units were deposited with the 1st appellant, to secure the indebtedness. These stock units were owned by PHJ a subsidiary of CFG.

3. By a letter dated May 27, 1997, addressed to the 1st appellant, under the hand of Henry Fullerton, a controlling shareholder, director and executive chairman of both CFG and MSC, CFG requested that the 1st appellant deliver to the respondent the relevant share certificates for the stock units. Enclosed in that letter, was a letter of even date from PHJ conveying instructions to the respondent that the proceeds of sale of the shares should be remitted to the 1st appellant. This copy letter was stamped and signed on the respondent's behalf by an officer of the respondent as having been received on May 27, 1997.

4. On May 28, 1997 the 1st appellant wrote to the respondent transmitting the Share Certificates to them stating in the letter that they were against the respondent's undertaking to remit to the 1st appellant the proceeds of sale of the stock units which were estimated to be US\$8,858,350.80.

5. The 1st appellant, by letter of May 29, 1997 requested Citizens Merchant Bank to deliver to it 31,000,000 Jamaican Flour Mills Shares which were being held by that bank as collateral for credit facilities afforded CFG, on the 1st appellant's undertaking to pay the bank J\$54,854,500.00 from the proceeds of

sale of those shares, if the sale materialized, or, to return the Certificates in the event it did not. By letter dated May 30, 1997 the shares were delivered to the 1st appellant by Citizens Merchant Bank.

6. By letter dated May 30, 1997, the 1st appellant transmitted to the respondent the 31,000,000 shares against the respondent's undertaking to pay US\$3,956,299.00. A letter dated July 9, 1997 addressed to the respondent sent by CFG, states as follows:

"Mr Jack Page
Scotiabank Jamaica Trust and Merchant Bank Limited
Corner of Duke and Port Royal Streets
Kingston

Dear Mr. Page,

Sale of JFM Shares

Further to our telephone conversation, we now formally request that you deliver the cheques for the sale of JFM Shares for the following, to our bearer, Mr. Ian Dixon; the relevant acceptance letters have already been forwarded to you:

- Donna McIntyre
- Brend Developments Limited
- MCS Investments Limited
- CM Company Limited.

With regards to PHJ Limited, our bearer will also collect the relevant cheques and deliver same to Life of Jamaica and National Commercial Bank, respectively.

Yours sincerely
CALDON FINANCE GROUP LIMITED

Greta Bouges (Miss)
Authorized Signature."

7. The shares were sold. In obedience to the request by CFG, the respondent issued a cheque for US\$14,861,992.98 drawn in favour of PHJ and delivered same to CFG's bearer. PHJ subsequently, on July 10, 1997 utilized the cheque to open an account in its name at one of the 1st appellant's banks. The 1st appellant alleged that the funds were expended and that the delivery of the cheque to CFG's bearer PHJ subsequently came to its knowledge.

8. By letter of October 29, 1998, the first appellant wrote to the respondent with a request that the respondent should honour an undertaking by letter of November 19, 1998, from the respondent to the 1st appellant. The respondent's response was that it had honoured its obligation by adhering to instructions it received.

9. On April 7, 1999, the 1st appellant commenced an action against the respondent claiming "damages for breaches of an undertaking between the plaintiff, the defendant and Caldon Finance Group Limited." On May 28, 1999, the respondent filed a defence denying liability.

10. The 1st appellant, on August 20, 2004, pursuant to an order of the court, filed an amended claim form adding the 2nd appellant as a party to the proceedings "by virtue of an assignment of the subject matter of the suit to it."

11. On October 19, 2004, the respondent filed an amended defence, having been granted permission so to do.

12. By a Notice of Application, dated October 10, 2007, the appellants sought an order to amend 17 paragraphs of its particulars of claim. The learned judge granted an amendment of 11 paragraphs. She refused to sanction amendments of the remaining paragraphs, namely, 14, 15, 16, 18, 23 and 24, on the ground that they raised new causes of action and were being sought after the expiration of the limitation period.

13. Rule 8.9 of the Civil Procedure Rules 2002 imposes a duty on a claimant to set out his or her case at the commencement of proceedings by stating all facts upon which he or she relies. Where there is an omission to conform with the provisions of Rule 8.9 (1), a claimant may not, without the permission of the court, place reliance on any allegation or factual argument which had not been pleaded.

14. In the exercise of its discretionary powers, the court, by virtue of Part 20 of the Rules may grant amendments but is restricted from so doing by rule 20.6 which prohibits the grant of amendments outside of the limitation period, save and except to correct a genuine mistake or in cases affecting the identity of a party. I must state at this stage that the amendments sought do not fall within the scope of Rule 20.6.

15. It is a well settled rule that an amendment will not be permitted, if to do so, would effectually divest a defendant of a right to a defence under the Statute

of Limitation. That is, if the proposed amendment amounts to a new cause of action, or a new claim, a court will refuse to grant an amendment if to do so would deprive a defendant of a defence under the Statute of Limitation.

16. The foregoing proposition finds support in the case of **Weldon v Neal** (1887) 19 QBD 394 when at page 3 Lord Esher M.R. said: -

“We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.”

17. In **Weldon v Neal** (supra) the plaintiff obtained an order for a new trial from the Court of Appeal with permission to amend his statement of claim. Fresh claims were included in his statement of claim. These were statute barred at the time the amendments were sought. The paragraphs bearing new causes of action were struck out.

18. It is of importance to make reference to the dictum of Lord Esher M.R. that a court may be empowered to allow an amendment in “very peculiar

circumstances.” **In Philmore Ogle** (Liquidator appointed by the court for Jamincorp International Merchant Bank Ltd) **v. Jamaica Citizens Bank Ltd** (1995) 32 JLR 433, this court dealt with the issue as to whether the court has the power to allow an amendment under “very peculiar circumstances”. In defining the issue, this is what Patterson J. A., had to say at page 436:

“Of course, the dictum is obiter, and we were not pointed to any authority in which the ‘very peculiar circumstances’ prevailed over the well established rule of practice that ‘amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments (per Lord Esher M.R. in **Weldon v. Neal** (supra)).”

19. It is obvious therefore that where the introduction of a new cause of action operates to deprive a party of the benefit of the Limitation of Actions Act, the court will not entertain an amendment.

20. In **Cave v. Crew** (1893) 62 L.J. Ch. 530, it was held that a plaintiff could not so change the character of his claim to add a new claim outside the limitation period. In **Marshall v. London Passenger Transport Board** [1936] 3 All ER 83, it was held that an amendment must be disallowed where it introduces a new claim, which, if set up in an action commenced at the date of the amendment, would have been barred by the effluxion of time.

21. In **Dornan v J. W. Ellis & Co. Ltd.**, 1962 1QB 583, a plaintiff applied to amend his statement of claim by making addition to the particulars of negligence outside of the limitation period. By his endorsement on the writ of summons he

sought "damages for personal injuries caused by the negligence and/or breach of statutory duty of the defendants, their servants or agents." Paragraph 3 of the statement of claim was couched in the following terms:

"The said accident and resultant personal injuries were caused by the breach of statutory duty and/or negligence of the defendants, their servants or agents."

22. When the action came on for trial, the plaintiff sought to amend his particulars of negligence by adding allegations which essentially claimed that the accident had been caused by the negligence of a co-worker, or other servants or agents of the defendants and the defendants were thereby vicariously liable. The proposed amendment was refused by the trial judge on the ground that it raised a new cause of action and was statute barred. On appeal, it was held that the particulars of negligence although being dismissimilar in quality from the original claim did not raise a new claim or a different case of negligence. In the circumstances, the court allowed the amendment.

23. The authorities have made it abundantly clear that the court will not depart from the prescribed rule of refusing an amendment where the amendment sought is one involving new consideration or new set of facts. An amendment may, however, be granted where a rule empowers the court to do so and will only be granted in circumstances specified by the rule.

24. The following grounds of appeal were filed:-

- (a) The Learned Judge erred in law holding that the proposed amendments introduced new causes of action which are barred by the operation of the Statute of Limitations.
- (b) The Learned Judge erred in law and wrongly exercised her discretion in refusing to grant the application to amend the said paragraphs of the proposed Amended Particulars of Claim on the ground that they amounted to new causes of action, in that she failed to have regard to the fact that:
 - a) the claim contained in the Endorsement to the Writ of Summons dated 7th April, 1999 was expanded by the Statement of Claim also dated 7th April, 1999 and that the causes of action on which the proceedings were commenced are breach of contract and negligence;
 - b) the application in respect of paragraphs 14 and 15 of the proposed Amended Particulars of Claim is part of the claim for breach of contract and introduces additional particulars of the breach and a different approach to identifying the breach;
 - c) the application in respect of paragraph 16 of the proposed Amended

Particulars of Claim represents statements of fact only;

- d) the application in respect of paragraph 18 introduces additional particulars of the negligence and breach of contract;
- e) the determination of the existence of the equitable assignment referred to in paragraph of the proposed Amended Particulars of Claim occurred by the reason of the decision of the Supreme Court in December, 2004, in separate proceedings between the parties and was confirmed by this Honourable Court in July 2007, within the statutory period; and
- f) the estoppel claimed in paragraph 24 of the proposed Amended Particulars of Claim relies upon facts pleaded from the inception of the case.”

25. The critical issue which falls to be determined in the appeal is whether the proposed amendments are merely detailed expressions of matters of which the appellant originally complained or they are new claims. The decisive factor which must ultimately determine the issue, is whether the amendments sought raise new causes of action and are statute barred.

26. Paragraph 14

Mr. Piper argued that the claim as endorsed on the Writ of Summons was augmented by the amended statement of claim of August 20, 2004 and the causes of action which were commenced and pursued were breach of contract and negligence. The averments raised in paragraph 14 of the proposed amended particulars of claim, he argued, are part and parcel of the claim relating to the breach of contract as it thereby introduces further particulars of the breach, and does not raise a new cause of action.

27. It was Dr. Barnett's submission that the amendment sought to paragraph 14 introduces a new cause of action relating to the custom between banks. He further submitted that the limitation period having expired, an amendment of the particulars of claim would be impermissible.

28. There is no dispute that the claim in its original form alleged one cause of action, namely, "damages for breaches of an undertaking contained in correspondence between the Plaintiff, Defendant and Caldon Finance Group Ltd." One will now have to look at the substance of the proposed amendment to ascertain whether it is a new claim or merely an amplification of an existing claim. Paragraph 14 of the proposed amended particulars of claim is pleaded as follows:

"Further, the Claimant says that it was the custom between Bankers to send to each other documents of title on the receiving Bank's undertaking to deliver to

the sending Bank the sum required by the sending Bank or the fulfilment of the condition imposed by the sending bank, without the need for a formal acceptance of the undertaking. As a part of the said custom, if the receiving Bank is in any manner dissatisfied with the undertaking being sought, it would seek clarification and, if none was forthcoming, it would refrain from dealing with the subject matter of the stated undertaking and return the said documents to the sending Bank”

29. In the amended particulars of claim, there is also an allegation of breaches of an undertaking contained in correspondence between the 1st appellant and the respondent, which is the same as that which was originally pleaded. This allegation is grounded in contract. The appellants sought to rely on the particulars of the contract as alleged.

30. They are now proposing to rely on a plea of custom. Such custom as alleged is that which exists between banking institutions with respect to the delivery of documents of title, and the receipt of an undertaking to perform an act without the necessity of a formal acceptance of the undertaking. It is without doubt that this is a claim in which the appellants are advancing new allegations of facts from that on which they sought to rely, that is, the undertaking contained in the correspondence. In my judgment, this being a new cause of action, the learned judge was correct in disallowing it. To grant the amendment sought, would be to deny the respondent of a defence under the Limitation of Actions Act and would therefore be prejudicial to them.

31. Paragraph 15

It was argued by Mr. Piper that paragraph 15 of the proposed amendment relies on facts previously pleaded, it being founded upon the action for breach of contract. The amendment seeks to expand upon the claim, he argued. He submitted that the implied term is that which is contained in the contractual letters forming the foundation of the claim ab initio pointing to the custom between bankers and is therefore not a new cause of action.

Paragraph 15 reads:

"Having regard to the contents of the letters mentioned and described in paragraphs 9 and 13, to the matters set out in paragraph 14 and to the nature of the 1st Claimant's business, it was a term to be implied in the agreement created by the said correspondence that, if the Defendant did not understand or was unwilling to accept the undertaking referred to in the said letters, it (the Defendant) would not act in any manner in relation to the subject matter thereof and would return to the 1st Claimant the stock units of 69,515,972 and 31,000,000 referred to therein. The 1st Claimant says that, it is necessary to imply the said term, so as to give business efficacy to the transaction involved in the Defendant's acceptance of the said shares from the 1st Claimant and its (the Defendant's) subsequent sale thereof"

32. Paragraphs 9-13 of the amended particulars of claim set out averments founded on correspondence passing between the parties on May 28, 29, and 30, 1997 as well as an alleged request from CFG to the 1st appellant to procure

share certificates from Citizens Bank. These certificates were in the custody of that bank. The effect of the proposed amendment is to introduce an allegation that there was an implied agreement between the 1st appellant and the respondent that if the respondent was disinclined or reluctant to accept the undertaking it would have returned the relevant certificates to the 1st appellant. These allegations in my view portray particulars of a separate contract, a new contract and therefore a departure from that which was earlier pleaded. In light of the passage of time, the respondent would be denied the right to pray in aid the Limitation of Actions Act as a defence if the amendment was permitted.

33. Paragraph 16

It was submitted by Mr. Piper that the contents of paragraph 16 as proposed, do not purport to raise a new cause of action. It outlines additional facts upon which the appellants will depend at the trial, he argued.

Paragraph 16 states as follows:

"The Defendant sold and transferred the said shares to ADM, which sale yielded at least the sum of US\$13,285,893.63, the estimated value of the said stock unit, as well as an additional payment, contingent on the outcome of pending litigation between JFM and its Insurers, which was eventually forthcoming, was quantified and the sum of US\$1,215,380.98 thereof was paid to the 2nd Claimant on the 28th February, 2005."

34. The allegations pleaded in the foregoing paragraph develop averments raised in the amended particulars of claim. They do not raise new substantial facts nor a new claim. To my mind they ought to be allowed for the purpose of better defining the issues between the parties.

Paragraph 18

35. In a further submission Mr. Piper stated that paragraph 18 introduces additional particulars of negligence and breach of contract and do not raise any new cause of action. He argued that the claim, as pleaded may be regarded as having lacked particulars, and in obedience to the requirement to particularize the claim, they ought to be included for the better adjudication of the matter.

36. Dr. Barnett submitted that no sustainable pleading of negligence had been advanced by the appellants. He contended that to allow an amendment would be effectually permitting an action to be instituted outside the limitation period.

37. Paragraph 15 of the amended particulars of claim states as follows" –

"By letter dated July 9, 1997, addressed to the Defendant by CFG for the attention of Mr. Jack Page, CFG without the knowledge of the 1st Claimant, by its authorized agent and its 'authorized signature' Greta Bogues, confirmed an oral request by Greta Bogues of Mr. Jack Page for the Defendant inter alia to deliver to CFG's bearer, a cheque for delivery to the 1st Claimant, which cheque included the proceeds of sale of of(sic) PHJ's holding of JFM shares due to the 1st Claimant. Notwithstanding the aforesaid undertakings and notice on the Defendant's part of the interest of the 1st Claimant in the said proceeds of sale, the

Defendant issued a single cheque payable to PHJ in the amount of **FOURTEEN MILLION EIGHT HUNDRED AND SIXTY ONE THOUSAND NINE HUNDRED AND NINETY TWO UNITED STATES DOLLARS AND NINETY EIGHT CENTS (US\$14,861,992.98)** and delivered same to CFG's bearer as had been requested by CFG. At the trial the 1st Claimant will aver that the said cheque included an amount of US\$13, 285, 893.63 due to the 1st Claimant which sum represented the proceeds of sale of PHJ's holding of JFM shares released to the Defendant by the 1st Claimant. In proceeding to issue a single cheque payable to PHJ and by delivering same to CFG's bearer, the Defendant acted negligently and in breach of their undertakings and agreement to forward to the 1st Claimant the proceeds of the same JFM shares released to them by the 1st Claimant. **A copy of the letter is attached.**

38. The respondent in its amended defence answered these allegations in the following terms in paragraphs 12 and 13:—

- "12 The defendant further denies that issuing a single cheque and delivering same to PHG's bearer was negligent or in breach of any undertakings or agreement with the First Claimant as alleged in paragraph 15 of the Amended Particulars of Claim or at all."
- 13 The defendant says that it did not act negligently and that the allegation of negligence in paragraph 15 of the Amended Particulars of Claim is unsupported by any or any proper pleading. The Defendant denies that it acted in breach of the alleged or any undertaking and agreement as alleged or at all. Further or in the alternative the Defendant says that the First Claimant consented to, waived and/or acquiesced in the Defendant's method of performance of the alleged or any undertaking and is estopped and/or otherwise

precluded from bringing this action or complaint."

39. Paragraph 18 of the proposed amended particulars of claim alleges:

"In proceeding in the manner set out in paragraph 17 hereof, the Defendant acted negligently and in breach of its undertaking and agreement to deliver, to the 1st Claimant the proceeds of sale of the said shares and the Claimants rely on the facts set out in paragraph 17 and the following as being particulars of the negligence and/or breach of contract."

PARTICULARS OF NEGLIGENCE &/OR BREACH OF CONTRACT

- a) "Delivering the proceeds of the said shares to PHJ despite having received the stock units on the specified undertakings:
- b) Neglecting or refusing to make the payment representing the proceeds of the sale of shares to 1st Claimant when it knew or ought reasonably to have known that the said stock units constituted the security for the liabilities of CFG and MCS;
- c) After having agreed to make payment of the proceeds of 69,515,972 shares to the 1st Claimant, entering into a contrary agreement with CFG and PHJ for the delivery of the proceeds of shares to them, without enquiry of the 1st Claimant and without regard to the consequences of so doing;
- d) Failing to make any or any adequate steps to ensure that the proceeds of sale of the said shares did not come into the hands of or under the control of PHJ, CFG or their principal Mr. Henry Fullerton when it knew or ought reasonably to have known that the 1st Claimant could suffer loss and damage by reason thereof;

- (e) The Defendant knew or ought reasonably to have known that the correspondence it received from the 1st Claimant had or were intended to have commercial significance in or about in dealings with its customers CFG and PHJ but acted in utter disregard for same; and
- e)sic) Acting in disregard of the custom of bankers in regard to undertakings sought and given between them."

40. A general plea of negligence was raised by the appellants. Negligence was denied by the respondent, which, also stated that the plea was devoid of particulars and therefore ineffective, yet it did not seek to strike out the claim for want of particulars.

41. A claim for negligence must contain particulars to show in what respect a defendant was negligent. A claimant ought to state the facts upon which the supposed duty is founded and the duty to the claimant with respect to the breach of which the defendant is charged. See Willes J, in **Gautret v. Egerton Rand Central Gold Mining Co. v. R** [1905] 2K B at 400. He or she is also required to state the allegations of the precise breach of duty of which he or she complains as well as the particulars of his loss or injury.

42. The appellants, in the amended particulars, stated the facts upon which the alleged duty of the respondent is grounded, but failed to expressly state the precise breach of the duty or particulars of its loss. There is no doubt that negligence had been imperfectly pleaded. However, the respondent was aware

that a claim for negligence had been raised by the appellant and pleaded thereto but stated that it had been inadequately pleaded. Paragraph 15 of the amended particulars of claim alleges a breach of duty of care on the part of the respondent by the allegation of its delivery of the cheque to PHJ's bearer. Paragraph 17 of the amended particulars of claim refers to the delivery of the cheque to CFG's bearer. The respondent expressly traversed the claim by denying that it was negligent in issuing the cheque to PHJ's bearer or being in breach of any undertaking or agreement. The claim contained in paragraph 18 of the proposed amended particulars of claim as well as (a) (b) and (d) of the particulars of negligence, save and except the words "or their principal Henry Fullerton" appearing in (d), in my view, are not new allegations, they do not raise a new claim. They amount to further particulars in a claim which had already been raised. The defect in paragraph 15 of the amended particulars of claim may be cured by an amendment as put forward in paragraph 18 (a) (b) and (c) of the proposed particulars of claim, as amended. The proposed particulars in respect of contract are new and must be disallowed.

Paragraph 23

43. It was also Mr. Piper's contention that paragraph 23 of the proposed amended particulars of claim is as a result of this court's decision in respect of separate proceedings between the parties with regard to the existence of an equitable assignment, in that, the proceeds of the shares were the subject of such assignment and therefore is not a new claim.

44. Dr. Barnett contended that the paragraph raises a new claim, as it introduces an allegation which had not been previously pleaded and could not be treated as a qualitative alteration or alteration of that which was previously pleaded.

Paragraph 23 reads as follows:

"The Claimants say that, at the material time, the 1st Claimant was entitled to the proceeds of the said shares, same having been the subject of an equitable assignment, later to be confirmed by the decision of the Supreme Court in Claim No. C.L.E 380 of 1999 delivered on the 13th December 2004 and of the Court of Appeal in Civil Appeal No. 37 of 2005 delivered on the 27th July, 2007. The Court of Appeal also held that the 1st Claimant has since effected in favour of the 2nd Claimant a legal assignment of all of the 1st Claimant's rights, title and interest in the debt and securities of CFG."

45. The purport of the proposed amendment is to advance a claim or an allegation that the proceeds of the shares, to which the 1st appellant was entitled, form the subject matter of an equitable assignment. Although this court so established, this cannot be regarded as a ground on which an amendment should be permitted. The issue before us is whether the proposed claim creates a new cause of action. We must pay due regard to the time a cause of action would have arisen and not when this Court made its decision. The proposed amendment had not been raised in the original or the amended particulars of claim. It is clearly a new claim and cannot be allowed. To permit this

amendment would be to validate a claim which has been statute barred. It would effectively deprive the respondent the right to rely on the Limitation of Actions Act.

Paragraph 24.

46. Mr. Piper contended that paragraph 24 is not a cause of action. It raises a plea of estoppel which is based on the same facts upon which the appellants had placed reliance at the commencement of the proceedings. It was his submission that it outlines a series of material facts based on the two causes of action pleaded.

47. Paragraph 24 states: -

"The claimant's say that the Defendant is estopped from alleging that its obligation was to make payment to PHJ, and the Claimants rely on the facts set out in paragraphs 3, 4, 5, 6, 8, 9, 13, 14, 15, 16, and 18 of these Further Amended Particulars of Claim and the following as being particulars of the estoppel:

ADDITIONAL PARTICULARS OF ESTOPPEL

- a) by accepting the share certificates in the terms of the letters from the 1st Claimant delivering same to them, the Defendant led the 1st Claimant to believe, as indeed it did, that the proceeds of the said shares would be paid to and delivered to the 1st Claimant only.
- b) by remaining silent after receiving the letters delivering the share certificates

to it, the Defendant led the 1st Claimant to believe, as it indeed did, that it (the Defendant) had accepted the terms of the undertakings referred to therein and understood them to mean that the proceeds of sale of the said shares were due to the 1st Claimant.

- c) by failing to make any enquiries of the 1st Claimant prior to delivering the cheque for US\$14,861,992.98 to the bearer for PHJ, the Defendant deprived itself of the knowledge that circumstances exist which the Court would ultimately find constituted an equitable assignment of the proceeds of sale of the said shares, to the 1st Claimant."

48. The intent of the proposed amendment is to present a pleading based on estoppel. The appellants seek to assert that the respondent had accepted the undertaking and is therefore estopped from alleging that its obligation was to pay PHJ. The respondent expressly denied that existence of an undertaking, or that it was in anyway liable to the appellants. There is nothing disclosed in the pleadings to show that the respondent made any unequivocal promise or representation of facts or otherwise to assure the 1st appellant that the appellants would rely on any supposed strict rights. By the amendment sought, the appellants are attempting to convert the proposed claim of estoppel into a sword rather than a shield as rightly argued by Dr. Barnett.

49. I would allow the appeal with respect to the amendments sought regarding paragraphs 16 and 18 of the claim but deleting from paragraph 18 the

words "and or breach of contract." I would also allow the appeal with respect to (a) (b) and (d) of the particulars of negligence but deleting from (d) the words "or their principal Henry Fullerton." I would dismiss the appeal in respect of the amendments sought to paragraphs 14, 15, 23, and 24, and to (c) & (e) (sic) (e) of the particulars of negligence in paragraph 18, and would award one half costs to the respondent.

DUKHARAN, J.A.

1. I too agree with the reasoning and conclusions of Harris, J.A. There is nothing further I wish to add.

PANTON, P.:

ORDER

1. The appeal is allowed in part. The order of the learned judge is discharged in respect of paragraph 16 of the proposed amended particulars of claim.

Paragraph 18 thereof is varied to read as follows:

"18. In proceeding in the manner set out in paragraph 17 hereof the Defendant acted negligently and in breach of its undertaking and agreement to deliver to the 1st Claimant the proceeds of sale of the said shares and the Claimants rely on the facts set out in paragraph 17 and the following as being particulars of negligence.

Particulars of Negligence

- (a) Delivering the proceeds of the said shares to PHJ despite having received the stock units on the specified undertakings.
 - (b) Neglecting or refusing to make the payment representing the proceeds of sale of shares to the 1st claimant when it knew or ought reasonably to have known that the said stock unit constituted security for the liabilities of CFG and MCS.
 - (c) Failing to take any or any adequate steps to ensure that the proceeds of sale of the said shares did not come into the hands of or under the control of PHJ, CFG when it knew or ought reasonably to have known that the 1st Claimant could suffer loss and damage by reason thereof.
2. The appeal is dismissed with respect to the proposed amendments in paragraphs 14, 15, 23 and 24 as well as items (c), (e) (sic) and (e) of the proposed particulars of negligence in paragraph 18.
3. One half costs is awarded to the respondent to be taxed if not agreed.