IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. P090 OF 1987

BETWEEN	THE PEPPERSOURCE LIMITED	PLAINTIFF
A N D	GRAINS JAMAICA LIMITED	DEFENDANT

Dr. Lloyd Barnett, Clarke Cousins and
Ms. Karen Wilson instructed by Rattray
Patterson & Rattray for the plaintiff

Leighton Pusey and Mrs. Sharon Usim
instructed by Grant, Stewart, Phillips & Co.
for the defendant

20th, 21st, 22nd, 23rd, 27th, 28th April, 1998
5th November, 1998 and 25th June, 1999

CLARKE, J

The trial of this action began on the basis of the plaintiff claiming, and the defendant counterclaiming, damages for breach of contract. While the defendant contends that the plaintiff repudiated the contract and that it merely accepted the repudiation, it has properly conceded in argument that its counterclaim for damages is not maintainable because of its failure to prove any part of the damages counterclaimed.

What must now be determined, therefore, is which party is entitled to judgment on the claim and if the plaintiff is so entitled what, if any, are the damages recoverable.

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.

Furthermore, on the pleadings and the evidence the following facts are not in dispute:

(a) The agreement between the parties was partly oral and partly in writing.

(b) The defendant agreed to initially grow at its Holland Farm in St. Elizabeth 150 acres of four varieties of hot peppers, namely, red cayenne, jalapeno, serrano and sport pepper exclusively for the plaintiff, process them at the procedding plant on the said farm and ship them freight collect to the plaintiff in the United States.

(c) The price was U.S.$0.10 per lb for the peppers when delivered at the processing plant and U.S.$0.03 per lb for processing.

(d) The plaintiff supplied the defendant with pepper seeds of the said varities, trade secrets and processing technology not known to it.

(e) Pepper seeds supplied by the plainitff were grown to maturity by the defendant.

(f) None of the cayenne peppers grown exclusively for the plaintiff was ever shipped to it; a small quantity of serrano peppers was the only product under the initial agreement received by the plaintiff and for which the defendant was paid.

(g) The plaintiff informed the defendant that it had a substantial contract with Durkee Foods to supply that company with red cayenne peppers and that having terminated its Haitian operation the defendant was its sole source of supply.

(h) On 1st April 1987 representatives of Durkee Foods together with Gerald Marchese, president of the plaintiff company and Bill Taylor, managing director of the defendant company and Anthony Hart, another official of the defendant company, inspected the farm and processing plant. The representatives of Durkee Food were pleased with the farm and plant.

(i) Between April 1 and 3, 1987 Anthony Hart on behalf of the defendant obtained the agreement of Durkee Foods to purchase directly from the defendant the red cayenne peppers it was growing exclusively for the plaintiff.

(j) When the defendant entered into that agreement with Durkee Foods the agreement for the supply and purchase of pepper between the plaintiff and the defendant was still in existence.

(k) On April 4, 1987 Bill Taylor advised Gerald Marchese that the defendant would ship no further products to the plaintiff.

(l) On April 7, 1987 the defendant and Durkee Foods signed a contract in the same terms as the plaintiff's contract with Durkee Foods.

(m) The defendant subsequently shipped several containers of red cayenne pepper to Durkee Foods.

(n) On April 19, 1997 the defendant issued letter of termination of the agreement with the plaintiff substantially on the basis that the plaintiff had not paid for shipments of sweet peppers, the defendant contending that the plaintiff had thereby repudiated the agreement which repudiation the defendant said it accepted.

The nature of the contractual relationship

True, it is not disputed that the defendant also agreed to obtain full grown sweet peppers and process them for the plaintiff and to grow and/or process for the plaintiff other produce including egg plants and baby egg plants. The parties, however, disagree as to precisely what the plaintiff agreed to do in this regard. They also disagree about whether or not this aspect of their contractual relationship formed part of only one contract or constituted a subsidiary agreement separate and apart from the agreement to grow the four specified varieties of hot peppers ("contract peppers") and to pay particular predetermined prices to grow and process them.

It is common ground that the parties agreed that as for produce other than "contract peppers," the plaintiff would advance the shipping and distribution expenses and thereafter any net profits or losses would be shared 50:50. The defendant contends that the plaintiff also agreed to pay pre-determined prices for such produce as in the case of the "contract peppers".

So, what was the nature of the contractual relationship between the parties? The defendant says it was one agreement. The plaintiff asserts that there were two distinct arrangements. I find that there was an initial arrangement which concerned only the "contract peppers", namely, serrano, red cayenne, jalapeno 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. It reads thus:

"**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.

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

CARIBE GROWN 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.

Sgd. .....
BILL TAYLOR
MANAGING DIRECTOR
GRIANS JAMAICA LIMITED

Date: Oct. 11. 1985

Sgd.....
JERRY MARCHESE
CARIBE CROWN

Date: Oct. 11, 1985

"

The letter of intent is complemented by the defendant's letter of February 6, 1986. It is conveneient at this stage to set forth the text of the defendant's letter which reads as follows:

"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-marticial 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 Jamaice 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 wil 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

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 6th 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 6th letter does not suggest otherwise and, indeed, Bill Taylor made no response when asked in cross examination whether he could find in the doucmentary 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.

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 arrangment 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 inspite 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.

Which party committed a repudiatory breach?

Mr. Pusey maintains that the plaintiff repudiated the contract and that thereafter the defendant accepted the plaintiff's repudiatory breach. In its defence the defendant merely makes a general denial of the plaintiff's particularised claim for breach of contract. The defendant makes no statement in its defence that it was justified in terminating the agreeemnt because the plaintiff had committed a repudiatory breach.

It is only in its counterclaim that the defendant purports to base its case in respect of a refusal to pay. Paragraph 14 of the counterclaim reads as follows:

> "By its refusal or neglect to pay for the product and for the costs of production which it had contracted to pay, the plaintiff repudiated the said contract"

That pleading is consistent with Bill Taylor's letter of April 11, 1997 which specifically discloses that:

> "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."

Also, Bill Taylor said in evidence that the defendant terminated the contract because the plaintiff had failed to pay outstanding bills after several requests had been made for payment.

That break-off of the contractual relations incontestably occurred on April 4, 1987, the very day that three invoices were handed over to Gerald Marchese in respect of deliveries of serrano peppers. Bill Taylor's assertion about prior requests for payment and refusal to pay are unsupported by the documentary evidence. 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**). I find, however, that a full load of "contract peppers" had not been delivered up to the time of termination and that a high percentage of same had been spoilt. I also find that nothing was payable in respect of the products under the "Capsica" arrangement, for apart from the fact that no invoices were delivered, there had been no sales, the expenses incurred by the plaintiff far exceeded the price and up to that point the venture was running at a loss. The amount of US$3,900.00 claimed as per the three invoices in respect of serrano peppers was a small portion of the total contract price and I find that after deduction for spoilage the sum properly payable was US$2,981.68 which the defendant admits receiving.

Therefore, in the circumstances I accept Dr. Barnett's submission that failure to provide a letter of credit or banker's guarantee prior to the

termination of the agreement cannot be treated as repudiation of the contract. Allthough the failure constituted a breach by the plaintiff it was, in my judgment, a minor breach and did not amount to repudiation of the contract. In any case, such failure has not been pleaded or alleged in the correspondence. And as for the question of repudiation the law is clear: to amount to repudiation there must be a fundamental breach of the contract evidencing conduct which shows an intention not be bound by the agreement: see for instance, **Mersey Steel & Iron Co. Ltd. v. Maylor** (1884) 9 App. Cas. 434. As Lord Wilberforce has pointed out:

> "Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations": **Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.** [1980] 1 All. E.R. 571 at 576d.

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.

On the other hand, I find that virtually without any warning and in an atmosphere where it appeared that the business between the parties was being dealt with amicably, the defendant terminated the contract and thereby deprived the plaintiff of its major business prospects.

In addition to the ground of refusal to pay there are four other grounds on which the defendant has sought to justify its termination of the contract. Those grounds, are in my opinion, devoid of merit. Let me take them **seriatim**:

(1) **non delivery of equipment**

The defendant alleges in paragraph 3 of the defence that the plaintiff agreed to supply "certain pieces" of machinery while in paragraph 3 of the counterclaim it alleges that the plaintiff agreed to supply "all items of machinery". In paragraph 13 it alleges that the plaintiff failed to supply "any items of machinery" (emphasis supplied). Again, I agree with Dr. Barnett that the documentary and the oral evidence refute these allegations. I find that not only were several items of equipment supplied by the plaintiff long before processing was due to commence but, at the inception, the defendant bought the Holland property and advised that it had available all the

required equipment except a hammermill or pulper. That, as Dr. Barnett points out, was the only equipment discussed at length by the parties and that was dealt with in a cooperative spirit and without any demands. He is correct in this as well: the complaint about equipment is an afterthought because throughout a period of more than a year there were no complaints and the defendant always indicated in a friendly way what items of equipment or supplies were needed and the plaintiff always responded positively. Indeed, on May 20, 1987 Bill Taylor told Marchese that the plant was set up and ready to go and made no complaint or demand.

(2) **Failure to provide a substantial portion of the materials required for production**

That is what is alleged in paragraph 13 of the counterclaim. The allegation runs counter to the documentary evidence. The fact is that there was a constant stream of supply of materials from the plaintiff to the defendant including chemicals and pails.

(3) **Provision of only a small portion of the seeds needed**

This allegation made in paragraph 8 of the counterclaim is also refuted by the documentary evidence. More seeds than were needed had in point of fact been supplied and the defendant was at all material times holding seeds in stock.

(4) **Refusal to accept 14,000 lbs of baby egg plants**

Here again, I approve of and accept Dr. Barnett's analysis and submissions on the evidence. They bear repetition:

> "The problem with the egg plants resulted from the possible use of the wrong seeds or wrong processing. But Mr. Marchese said that he ordered the seeds from a leading and highly reputable supplier and this is not contradicted. Mr. Bill Taylor says it could not be known that the seeds were wrong until the plants bore fruit. Accordingly, there is no basis to suggest that the plaintiff was negligent. This was a loss to be borne by both partners of the joint venture agreement. It is well established that in a joint venture or partnership agreement the profits and losses are, in the absence of express or implied agreement, borne equally and **a fortiori** where the agreement states that profits are to be shared 50:50 - **Robinson v. Anderson** (1855) 20 Beav. 98."

The stark truth, as was submitted on behalf of the plaintiff, is that until the precipitous termination of the agreement immediately after the visit to the farm of the representatives from Durkee Foods there is no trace in the voluminous documentation of any complaint by the defendant of non performance or breach by the plaintiff. Plainly, it is the defendant which has broken the agreement, and not the plaintiff.

There will, therefore, be judgment for the plaintiff on the claim and on the counterclaim.

Damages

Resulting from its breach of the agreement the defendant is liable to the plainitff for such consequential damages as fall within the principle outlined in **Hadley v. Baxendale** (1854) 9 Exch. 341. There Alderson B., giving the judgment of the Court said (9 Exch. 354):

> "... 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 either arising naturally - i.e. according to the usual course of things [from the breach] - or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

It is common ground in the case before me that the plantiff 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 distrubance 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 with the defendant, and (c) technology and trade secrets supplied by the plaintiff intended to be used solely to execute the agreement between the parties.

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 forseable 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 reuslting from its breach.

Four aspects of the plaintiff's entitlement to damages therefore arise:

1. **The losses on the "contract peppers"**

I hold that special damages claimed for losses relating to the red ceyanne 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 - 500,000lbs at $00.28¢ = $140,000.00 x 36% (net profit taking into account 2% for overheads) = $ 50,400.00

Durkee Foods - 500,000lbs at $00.27¢ = $135,000.00 x 3% (net profit taking into account 2% for overheads) = 41,800.00

US$ 92,250.00

2. **The contribution payable by the defendant with respect to the expenses and losses incurred in the joint venture or Capsica section of the project**

Here again I am satisfied that the special damages claimed as representing the contribution payable have been proved. Gerald Marchese was cross examined at length in this area. He was not shaken. His evidence is credible and I accept it. The figures set out in the particulars of the amended Statement of Claim are consistent with his evidence and reflect the principle that in joint venture losses like profits are shared proportionally. And in this case the parties fixed the proportion at 50:50. I allow the sum of US$128,550.00 as the half share of losses proved.

So the total special damages proved comes to US$220,800.00 ($92,250. + $128,550.00).

3. **General damages for breach of confidence resulting from the unalwful use of trade secrets and non-patentable requirements**

It is clear on the pleadings and on the evidence that the defendant utilised for its own benefit the trade secrets, know-how, materials and non-patentable equipment. As was submitted on behalf of the plaintiff, information of a confidential nature supplied for one purpose may not be used by the recipient for other purposes to the detriment of the owner of the information: see **Cranleigh Precision Engineering Ltd. v. Bryant & Another** [1964] 3 All E.R. 289.

That principle the defendant flouted. I find that the defendant not only misappropriated the information, equipment, know-how and trade secrets which save for the agreement with the plaintiff it would not have been provided with, but by its breach it usurped the plaintiff's role as supplier to Durkee Foods. Dr. Barnett is again correct: the confidential information, equipment and trade contracts and trade secrets were not intended for this purpose when their initial owner, the plaintiff, provided them to the defendant in furtherance of their agreement

Consequently, I hold that the defendant is liable to the plaintiff for damages suffered as a result of breach of confidence resulting from a misappropriation of trade secrets and non-patentable equipment; and I award the sum of US$30,000.00 under this head. In so awarding I consider as of no small importance the fact that, so far from returning any of the supplies and equipment received the defendant within months of its agreement with the plaintiff, entered into an agreement with Durkee Foods to supply the initial 500,000lbs of red cayenne pepper mash increasing to 2,500,000lbs. The defendant must have in the circumstances reasonably believed that the plant and seedlings already on the farm would mature and bear fruit as a result of the plaintiff's delivery of know-how and materials.

4. **General damages for prospective losses**

Mr. Pusey submitted that the parties did not intend that the agreement contained in the letter of February 6, 1986 and orally

would subsist beyond what the letter of February 6th refers to as the "pre-marital crop year". He further submitted that this meant that there was no guarantee of a long term agreement.

First of all, it is necessary to determine what the parties intended by "pre-marital crop year". It is clear from the documentary evidence that that period was the period in which the first 150 acres was to be planted and reaped. Secondly, did the parties provide a basis for the agreement to continue? I hold that the answer is yes. The basis on which the agreement was to continue is to be found in the letter of February 6th itself. Paragraph 4 (7) thereof 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".

So, the basis was compatibility. I find that that 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 lightest indication of any conflict or incompatability. As Dr. Barnett submitted, I find that the only reasonable inference is that the break-off of the relationship did not result from any break down in the relationship but from a deliberate decision by the defendant to deal directly with Durkee Foods.

So, it is in that context that I must consider what were the prospects for continuation and therefore for further profits to the plaintiff from Durkee Foods, Acadiana and from other persons to whom the "contract peppers" were to be sold.

In my opinion, Mr. Pusey's submission that there was no guarantee of a long term agreement, misses the point, for as Dr. Barnett correctly submitted, damages in commercial transactions are not to be assessed on the basis of guarantees or certainties but on the basis of reasonable probabilities. And where, as here, the parties were for more than a year acting on the basis of a

that their order would increase from 500,000lbs to 1,500,000lbs. 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 500,000lbs to 1,0000000lbs. I also acccept the evidence that on January 15, 1988, some 8 months afterwards, the quantity to be supplied by the defendant to Durkee Foods increased to 2,500,000lbs. This was in my view 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 agreement.

Taking all those factors into account I award the plaintiff the sum of US$370,000.00 as general damages for prospective losses.

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 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.

I award interest at the rate of 5% per annum on the special damages as from 11th June 1987 and interest at the rate of 5% per annum on general damages of US$30,000 as from the date of the service of the writ.

The defendant must pay the plaintiff's costs which are to be taxed if not agreed.