ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.12 OF 2006

BETWEEN:

EAST CARIBBEAN FLOUR MILLS LIMITED

Appellant

and

ORMISTON KEN BOYEA

Respondent

BETWEEN:

EAST CARIBBEAN FLOUR MILLS LIMITED

Appellant

and

HUDSON WILLIAMS

Respondent

Before:

The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal
The Hon. Mde. Ola Mae Edwards	Justice of Appeal [Ag]

Appearances:

Sir Henry Forde Q.C., Mr. Barry Gale Q.C., Mr. David di Mambro, Mr. L.A. Douglas Williams and Ms. Nadine Worrell for the Appellant
Dr. Joseph Archibald Q.C., Mr. Sydney Bennett Q.C., Mr. Stanley John and Mr. R. Akins John for the Respondents

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2007: May 21; 22;
July 16.

JUDGMENT

[1] BARROW, J.A.: After the trial had commenced, some nine years after the claim was filed, on 20th June 2006 while counsel for the defendant was cross-examining the claimant Ormiston Boyea, counsel for the claimant objected to the defendant relying on certain documents. In response to the judge's inquiry counsel for the claimant advised that they intended to object to several documents and the judge decided to hear all objections together. Since hundreds of documents had been disclosed the court adjourned to enable counsel for both sides to organize their respective objections and responses and heard the objections some days later. It is from the judge's reserved ruling on the objections, delivered on 27 September 2006 (the Ruling), that the defence has appealed.

Outline of the case

[2] Mr. Boyea and Mr. Williams brought separate claims for damages for wrongful dismissal from their employment with East Caribbean Flour Mills Limited (the appellant or the defendant). The two claims were later consolidated with Mr. Boyea's claim as the lead action. Mr. Boyea alleged he had been employed first as the general manager and then as the company's managing director for a total of 20 years and Mr. Williams alleged he had been employed for a total of 19 years and had risen to the position of Financial Controller and Secretary. Each claimed substantial sums for damages, amounting to millions of dollars in Mr. Boyea's case.

[3] The company filed a defence and counterclaim to each claim. The company asserted that it terminated the employment for cause and alleged serious misconduct by each claimant. In its defence to Mr. Boyea's claim the company described the misconduct thus:

> "4. The plaintiff, for his own account and jointly with others including Mr. Hudson Williams ("Williams"), the Financial Controller of the defendant, engaged in a course of conduct over a period of many years designed to misappropriate for his own benefit and the benefit of third parties significant corporate assets and funds and business opportunities

> belonging to the defendant, repeatedly violated his fiduciary duties to the defendant, participated in and encouraged acts of gross insubordination by himself and Williams and consistently and repeatedly violated the express and implied terms of this (sic) written employment agreement …"

[4] For this conduct, which it stated was particularized below, the defendant pleaded it terminated the claimant's employment. Such misconduct caused financial loss of millions of dollars, the company asserted, and counterclaimed for such loss.

The defendant's case

[5] The defendant asserted a positive case set out in 58 paragraphs over 22 pages. Much turns on the relevance of the challenged material to the pleaded case and it is therefore necessary to appreciate the case the defendant pleaded.

[6] The broad allegations of misconduct stated in paragraph 4 of the Defence quoted above were particularized under 4 headings. The headings were (1) Breaches of plaintiff's fiduciary and other duties to the defendant, (2) Further breaches of the plaintiff's fiduciary duty, (3) Negligence of the plaintiff and other improper conduct, and (4) Gross insubordination. The counterclaim rested on these allegations.

[7] In the Defence and Counterclaim the particulars of the allegation of breaches of fiduciary duties open with the allegation that since at least 1990 the plaintiff has violated his fiduciary and other duties to the defendant, misappropriated its assets and business opportunities, breached his employment agreement and failed to devote his full time employment endeavours on behalf of the defendant.

[8] The defendant proceeds with its allegations against the claimant by alleging that the claimant in 1990 caused a company, named Caricom Rice Mills Limited (Caricom), to be incorporated to acquire a rice mill in Guyana, improperly and without authorization converted many millions of dollars of the defendant's funds to the use of the rice mill, and misappropriated both the defendant's funds and a corporate opportunity. The defendant alleged that the claimant assumed a position

as a senior officer and director of Caricom and that the claimant profited as a shareholder of that entity. The defendant also alleged that this conduct violated the employment agreement that the claimant would not engage in any competing business. The defendant alleged that at one point the claimant had secretly invested in Caricom over $16 million of the defendant's money.

[9] The defendant developed its case by alleging that in 1993 the claimant changed Caricom's mode of operating and arranged for a foreign company, Russell Martin Limited (RML), to interpose itself as a 'middle man' between Caricom and its customers and earn profits by selling at a mark-up rice it bought from Caricom. The claimant alleged that in 1994 the claimant incorporated a company named Tyldesley Exports Incorporated (TEI) in the British Virgin Islands, that the claimant was the sole and beneficial owner of TEI, and that from the profits that RML made RML remitted payments aggregating at least $705,730.00 to TEI. The defendant alleged these were secret payments of moneys that rightfully belonged to the defendant.

[10] In 1994, the defendant alleged, the claimant incorporated Montserrat Mills Limited (MML) to own and operate a rice mill in Montserrat. The defendant alleged that the claimant owned shares in MML. The defendant alleged that a company, Antillian Investments Limited (Antillian), also owned shares in MML. The defendant alleged the claimant knowingly allowed senior managers of the defendant (including Mr. Williams) to establish Antillian to divert to them monies that rightfully belonged to the defendant. The defendant described how Antillian earned commissions. The defendant alleged that the claimant knew that the creation of Antillian created impermissible conflicts of interest for the defendant's senior managers and that profits earned by Antillian were earned at the expense of the defendant.

[11] It was further alleged by the defendant that the capital to make MML operational, amounting to millions of dollars, was paid for at the direction of the claimant by the defendant. MML became the sole shareholder of Caricom, according to the

defendant, and this created an untenable conflict of interest. The defendant made further allegations about Mr. Boyea's dealings with these entities in alleged breach of the fiduciary duties that the claimant owed to the defendant and to the substantial financial detriment of the defendant.

[12] Under the heading 'Further breaches of the Plaintiff's fiduciary duty' the defendant set out particulars of its allegation of receipt of secret payments to the detriment of the defendant. The defendant identified particular secret payments allegedly made to Mr. Boyea's bank accounts of US$200,000.00 and US$50,000.00 and, for improperly writing off debts due from a customer to the defendant, a secret payment of US$150,000.00.

[13] In its counterclaim the defendant restated the allegations of receipt of improper payments made to and received by the claimant and claimed "that all such improper payments and the benefits resulting therefrom by the plaintiff were received by him in violation of his fiduciary duties to the defendant and are owed by (sic) the defendant and that the plaintiff is liable to reimburse the defendant to the full extent thereof."[1] The defendant asserted "a constructive trust over all bank accounts maintained by the plaintiff, TEI and all other corporations and entities owned or controlled by the plaintiff and into which any of these secret profits, secret commissions or unauthorized payments from the defendant, Caricom, MML, RML and Euro Mills were deposited."[2]

The Report

[14] In September 2003 Messrs KPMG Forensic Inc. produced an Investigative Report (the Report) under the hand of Mr. James D. McAuley, a senior vice president, of its investigation of various transactions and issues involving the two claimants.

[1] Paragraph 52 of the Defence and Counterclaim dated 17th November 1997
[2] Paragraph 55

The defendant had commissioned the investigation in connection with the pending litigation. The defendant disclosed the Report to the claimants in 2003.

[15] A useful overview of the contents of the Report, comprising 137 pages and 22 schedules, is contained at the beginning of the report:

> "1.1 Background and Overview
>
> "KPMG Forensic Inc. ("KPMG") was retained by East Caribbean Flour Mills Limited ("ECFML") to investigate various transactions and issues involving Mr. O.A. Boyea, former managing director of ECFML and Mr. Hudson Williams, former financial controller of ECFML.
>
> "Our investigation included the review of various transactions occurring primarily between 1990 and 1997. In particular, we reviewed relevant records and documentation, and conducted interviews, relating to ECFML's investments in and advances to a number of companies including Caricom Rice Mills Limited ("Caricom") and Montserrat Mills Limited ("MML") and relating to a number of unusual or irregular payments made directly or indirectly to Mr. Boyea by Russell Martin Limited ("RML") (a European sales agent of ECFML), Antillean Investments Limited ("Antillean") (a 10% shareholder of MML) and others.
>
> "Our investigations indicated that, as a result of Mr. Boyea's direct involvement and with the knowledge and/or involvement of Mr. Williams, ECFML financed the purchase in 1990, and subsequent refurbishment of, by Caricom of a rice mill in Guyana and the construction and start-up of MML commencing in 1994. We found no evidence that either the use of ECFML's monies in connection with Caricom or MML, or Mr. Boyea's claimed or actual shareholding interest in Caricom and MML, were approved by ECFML's board of directors.
>
> "Our investigations also found evidence of an arrangement, undisclosed to ECFML's board of directors, to allow Mr. Boyea to profit personally (directly or indirectly) from the sale of rice by MML through RML and evidence of payments, also undisclosed to ECFML's board of directors, made directly or indirectly to Mr. Boyea from RML (and a related company) and from Antillean. These undisclosed payments resulted in substantial personal benefits to or for Mr. Boyea. We also identified a number of other unusual and/or irregular transactions that resulted in direct or indirect personal benefits to Mr. Boyea and Mr. Williams."

[16] The Table of Contents shows the Report is divided into sections that are numbered and headed. Under each heading appear specific items of payments, accounting, invoicing and comments. The relevant headings are set out below. To indicate the detail of the Report I have included the items that are listed under the first substantive heading, No. 4, but so as to contain the length of this judgment, I have not done so in respect of the other headings.

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The objections and ruling

[17] Counsel for the claimants objected, among other things, to the admission of the Report, which formed part of the witness statement of Mr. McAuley, and to reliance on supporting documents. Among the grounds of objections on which counsel for the claimant relied were hearsay, irrelevant, and that matters in certain documents were not in issue on the pleadings.

[18] The judge admitted the Report and the witness statement of Mr. McAuley. She excised 21 statements purportedly made by persons other than Mr. McAuley from the Report as being hearsay. She excised a number of documents from the Report because they were hearsay. On the ground that they were irrelevant she excised 15 matters from the Report. The judge also ruled that matters in certain documents "were not included in the pleadings and therefore the documents cannot be used in support of those allegations."

Delay

[19] In resisting the claimants' objections in the court below, counsel for the defendant took the point that the objections in relation to the Report were being made far too late. The Report had been served on the claimants since 23 September 2003. The objections were being made almost 3 years later. The judge agreed with the submission that "the application is made very late" but she decided the issue on the basis that "if an expert report contains hearsay or irrelevant matter the fact that the application to exclude such matters is late should not preclude the Court from excluding them. The same applies to documents that are inadmissible because they are irrelevant."[3] Further, the judge ruled, Part 11.3 (2) of CPR 2000 gives the court discretion to hear an application at trial that should have been made earlier. That rule states:

> "If an application is made which could have been dealt with at case management conference or at pre-trial review the court must order the applicant to pay the costs of the application unless there are special circumstances."

The judge, therefore, decided she would not dismiss the objections on the ground of delay but she ruled that the claimants must pay the costs of the application.

[3] Ruling, paragraph [13]

Prejudice

[20] Before this court, Mr. di Mambro, counsel for the defendant urged that in exercising her discretion whether or not to allow the late application to exclude evidence the judge wrongly failed to take into account the prejudice caused to the defendant's case and its conduct of its case by hearing the claimant's application at that stage. Thereby, the defendant contended, the judge failed to take into account and give effect to the overriding objective as mandated by rule 1.1 and 1.2 of CPR 2000.

[21] In support of those contentions the defendant argued that because no objection was made to the Report at the pre-trial or case management stage the defendant prepared its case on the basis, as it was led to believe, that there was no objection to the report or its contents. The subsequent objection by the claimants to the admission of the contents of the Report was "trial by ambush" that Alleyne C.J. (Ag.) (as he now is) criticised in St. Kitts Development Limited v. Golfview Development Limited et al.[4] Further, counsel for the defendant argued, the parties are required to cooperate by revealing to each other procedural points that they intend to take. The seriousness of this obligation is shown in Hertsmere Primary Care Trust v Estate of Balasumbramamium Rabindra-Anandh[5] in which the English Court of Appeal rejected a technical objection that a party had indicated to the other side it would take but which the objector had refused to identify beforehand, on the ground that parties should not be allowed to reap any benefit from non-cooperation in breach of the overriding objective.

[22] Counsel for the defendant developed the argument that the court did not take into account the prejudice caused to the defendant by the late objections by arguing that had objections been taken to any aspect of the report at the pre-trial stage the defendant could have filed additional witness statements. An award of costs in

[4] St. Christopher & Nevis Civil Appeal No. 24 of 2003 (judgment delivered June 20th 2007
[5] [2005] 3 All E R 274 Ch

favour of the defendant will not compensate for the prejudice suffered, counsel argued and the court should hold that the claimants must be taken to have waived any objection to the admissibility of the contents of the Report regardless of whether or not those contents were relevant to the issues or were admissible in evidence under the Evidence Act.

[23] In support of this last point counsel for the defendant relied on the observations in Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd[6] to submit that once it is established that it would be unconscionable for the claimants to violate the representation they had made, by their conduct over almost 3 years, that they would not be taking any objection to the contents of the Report, the court should hold the claimants to that representation. The judge in that case expressed the view that the more recent cases on estoppel by encouragement indicate a much broader approach to the determination whether it would be unconscionable to allow a party to withdraw from a representation on which another has acted to his detriment than inquiring whether the circumstances can be fitted into the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.[7]

Proper practice

[24] Drawing on his experience as one of the first Masters and then as a judge of our High Court, Rawlins J.A. indicated to counsel during the course of argument that regrettably there was no consistent practice across the jurisdiction of settling before trial what documents would be admissible without objection and what documents would be challenged as inadmissible. His Lordship emphasized the case management value and therefore the great desirability of such a practice. The interruption and adjournment of the trial for over a year now stand as witnesses to the consequence of failing to conform to that practice.

[6] [1982] 2 QB 133
[7] At 151-152

[25] Both sides are to blame for the fact that proper practice was not followed in this case. Even without the aegis of a case management conference or pre-trial review, in a case with so many documents counsel should have settled in advance of the trial what documents would and would not be objected to. (It was perfectly open to and would have been entirely appropriate and sensible for the lawyers for the defendant, not having received any indication from the lawyers for the claimants, to write to them to say we need to know which of our documents you will be objecting to, so please let us know before a stated date what is the position.) I would need to be persuaded that either side could have thought that there would be no objection to documents and, further, relied on that assumption.

How the objections came to be taken

[26] In responding to the submissions on delay and the allegations of trial by ambush and that it was an unfortunate way to conduct litigation, Dr. Archibald Q.C., who argued the factual aspect of this ground for the claimants, referred to the transcripts of the proceedings to show that it was not true, as Mr. di Mambro, who did not appear in the court below, thought, that counsel for the claimants came to the trial armed with their previously crafted objections, ready to spring a surprise on the other side. Dr. Archibald handed up copies of the handwritten document that he had presented to the judge, on the day following the taking of the objection, identifying the material to which counsel for the claimants objected and the grounds for objecting. Dr. Archibald stated he and the other lawyers for the claimants worked all through the night to produce that document by sifting through all the material to identify all that they would be objecting to.

[27] The transcript of the proceedings on the day the objection was taken[8] discloses that it was the judge who rightly thought it would be sensible to have all objections dealt with at once, and that Sir Henry Forde Q.C., lead counsel for the defendant

[8] Transcript of Proceedings, Tuesday June 20th, 2006, 2:10 p.m. to 3:53 p.m., at pages 9 to 11

in the court below, with his usual fairness recognized that both sides were to blame for not clearing a path through the forest of documents. The following extract[9] provides a good sense of the context in which the judge exercised her discretion to permit the objections to be made at the stage that she did:

> "SIR HENRY FORDE, Q.C.: My Lady, with your permission my learned friend [referring to other counsel for the defendant] is going to take the specific reply to specific matters raised by my learned friend. But, My Lady, you have raised a very fundamental question on how this case is going to be conducted. There are hundreds, I will say thousands of documents in this case. It is most unfortunate that we have not been able to sit down and read the bundle.
>
> My Lady, it must be almost impossible to conduct a case in which there are this number of documents on which there's not an agreement on one document. And, My Lady, if my learned friends intend to object every time I come to a document, it will mean that we will get no further in several weeks. I must really confess from my years of experience that is what appears to me here. Because I would have to refer to the documents from time to time.
>
> Mr. SYDNEY BENNETT Q.C.: My Lady, I am entirely in agreement with my learned friend. I think he's right. I don't know if it would be a problem if we could sit down and agree with (sic) documents?"

[28] The transcript shows that thereafter counsel accepted they would "agree to disagree on some documents and identify them"[10] and present arguments the following morning. The judge noted this would put an end to "this constant argument as to what documents both sides have objections to in terms of admissibility." [11] Counsel's words following the judge's observation provide general guidance by highlighting the harm it does when counsel do not take the steps within their power to prepare a case for trial:

> SIR HENRY FORDE Q.C.: ...My Lady, it's the first case for many years, particularly, under the new system of CPR that I have found that there is no agreement on basic documents in the trial. And, My Lady, with respect, both --- lawyers must take the blame in here because the Court's order was for us to get together, and we did write about it and, My Lady, it places a strain on me and then on my learned friends as well because we

[9] Pages 12 to 13
[10] Page 14, lines 7 -14
[11] Page 14, line 18

> will have to take objections from time to time. But what is even more serious about it, it [places] an unreasonable strain on the Court, and it is for that reason that I think we either have to agree and take the preliminary points that my learned friends are taking because Your Ladyship will find it difficult as I find it difficult to listen to an objection to be cross-examined and then to come back and get the rhythm going. And my learned friends will find it even worse because we do have a large number of witnesses as compared with the other side. And it seems to me that if one takes the overriding principles into account that we have to deal with the problem as soon as possible.

[29] Seen in that factual context to which Dr. Archibald very helpfully directed the court there is simply no basis, in my view, for challenging the alleged exercise of discretion by the judge to entertain the objections at the stage they were made. It is interesting to see the indication in the transcript that counsel for the defendant had passed up to the judge a short list of documents which they intended either to object to or rely on – the statement of intent is truncated.[12] Whichever it was, passing up a list at that stage does not seem very different, in approach, to delaying objecting until after the trial had started.

[30] It is unnecessary to consider the submissions on this point made by Mr. Bennett Q.C., who made the main presentation for the claimants, except to say that they raise the question whether a ruling on the admissibility of evidence on the ground of hearsay or irrelevance involves the exercise of any discretion. I would leave that question open, as well as the question whether there is any justification for counsel for the defendant to characterise the taking of the objections to the admissibility of evidence as the making of an application (that counsel for the defendant said ought to have been made at a case management conference.) I do not accept, unargued, that taking an objection to the admissibility of evidence amounts to making an application. However, I leave those questions aside and, remaining with the premise underlying this ground of appeal, dismiss it on the basis that the judge made a perfectly sound decision in relation to delay.

[12] At page 10

Relevance

[31] Based on her analysis of the contents of the Defence and Counterclaim the judge ruled that certain allegations that are made in the Report and the contents of certain documents were not relevant. The matters that the judge ruled irrelevant were the following:[13]

(1) Payment to Boyea by Mr. Kingsley Thomas

(2) Payment of Commission by Antillean to Boyea

(3) Payment of £15,000 from Russell Martin Ltd in December 1994.

(4) Any allegations relating to Tropical Produce Ltd or its bank account, and in particular any allegation that W.G. Russell made payments to Tropical Produce Ltd or any allegations relating to payment to Boyea of money originating in account of Tropical Produce Ltd at the Bank of Butterfield in the Cayman Island.

(5) Any allegation of payments to Boyea by W.G. Russell

(6) Any claim or allegation relating to payment by Leroy Warren

(7) Any allegation relating to the Organization of Rural Development

(8) Any allegation relating to East Caribbean Maricultures Ltd.

(9) Any allegation that Williams or Boyea placed ECFML in breach of foreign exchange regulations of Saint Vincent and the Grenadines

(10) Any allegation of impropriety in connection with Boyea's transitional ownership of shares in Euro Mills.

(11) Matters concerning Mr. Boyea's dealing with W.G. Russell.

(12) Allegations that Mr. Boyea's interest in Euro Mills was 'hidden' or otherwise improper.

(13) Allegations concerning payment by W.G. Russell of US$2,293 into the account of Tropical Produce Ltd.

(14) Allegations concerning payment of $15,000 by Kingsley Thomas to Tropical Produce Ltd.

[13] Ruling, paragraph [103] (5) (1) to (15)

(15) Allegations concerning receipt by Mr. Boyea of commissions from Antillean.

[32] The documents identified as Tabs 31 and 33, which the judge ruled could not be used to support the allegations that they allegedly documented, were excluded on the basis that the matters they raised were not pleaded. The documents relate to sums of money deposited by Russell Martin to the bank account of Tropical Produce. The judge ruled the defendant could not use these documents in support of an allegation of improper receipt of funds; as one gathers, because these particular receipts were not pleaded. The judge did agree that the defendant could use the documents to cross-examine Mr. Boyea since Mr. Boyea mentioned these matters in his witness statement.[14]

The judge's analysis of the pleadings

[33] Parts 8.7 (1) and 10.7 (1) of CPR 2000 provided the starting point for the judge's determination of what were the issues between the parties and, therefore, what was relevant. The judge noted the obligation on both a claimant and a defendant to set out all the facts on which they wish to rely.[15] In relation to a claimant the provision reads:

> "8.7 (1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies."

In relation to a defendant the comparable provision states:

> "10.7 (1) The defendant may not rely on any allegation or factual which is not set out in the defence, but which could have been set out there, unless the court gives permission."

[34] The judge quoted passages from the judgments of Lord Woolf in McPhilemy v Times Newspapers Ltd[16] and Gordon JA in Kenneth Harris v Sarah Gerald[17]

[14] Ruling, paragraph [101]
[15] [Judgment, paragraph 75]
[16] [1999] 3 All ER 775
[17] Montserrat Civil Appeal No. 3 of 2003

and referred to the approval given to Lord Woolf's statement by the House of Lords in Three Rivers District Council and others v Bank of England (No. 3)[18] to conclude that she agreed with the submissions for the claimants that the role of the witness statements and disclosed documents is to provide details relating to issues that arise from the pleadings. "They do not establish issues between the parties. They provide the details and the evidence that the party has to support the allegations contained in the pleadings."[19]

[35] Next the judge turned to the question whether the matters complained of are matters that relate to issues which arise on the pleadings and are in dispute between the parties or whether they are new allegations. The judge noted that the allegations made were of improper conduct, dishonesty, bad faith and breach of fiduciary duty. She referred[20] to Lord Hope's statement in Three Rivers (No. 3) of the "greater need for particulars to be given which explain the basis for the allegation"[21] of serious misconduct.

[36] At paragraph [85] of her Ruling the judge states her conclusion as to what was required of the defendant. On the basis of that conclusion the judge determined the question of what needed to be contained in the pleading. She stated:

> "[85] It is quite clear from the provisions of CPR 2000 Part 8.7 that a statement of claim must contain all the facts relied on by the Claimant. The same applies to a counterclaim. Pursuant to Part 10.5 … the defence must contain all the facts on which a defendant seeks to rely to defend the claim. Failure to state the facts would result in the defendant not being able to rely on them – Part 10.7. Also the House of Lords in the Three Rivers case confirmed the well settled principle that allegations of dishonesty, improper conduct, fraud, misconduct must be pleaded."
>
> .

[37] The judge then examined the defendant's pleading to see whether the matters complained of were included in the paragraphs that counsel for the defendant said

[18] [2001] 2 All ER 513 at paragraph 49
[19] Ruling, paragraph [78]
[20] Ruling, paragraph [84]
[21] At paragraph 51

made these matters relevant. After analysing the nine paragraphs on which counsel apparently relied the judge concluded:

> "[96] No mention is made in any of the paragraphs referred to above of any of the allegations complained of. I find that in view of CPR 2000 Part 8.7, 10.5 and 10.7 and the cases of McPhilemy, Three Rivers case and Kenneth Harris the Defendant was required to plead the matters complained of in the defence and counterclaim. The Defendant has not done so and as a consequence cannot rely on them at trial. The Defendant cannot adduce documents to prove them at the trial. To be able to rely on these allegations the Defendant was required to amend its pleadings. In fact the Defendant sought to do so and its application to amend was refused, see decision of d"Auvergne JA (Ag.) in Civil Appeal No. 3 of 2004. The defendant not having pleaded these matters they are not issues between the parties to be determined by the Court. They are irrelevant. These matters being irrelevant they cannot be included in the expert report. The expert report must be restricted to matters in issue before the Court."

Pleadings

[38] Mr. di Mambro's submissions, at their core, contended that the judge's decision failed to distinguish between a fact and particulars of that fact. He submitted there was nothing wrong with the defendant using a witness statement to flesh out or particularize what is said in the pleadings. On that view, rules 8.7 and 10.5 which require that a pleading must contain "all the facts" on which a party relies, must not be taken too literally. The opposing view of Mr. Bennett was that a party was obliged to plead each fact or allegation on which he relied. Mr. Bennett submitted that the argument of the defendant really amounted to saying, if we make an allegation of dishonesty that serves as notice that other allegations of dishonesty will come.

[39] Counsel on both sides seemed to agree that the authorities on which they respectively relied went in different directions, with counsel for the appellant describing the approach adopted in one recent authority as "a reversion to the Victorian approach". That authority, on which the claimants relied, and on which the judge placed some emphasis, was the House of Lords case of Three Rivers

District Council v Bank of England (No. 3)[22] which contained the following statement by Lord Hope of Craighead:[23]

> "51. On the other hand it is clear that as a general rule; the more serious the allegation of misconduct, the greater is the need for particulars to be given which explains the basis for the allegations. This is especially so where the allegation being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud."

Lord Hope went on to say:[24]

> "55. … As the Earl of Halsbury LC said in Bullivant v Attorney General for Victoria [1901] AC 196 at 202 where it is intended that there be an allegation that a fraud has been committed, you must allege it and you must prove it. We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty it is not open to the Court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Miller LJ said in Armitage v Nurse (1997) 2 AER p. 705 at 715 "it is not necessary to use the word "fraud" or "dishonesty if the facts which make the conduct fraudulent are pleaded but this will not do if language used is equivocal (see Belmont Finance Corporation Ltd v Williams Furniture Limited (1979) 1 AER p 118 at 311). In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, the allegation of fraud, dishonesty or bad faith must be supported by particulars: The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself must be struck out."

Particulars

[40] I do not think proper attention has been paid to the context in which Lord Hope made this and the other statements he made relative to the contents of pleadings. The issue before His Lordship was whether the facts pleaded by the claimants were capable of meeting the requirements of the tort of misfeasance in public

[22] [2001] UKHL 16
[23] Paragraph 51
[24] Paragraph 55

office that was alleged against the Bank of England.[25] The High Court and a majority of the Court of Appeal had decided that a fresh pleading headed "New draft particulars of claim" did not disclose a reasonable cause of action. Lord Hope stated that the question he was considering was the adequacy of the pleadings and this raised the issue of the sufficiency of the particulars.[26] His Lordship stated that the Bank "makes much of the fact that the claimants have received numerous warnings of the need for particulars to be given of the facts relied on in support of their allegations and of the many opportunities that they have been given to amend their statement of claim." The House was being asked, he said, to infer from the absence of particulars, and in the light of the available evidence, that the claimants were not able to make good their allegations.

[41] In response to this he said:

> "49. In my judgment a balance must be struck between the need for fair notice to be given on the one hand and excessive demand for detail on the other. In British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 72 BLR 26, 33-34 Saville LJ said:
>
> > "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is being made by the other and is able properly to prepare to deal with it."
>
> 50. These observations were made under the old rules. But the same general approach to pleadings under the CPR was indicated by Lord Woolf MR in McPhilemy v Times Newspapers Ltd [1993] 3 All ER 775, 792J-793A:
>
> > "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that

[25] Paragraph 14
[26] Paragraph 47

> party's witness statement, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."

[42] It is to be noted that it was after Lord Hope approved the statement by Lord Woolf MR, that the important requirement was that pleadings should make clear the general nature of the case of the pleader, that he went on to make the statement reproduced earlier in this judgment, at [41]. That statement, Lord Hope's paragraph 55, draws a distinction between making an allegation of fraud, dishonesty or bad faith and the particulars of the allegation that must be given. His Lordship stated in the paragraph that followed that in the case before him "it is clear beyond a peradventure that misfeasance in public office is being alleged."[27] Throughout the remainder of His Lordship's consideration of the pleading issue, which went on for a further fourteen paragraphs, the constant theme was the sufficiency of the particulars of the allegation. The distinction between an allegation and particulars of an allegation could not have been clearer.

Witness statements

[43] Lord Hope's reproduction and approval of the exposition by Lord Woolf MR in McPhilemy v Times Newspapers Ltd[28] on the reduced need for extensive pleadings now that witness statements are required to be exchanged, should be seen as a clear statement that there is no difference in their Lordships' views on the role and requirements of pleadings. The position, as gathered from the observations of both their Lordships, is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The "pleadings

[27] Paragraph 56
[28] [1999] 3 All ER 775

should make clear the general nature of the case," in Lord Woolf's words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand to mean pleadings with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case.

[44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings. The issue in the Three Rivers case was the need to give adequate particulars, not the form or document in which they must be given. In deciding that it was only the pleadings that she should look at to decide what were the issues between the parties the judge erred, in my respectful view. If particulars were given, for instance, in other witness statements the judge was obliged to look at these witness statements to see what were the issues between the parties. It follows, in my view, that once the material in Mr. McAuley's witness statement and Report could properly be regarded as particulars of allegations already made in the pleadings such material was relevant and, therefore, admissible. This proposition applies equally to the contents of the documents identified as Tabs 31 and 33.

No change of case

[45] Before considering whether the challenged material were particulars of existing allegations or were new allegations I consider the related objection by the claimants that the defendant was not permitted to change its statement of case after the first case management conference unless it obtained permission. Rule 20.1 (3), which so provides, further states the court may not give permission unless the party wishing to make the change can satisfy the court that the change is necessary because of some change in the circumstances which became known

after the date of the first case management conference. In this case, we are reminded, the Court of Appeal refused permission. I do not know the specifics of the proposed amendments to the statement of defence that were refused and I would like to be clear that I do not intend to allow any change of case to be made. However, I am firmly of the view that additional instances or particulars of a sufficiently made allegation do not constitute a change in the statement of case.

[46] If a party alleges misconduct of a certain nature, say misappropriating funds by making false entries in an accounting record, and gives 5 instances of false entries, and a closer look at documents reveals a 6th false entry I see no reason why the party should be prevented from giving particulars of it in his witness statement, provided the requirements of fairness have been satisfied and there has been no abuse of process or other disentitling conduct. I emphasize the distinction between changing a statement of case and supplying particulars to say I expect the courts will be keen to ensure that the one does not masquerade as the other. Decisions will be made on a case-by-case basis.

[47] In this case the fact that as long ago as 3 years before the objection was taken the defendant provided the claimant with the material that it seeks to adduce as further instances or particulars of the alleged misconduct satisfies me, if the material is really particulars and not new allegations or a change of case, that there would be no unfairness in permitting this evidence to be admitted. Such evidence would be relevant to the misconduct alleged in the defence and counterclaim. It is therefore necessary to examine the excluded material to see if it truly consists of particulars of allegations already made or is in reality new allegations.

Analysis of the excluded material

[48] Mr. Bennett Q.C. submitted on behalf of the claimants that an inspection of the Defence and Counterclaim and indeed of the Statement of Facts and Issues included in the Case Summary filed by the defendant revealed no mention of any

of the matters listed in paragraph [31], above (the new instances). Counsel submitted that the defendant (properly) made certain specific allegations in the pleadings and that, in contrast, in paragraphs 4, 52, 53, 55 and 56 of the Defence and Counterclaim the defendant set out "general and unparticularised allegations of dishonesty and breach of fiduciary duty amounting to misconduct."

[49] After quoting Lord Hope on the requirement to be clear in pleading fraud counsel argued that

> "the matters which the defendant describes as *"issues arising on the pleadings"* are in reality lists of the general allegations/causes of action that it intends to pursue at trial. The fact is that the Appellant/Defendant is not required to list causes of action in its Defense and Counterclaim: it is required by CPR 8.7 (1) and CPR 10.5 (1) to set out in its Defense and Counterclaim all the facts on which it relies to dispute the claim and all the facts on which it relies to establish its Counterclaim. If the Defense and Counterclaim sets out specific facts in support of specific allegations, the documents and witness statements may supply detail in respect of those facts. What the Appellant seeks to do is to set out various general allegations and causes of action in its Defense and Counterclaim and to be entitled subsequently to supply the facts relevant to those allegations and causes of action in documents and witness statements filed after the close of pleadings. This is impermissible."

[50] Mr. Bennett's concluding submission on this point may be taken from his written submissions. He submitted:[29]

> "The purpose of pleadings is not to present allegations of wrongdoing in sufficiently wide terms as to permit the assertion of almost any fact at trial. Such a practice would have the effect of obscuring from the opposing party, rather than revealing to him the case that he has to meet, an objective which the Appellant acknowledges to be the primary purpose of pleadings. The purpose of a statement of case is to present the opposite party with a claim stated in sufficient detail to allow that party to understand the factual basis of the allegations being made against him thereby enabling him to respond to the claim by admitting or denying the specific facts and allegations on which that claim based. It is also required to clarify for the Court the facts and assertions underpinning the dispute thereby identifying the issues to be decided by the Court. The submissions made by the Appellant in this regard are antithetical to the purpose of a system of pleadings."

[29] At paragraph 12.6 of the skeleton argument of the respondent's counsel

[51] I think Mr. Bennett's is quite right in his statement of the purpose of pleadings. I do not agree, however, that the pleadings in this case "present allegations of wrongdoing in sufficiently wide terms as to permit the assertion of almost any fact at trial." To use Lord Hope's expression in the Three Rivers case, "it is clear beyond a peradventure" in this case that the defendant was relying on the allegation it stated in paragraph 4 of its Defence and Counterclaim, that Mr. Boyea

> "engaged in a course of conduct over a period of many years designed to misappropriate for his own benefit and the benefit of third parties significant corporate assets and funds and business opportunities belonging to the defendant, repeatedly violated his fiduciary duties to the defendant, participated in and encouraged acts of gross insubordination by himself and Williams and consistently and repeatedly violated the express and implied terms of this (sic) written employment agreement …" (Emphasis added).

Allegation of secret payments

[52] As I have tried to convey in the section of this judgment headed "The defendant's case", beginning at paragraph [5] above, the defendant gave a clearly presented summary of the particulars of the alleged misconduct. The general allegations of misconduct, of misappropriating corporate assets, business opportunities and funds were substantiated by particulars that included receiving secret payments of monies that the defendant contends rightfully belong to the defendant. It was a clear, dominant and repeated allegation by the defendant that Mr. Boyea received secret payments from a number of sources and that all of these secret payments were received in breach of his fiduciary duty and contractual obligations, and that they were payments of monies that belonged, by right, to the defendant. The defendant asserted in its counterclaim "a constructive trust over all bank accounts … into which any of these secret profits, secret commissions or unauthorized payments …" were deposited. It also asked for a tracing order to follow the trail of any unauthorized receipt of monies.[30]

[30] Paragraphs 55 and 56 of the Defence and Counterclaim

[53] It would be idle to suggest that the defendant's claim to be entitled to all secret payments it alleged the claimant improperly received was not intended to cover just what it said: all secret payments. If, therefore, at the time of exchanging witness statements the defendant had discovered alleged further instances of receipt of secret payments I can see no other sensible way of treating these newly discovered instances but as further particulars of the central allegation of the receipt of secret payments. Substantially all the matters the judge ruled irrelevant in her Ruling at paragraph 103, sub-paragraph (5) (1) to (15) and sub-paragraph (6) fall within and are relevant to the allegation of receipt of secret payments. It does not matter that in some instances the material relates indirectly to secret payments, as in the case of Mr. Boyea's alleged ownership of shares in Euro Mills which allegedly owned shares in MML. I would similarly regard as relevant the particularisation of the alleged breach of foreign exchange regulations, because this exposure was allegedly caused by the receipt of an improper payment by Mr. Boyea and his allegedly using the defendant's Canadian bank account to obtain payment abroad, in breach of exchange regulations.

[54] Notwithstanding the breadth of the submissions on the purpose of pleadings there has been no suggestion in this case that the Defence and Counterclaim in any way failed to satisfy that purpose. The submission was far narrower, in reality. The submission was that the matters excluded as irrelevant were irrelevant because they were not mentioned in the pleadings. To recapitulate, the true position, derived from the judgments of both Lord Woolf and Lord Hope upon a consideration of the Three Rivers case, is that particulars may be given in witness statements. Therefore it does not matter that particulars (not new allegations) are not contained in the statement of case but are contained in the witness statements. Accordingly I would allow the appeal against the exclusion, as irrelevant, of the material detailed as items (5) (1) to (15) and item (6) in paragraph [103] of the judgment.

Hearsay in documents

[55] The judge ruled that certain statements in the Report and certain documents on which those statements were based, specified in paragraph [103], sub-paragraphs (3) (a) to (u) and (4) of the judgment amounted to hearsay evidence, were inadmissible and were excised from the Report. The statements and documents are based on tape recordings, transcripts of those recordings, and notes made of interviews carried out with third parties by members of Mr. McAuley's investigative team and not by Mr. McAuley. The appellant accepts that Mr. McAuley did not personally hear these statements (with one exception). It was entirely or almost entirely on this basis that the claimants' attorneys objected that these statements were inadmissible hearsay evidence

[56] The appellant submitted that the judge decided to exclude the material on the basis that it was hearsay evidence and erred in failing to consider, given the relevant provisions of the Evidence Act[31], whether the material was admissible or inadmissible hearsay evidence. It is common ground that section 47 of the Act now provides for the admission of hearsay evidence, "whether [made] orally or in a document..."[32] Because the material that was challenged is all documentary the focus will be on the law relating to such material while keeping in mind the other statutory provisions on hearsay statements.

[57] Section 2 of the Act defines "document" to include "(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable, with or without aid of some other equipment, of being reproduced therefrom…"Counsel for the appellant submitted that the tape recordings on which the appellant sought to rely were documents. So too, counsel submitted, were the transcripts of those recordings and interview notes. They were all admissible, counsel submitted.

[31] Evidence Act of St. Vincent Cap. 158
[32] s 47 (1)

[58] Counsel for the appellant argued that in Marks and Spencer plc v Granada TV Ltd and another[33] the English Court of Appeal considered a case where statements were taken from illiterate witnesses by an amanuensis, who then read over what he had recorded after which the witness when satisfied made a mark or signature on the document. These documents were then translated from Arabic into English. Lord Bingham CJ concluded that the translations were "quite plainly a statement made in a document." He further stated that "whether a statement is made in a document depends on the intention of the maker of the statement..."

[59] In the instant case, the appellant submitted, it is clear that the intention of Mr. McAuley's team members was to make a written record of the notes of the interviews conducted by them with a view to these notes forming a written record or statement of what was said to them.

[60] Section 49 of the Act deals specifically with the admission of documentary hearsay evidence. It provides

> "49 (1) "Without prejudice to section 50, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if that document is, or forms part of, a record [compiled by a person acting under a duty from information][34] which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty."
>
> …

[33] [1998] 2 All ER (D) 40

[34] The words in square brackets are contained in the equivalent section 4 (1) of the English Civil Evidence Act 1968 but are omitted from the Act of St. Vincent and the Grenadines. It may be that this omission was a printing error because the provision, without the missing words or some of them, does not make sense. As the section is printed, a statement in a document shall be admissible as evidence if that document is, or forms part of, "a record which was supplied by a person" who had personal knowledge. As printed, the section speaks to the record having been supplied. As appears from the rest of the provision, the section really intends to speak to a scenario where a person is the compiler of a record and the compiler obtains information in the form of a statement in a document from a knowledgeable person. What is supplied is the information, not the record. The compiler compiles the record.

> "49(3) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him."

[61] The appellant referred the court to a discussion on the comparable English provision to section 49 in Phipson on Evidence 14th edition at pages 589 to 592 inclusive. It was submitted that this section has been interpreted very widely and Phipson suggests that this section should permit the production of notes taken of meetings of shareholders board meeting, meetings of lawyers negotiating about cases and meetings of businessmen for commercial purposes; see paragraph 22/11 at page 590. Accordingly it was submitted the recordings made and the notes taken by the KPMG employees of interviews conducted were admissible documentary evidence.

[62] In summary, counsel for the appellant submitted, the information contained in the recordings, transcripts and notes are statements contained in documents that are or form part of a record, the compilers were under a duty to their employer KPMG and to the appellant to record this information, and the persons interviewed might reasonably be supposed to have personal knowledge of the matters dealt with in that information. These documents constituted a record of what was said in these interviews.

[63] It was therefore submitted that the tape recordings, transcripts and notes which the judge ruled to be inadmissible hearsay, were admissible under Section 49 of the Act, being documents forming part of a record.

A statement made in a document

[64] In order to render hearsay evidence admissible on the basis of the provisions of the Act, counsel for the claimants submitted, the appellant needed to bring evidence that the statements were made "in a document". For the purpose of this

provision of the Evidence Act a distinction must be made between a statement made in a document and a statement contained in a document, counsel submitted, and referred to Apostolis Konstantine Ventouris v Trevor Rex Mountain ("The Italian Express")[35] where in relation to the "identically" worded provision in the English Civil Evidence Act 1968 Balcombe LJ observed that:

> "...It is to be noted that the Act appears to draw a clear distinction between statements made in a document and those contained in a document...".

[65] In The Italian Express Lord Donaldson pronounced upon this question as follows:

> "The answer to this question must, I think, depend upon what the maker of the statement thought he was doing or intended to do. The statute looks at the matter from the point of view of the maker of the statement, not from that of his audience. It should be, and is, his decision whether to make the statement orally, to take up a pen and write it or to speak it to or into a recording machine. In some circumstances, he can elect simultaneously both to make the statement orally and in a document. Judges hand down written judgments which, in so far as they are evidence of fact, are quite clearly statements made in a document. Alternatively, knowing full well that their remarks are being tape recorded and intending that they should be, they can give an oral judgment. In such circumstances they are making statements both orally and in a document. They intend both to speak the words to a live audience and to speak them to a recording machine. If, in the further alternative, there are no recording facilities or they are switched off and the Judge gives an oral judgment, he will be making a statement orally and not in a document. That Counsel or the solicitor may, and indeed should, make a note of his Judgment is nothing to the point. That is their note or record, not a statement made in a document by the Judge as the maker of the statement.
>
> I assume that the interlocutors, other than GDV, were wholly unaware that their statements were being taped or, if they may have suspected it, did not intend or accept this situation, but could do nothing about it. It follows that the tape was GDV's record of the conversations in much the same way as is the note of Counsel or of a solicitor. So far as the other interlocutors were concerned, they were intending to make and were making statements orally and not in a document."

[66] Counsel for the claimants submitted that in the case of statements made in telephone interviews for which transcripts are provided, what must be shown is not merely that the maker of the statement intended to convey information orally to the

[35] [1992] 2 Lloyds LR 216 per Balcombe L J at p.234

person conducting the interview but that he or she intended to create a document - either in writing or on tape or otherwise - by means of which that information was intended to be conveyed. In the instant case there is not even an indication that the interviewees were aware of the recording of their conversation much less that they intended by means of such, it was submitted.

[67] The same position obtains in relation to interviews at which notes were taken, counsel submitted, there is nothing from which a court may draw the inference that the interview notes were "*a statement...made in a document by...*" the interviewee. The inference to be drawn from the mere fact that notes were taken is that the interviewee intended to convey oral information to the interviewer and that the interviewer took notes for his own purposes. In the case of Marks and Spencer Plc v Granada TV Ltd & Another[36] cited by the Appellant the interviewees' intention to create the relevant documents could be inferred from the fact that they had appended their marks or signatures to the documents to verify and adopt the same as their own.

[68] The claimants' arguments continued by again referring to the judgment of Balcombe L J in "The Italian Express" where he said:[37]"

> "If the maker of the statement signs the document then he clearly adopts the document as his statement. The difficulty arises when the "document" takes the form of a medium of communication within the extended definition of s.10, e.g. a film or, as in the present case, a tape. In such a case it is unlikely, although not impossible, that the maker of the statement will adopt the tape or film as his statement in the same way as if he had signed a document. In such a case it will be necessary to consider what was his intention: was he speaking "for the record" or not?"

[69] No evidence has been brought as to the intention of the interviewer in making the statements which were recorded in interview notes, the claimants submitted. There is no evidence that any such interviewee intended to make any statement by means of a tape recording, still less that he or she intended that any such tape

[36] [1998] 2 All ER (D) 40
[37] supra, at 234

recording should be transcribed. Further, the only evidence as to the circumstances in which such statement came to be recorded in interview notes, tape recordings, or transcripts of such recordings would have to be given by the witness McAuley who does not purport to have first hand knowledge of those circumstances.

[70] In the premises, counsel for the claimants submitted, the appellant has neither shown nor attempted to show that any of the statements sought to be introduced in evidence and contained in tape recordings or interview notes were made in circumstances from which it could be shown or inferred that the same were "... *statements ... made in documents...*" within the contemplation of s.47 (1) or (4) of the Evidence Act.

[71] I find the submissions of the claimants convincing and would hold that the relevant statements were not shown to be statements made in a document.

Documents forming a record or part of a record

[72] Counsel for the claimants further submitted that in order to render the statements contained in the tapes and interview notes admissible in evidence under s.49 (1) as documents forming part of a record the appellant must show:

(a) That the statements are contained in a document or documents

(b) That the document or documents in which the statements are contained form part of a record

(c) That the record was supplied to the person compiling the same either directly by a person who had, or may be reasonably be supposed to have had personal knowledge of the matters dealt with in the information, or indirectly by such a person through intermediaries acting under a duty.

Counsel for the claimants expanded their submissions as set out in the following paragraphs which are a wholesale reproduction of counsel's arguments.

[73] Assuming that the tapes and interview notes are 'documents' within the meaning of s.2 of the Evidence Act, it was submitted that such documents do not form part of a 'record' within the meaning contemplated by Section 49(1) of the Evidence Act. A record for the purpose of the Evidence Act is the documentation in permanent form of the history of some event made contemporaneously with the occurrence of that event using information or materials supplied by persons having knowledge of the facts as they occurred. Such documentation is generally made with a view to preserving the memory of the event so that it might be available to others on another day: see generally R v Tirado.[38] I note that the decision on this point was expressly stated not to be a final decision although it does not appear to have been disapproved.

[74] Counsel submitted that the view expressed in that last case was confirmed by the decision of the Court in H and another v Schering Chemical Ltd and another.[39] In that case the Court refused to permit the admission into evidence of documents summarising the results of research, articles published in medical journals or letters written to such journals, on the ground that such documents were not 'records' for the purposes of the equivalent section 4 of the English Civil Evidence Act 1968. Bingham J. (as he then was) stated at p.146 that:

> "...The intention of that section was, I believe, to admit in evidence records which a historian would regard as original or primary sources, that is, documents which either give effect to a transaction itself, or which contain a contemporaneous register of information supplied by those with direct knowledge of the facts..."

I would agree with counsel's submission that this decision therefore establishes that it is the original contemporaneous notations and materials as opposed to any subsequent summary or later recollection by participants in the relevant event that will qualify as a record under s. 49(1) of the Evidence Act.

[38] 1974 Cr. App. R. 80 at 90
[39] [1983] 1 WLR 143

[75] It does follow, as counsel for the claimants submitted, and I therefore uphold the submission, that a collection of recorded interviews or proofs of evidence made during the course of, and for the purpose of ongoing litigation, containing statements of the current recollection of various individuals concerning past events is not a 'record' in the sense contemplated by the Evidence Act. Such a collection is not composed of information deliberately preserved in documentary form in order that it may be made available to others at some later date. Further, such a collection is not a compilation of original or primary information recorded contemporaneously with the occurrence of an event then sought to be documented from information then supplied by persons having direct knowledge of the facts.

[76] Moreover s. 49(1) of the Evidence Act is concerned not with the furnishing of information but with the supply of documents. The section contemplates that the person or persons who *"...had or may reasonably be supposed to have had personal knowledge of the matters dealt with in that information..."* would create and/or supply the documents containing that information either directly to the person compiling the record, or indirectly to that person through intermediaries acting under a duty.

[77] In the instant case the Appellant does not assert that persons having knowledge of the relevant matters created or supplied the tapes, transcripts and interview notes allegedly constituting "the record" to Mr. McAuley's investigators, the compilers of the same. Rather the investigators, using information elicited in interviews of persons having such knowledge, created these documents. It is to be noted that no person interviewed has been identified as having produced any document or as having maintained any records on behalf of the Appellant. The documents constituting the record and indeed the record itself were created by and supplied by KPMG Investigators whose knowledge of the matters dealt with in the information is not personal, but derived from information elicited in interviews.

[78] Further, the rationale for admitting into evidence statements contained in documents forming part of business records is the fact that such records are routinely maintained for administrative and other business purposes and are not created for the purpose of the particular litigation. The statements in question do not form part of any 'record' which has any existence apart from the instant litigation.

[79] Again, I find these arguments of counsel for the claimants convincing.

Admissibility of tape recordings and transcripts

[80] The appellants cite the case of R. v. Maqsud Ali and R v Ashiq Hussain[40] as authority for saying there was in principle no difference between a tape recording and a photograph and that a tape recording was admissible in law provided its accuracy could be proved: that a tape recording was no different from an eavesdropper and the fact that the person being taped were not aware that they were being recorded does not affect the admissibility of the recording; and that a transcript of a tape recording was prima facie admissible and there could be no objection to a copy of the transcript properly proved being put before the jury.

[81] Counsel for the claimants did not dispute the proposition that evidence obtained first hand by means of mechanical devices such as tape recorders and transcripts of such evidence may be proved in evidence in the same way as any other first hand evidence. They submitted, however, that those cases were not concerned with hearsay evidence in which the person giving testimony as to the contents of a tape recording or written note was not present at the creation of and cannot personally attest to the circumstances in which such a document came into existence. I agree with this submission. In Maqsud Ali and Ashiq Hussain there was no issue as to who made the secret recording of the appellants' conversation and, therefore, who could tender the recording into evidence.

[40] [1965] 3 W.L.R 229

Statements allegedly made by parties to the suit

[82] The appellants cite the cases of R. V. Christie[41] and R.V. Erdehein[42] in support of their assertion that statements made in the presence and hearing of a party and documents in his possession or to which he has access are admissible if relevant to the issue and are evidence against the party as to the truth of the matter stated if by his answers, conduct or silence he has acquiesced in their contents.

[83] Accordingly, it is urged that any statements allegedly made by any of the claimants in interviews must by virtue of that fact be admissible in evidence against them. The claimants do not dispute the proposition that relevant statements proved to have been made by a party to a suit are admissible in evidence against that party. What the claimants say is that such statements must be proved by admissible evidence. In the case of R. v. Erdehein (supra) the defendant was charged with concealing property from his trustee in bankruptcy. Statements made by him at his public examination as a debtor were directly proved against him by the parol testimony of the shorthand writer who had taken down his testimony in the examination proceedings. Again, in R. v. Christie (supra) statements made by a boy aged 5 in the presence and hearing of the accused, and the accused's conduct and demeanour at the making of those statements were directly proved by the testimony of the boy's mother and by a police officer who were present and witnessed the statement being made and the accused's reaction to it.

[84] I agree with the submission of counsel for the claimants that in the instant case the appellant seeks to introduce the relevant statements into evidence through the report of an expert who received that information from a third person and without satisfying the requirement of Section 47 (1) of the Evidence Act that such a statement be made in a document or of Section 47 (4) of the Evidence Act that such a statement be proved by the direct oral evidence of the person who made

[41] [1915] A.C. 545
[42] [1896] 2 Q.B. 260 at 270

the statement or of a person who heard or otherwise perceived it being made. If Mr. Boyea has admitted or, hereafter admits, making the statements attributed to him then, of course, they are admissible in evidence. If there is no such admission the statements allegedly made by Mr. Boyea can only be admitted in evidence by the testimony of the person to whom Mr. Boyea allegedly made the statements or by the testimony of a person who allegedly heard Mr. Boyea making the statements. As matters presently stand I would uphold the judge's decision on this material.

Specific submissions on admissibility

[85] Both sides made submissions on the specific items that the judge excluded and I now turn to consider these submissions. It will be convenient to divide them into the two categories that the claimants used, being statements made to interviewers and other statements. I will deal first with the latter category. For cross-referencing I will retain the letter designation that the judge gave to them.

[86] The appellant argued that the Court ought not to have ruled inadmissible the following statements:

> (a) "We understand that RML's duties as detailed in the 21 June 1997 letter and the March 1998 contracts are not different in any substantive way from the RML's activities from 1992 to 1997".

The appellant submitted: This statement is simply a comment by the expert which is based on documents which the expert is entitled to comment on. There is nothing to suggest that this statement is hearsay or why this statement would otherwise be inadmissible. The Appellant submits that this statement is not hearsay evidence, is admissible and should not have been excised from the KPMG Report.

The claimants submitted: This statement states a conclusion of fact which is based on information for which no source is attributed. Contrary to the assertion of the Appellant the statement does not purport to be based on any document(s).

Decision: This is not a hearsay statement; it is a statement of opinion. It is open to the claimants to challenge the weight of the opinion by challenging the basis for the statement, which may or may not be hearsay material, which may or may not be admissible. I would reverse the judge's decision to exclude this statement.

> (b) *"We understand that Ms. Ashante Infantry is apparently a social acquaintance of Mr. Boyea's from Toronto..."*

The appellant submitted: This statement is based on a tape recording for which there is a transcript both of which were disclosed by the Appellant. The Appellant submits that the recordings and transcripts are admissible under the Act and this statement is therefore admissible being a statement based on admissible evidence. Accordingly, these statements should not have been excised from the KPMG Report.

The claimants submitted: This again is a statement of fact which is based on information from an un-attributed source.

Decision: This is not hearsay; it is a statement of (non-expert) opinion. As with the immediately preceding item, the question of weight arises. I would also reverse the judge on this statement.

> (c) *"We note that a handwritten notation on the 21 June 1997 letter from RML to Mr. Davy stated 1% of C&F value per unit. This indicates the level of commission to be paid to Mr. Don Martin that was set almost immediately after Mr. Boyea's termination".*

The appellant submitted: This statement is simply a comment by the expert on a hand-written notation on a document which has been produced in these proceedings and cannot therefore be categorized as inadmissible hearsay evidence.

The claimants submitted: There is no indication as to the circumstances in which the handwritten notation was made or the identity of the person who made it. Accordingly the accuracy of that statement cannot be tested.

Decision: This is not hearsay; it is a statement of opinion. Again, the question of weight to be given to it arises. The question of who made the notation will no doubt arise. I would reverse the judge and rule this statement admissible, for what it is worth.

> (d) *"Accounting staff of ECFML stated that ECFML's electricity bill would include an amount related to the electricity consumed by the refrigeration containers. They also stated that to the best of their knowledge no amount had ever been allocated to either KFC or Mr. Boyea in respect of the electricity cost of these containers..."*

The appellant submitted: This statement is based on oral conversations between the witness James McAuley of KPMG and staff employed by the Appellant. As such this is first hand hearsay evidence which is admissible by virtue of Section 47(1) and (4) of the Evidence Act The claimants submitted: Again this statement is attributed to anonymous members of the accounting staff with no indication as to the circumstances in which such a statement was made or the person who made it. The credibility of the statement cannot be assessed.

Decision: The statement comprises admissible hearsay. Mr. McAuley, to whom it was made, may be cross-examined as to the identity of the makers of the statement and otherwise. As the claimants submitted, the issue here is credibility. I would reverse the judge.

> (e) *"Between November 1994 and May 1995, Antillean apparently had discussions with Mr. Boyea concerning the provision of services by Antillean to MML".*

The appellant submitted: This statement is based on the expert McAuley's review of documents which were produced by the appellant in the proceedings, namely the minutes of meetings of the board of directors of Antillean, and is therefore admissible under the Act. In addition this statement is simply a comment by the expert which is based on documents produced by the Appellant and which the expert is entitled to comment on. There is nothing to suggest that this is hearsay or why this statement would otherwise be inadmissible. The appellant submits that

this statement is admissible and should not have been excised from the KPMG Report.

The claimants submitted: This is a conclusion based on information the source of which is not disclosed.

Decision: For the reasons submitted by the appellant this statement is not hearsay and is admissible. Again, the judge must decide the matter of its weight.

[87] The following are statements made by persons to Mr. McAuley's investigators and these statements are caught by the decision I have made that they are not admissible as having been made in a document or as having been made in a document that is or forms part of a record, within the contemplation of s. 49 (1) of the Evidence Act. I have considered the specific submissions of the appellant on these items and do not reproduce them because the submissions do not go beyond the submissions already considered in analysing the provisions of the Act. Accordingly, I uphold the judge's decision to exclude as inadmissible hearsay, statements attributed to:

(f) Mr. Martin Labourde at an interview conducted 18th April 1997;
(g) Mr. Ken Boyea at interviews conducted 21, 22, and 25 April 1997;
(h) Mr. Atherton Martin in a telephone conversation allegedly conducted on May 9th, 1997 and July 23rd, 1999
(i) Mr. Leroy Warren;
(j) Mr. Robert Maldonado
(k) Mr. John Benjamin
(l) Mr. Joseph Davis
(m) Mr. Marius St. Rose of CDB at an interview conducted 24th June 1999;
(n) Mr. M. Van Aremvonk
(o) Conceded by the claimants
(p) Mr. Ramon Daubon on 30th June 1999;
(q) Ms. Zita Jolie Steglich on 29th June 1999 and 1st July 1999;
(r) Mr. Phillip Foster on July 23rd, 1999
(s) Mr. Kingsley Thomas on 30th May 2000;
(t) Conceded by the claimants
(u) Mr. Felix Mathurin on 23rd and 29th June;

[88] The concessions that the claimants made were in respect of statements made by Mr. Turhane Doerga and Mr. Jai Benie. The claimants accepted that if it can be shown that Mr. Benie and Mr. Doerga wrote letters to Mr. McAuley adopting

statements attributed to them by the appellant, the letters would constitute documents within the meaning of s. 47 (1) and (4) of the Evidence Act.

[89] At paragraph 103(4) of her Ruling the judge ruled that the following documents were hearsay evidence and inadmissible and to be excised from the KPMG Report: 558, 560, 562, 565, 577, 662, 663, 664, 665, 666, 668, 669, 670, 671, 673, 674, 676, 677, 678, 684.These documents are in fact the same tape recordings, transcripts, handwritten notes or memorandum which the judge ruled to be hearsay and excised from the KPMG Report under paragraph 103(3) of the Ruling. As the appellant rightly submitted, the reasons for the judge ruling these documents to be hearsay, inadmissible and excised from the KPMG Report are the same reasons for excluding the statements in the Report. Accordingly I would uphold the judge's decision to exclude these documents.

Conclusion

[90] These claims and counterclaims must now go back to the High Court for the trial to continue. It is now 10 years since the claim was filed (on 19 June 1997). Unlike this court, counsel are in a position to know why this claim has taken so long to reach this point. We do know, however, the cause of the delay for the past year and it is the unfortunate tendency of which Saville LJ spoke in British Airways Pension Trustees Ltd. Sir Robert McAlpine & Sons Ltd., quoted by Lord Hope in the Three Rivers (No. 3) case[43], and they merit further repetition:

> "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is being made by the other and is able properly to prepare to deal with it."

[43] See paragraph [41], above

[91] It would have been the simplest thing for counsel of the seniority and accomplishment of those engaged in this matter to have sorted out much of what was litigated. Further, after the judge gave her ruling and admitted the Report one wonders how much of the excluded material was worth fighting over on appeal and how much of the appeal could have been compromised. I do not pass judgment because I do not know what happened or what attempts were made. I do regret, however, that counsel were not able to avoid or at least reduce the delay.

[92] Finally, I consider costs. The judge awarded costs in the court below to the appellant and the claimants have not appealed. In this court the result, on my view, has been mixed. The appellant succeeded in restoring the material declared to be irrelevant and some of the material declared to be inadmissible hearsay. The claimants persuaded this court that their objections should not have been foreclosed because of delay as both sides were guilty of causing that delay and succeeded in excluding as inadmissible hearsay most of the material that the judge excluded. On that view of the result, coupled with my view that both sides could have done more to avoid this interlocutory appeal, I would order that each side bear its own costs of this appeal.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]