

JAMAICA

SUPREME COURT CIVIL APPEAL NO. 68/96

IN THE COURT OF APPEAL

**BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE PATTERSON, JA
THE HON. MR. JUSTICE BINGHAM, JA**

**BETWEEN: JAMAICA MUTUAL LIFE DEFENDANT/
ASSURANCE SOCIETY APPELLANT**

**A N D SEABURG TRADING PLAINTIFF/
COMPANY LIMITED RESPONDENT**

Dennis Goffe QC and Ms Nicole Lambert for Appellant

Clifton Daley for Respondent

February 3, 4, 5, 6 and 19, 1997

Rattray P.:

I have had the benefit of reading in advance the reasons for judgment of Patterson J.A..

I agree. The items listed under Headings II and IV of the Particulars of Special Damage in the Statement of Claim are in fact General Damages in respect of which warning is being given to the Respondent.

As was said by Viscount *Dunedin in Admiralty Comrs v. Susquehanna (Owners), The Susquehanna* (1926) AC 655 at p. 661 cited in the Perestrello

Judgment of Lord Donovan:

"If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."

All that the Respondent needs to do is to amend his Statement of Claim by listing these items under a heading of Particulars of General Damages.

We dismissed the appeal and ordered costs to the respondent to be taxed if not agreed.

PATTERSON, J.A.:

This appeal is against the order of Pitter, J. dismissing a summons filed by the appellants to strike out the statement of claim in an action brought by the respondent. The issue is whether Pitter, J. erred in law by holding that the respondent had sufficiently complied with an order of the court below to supply the further and better particulars requested by the appellant and further that the particulars supplied were not illusory.

A plaintiff is required to deliver to the defendant a statement of his claim and the relief or remedy he is seeking. Pleadings must contain and contain only a statement, in a summary form, of the material facts on which the party pleading relies for his claim, but not the evidence by which they are to be proved - [section 168 (1) of the Civil Procedure Code (CPC)]. Schedules III, IV & V to the CPC set out applicable forms of pleading, and where they are not applicable, then forms as near as possible shall be used. A party who uses any longer forms than that prescribed, or whose pleadings are unnecessarily long, runs the risk of having them deemed prolix and to be mulched in costs.

But there are certain cases in which particulars must be given - a few are: where a party relies on misrepresentation, fraud, breach of trust, wilful default, undue influence, and in libel and slander actions, particulars of the facts or matters relied on to support allegation that words were used in a defamatory sense other than their ordinary meaning (section 170 of the CPC).

Material facts must be pleaded as "it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendant on their guard, and tell them what they have to meet when the case comes on for trial" (per Cotton, LJ in **Phillips v. Phillips and others** 4 Q.B.D. 127 at page 139).

The plaintiff will not be allowed to give evidence of special damages or damages which have not been pleaded explicitly. It was held in **Perestrello E Companhia Limitada v. United Paint Co. Ltd.** [1969] 3 All E.R. 479:

"...(i) where a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act complained of, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage and particularise any item of damage which is capable of substantially exact calculation while at the same time giving the defendant access to the facts which make such calculation possible, thus showing him the case he has to meet and assisting him in computing a payment into court; furthermore the extent of this requirement is dictated not by any preconceived notions of what is general or special damage but by the circumstances of the particular case (see p. 486, letters A to C, post);

(ii) ...

(iii) furthermore, the plaintiffs could not, without such amendment, adduce evidence of the alleged loss of profits, since if a claim was one which could not with justice be sprung on the defendants at the trial it required to be pleaded so that the nature of that claim was disclosed; what amounted to a sufficient averment for this purpose would depend on the facts of the particular case, but a mere statement that the plaintiffs claimed 'damages' was not sufficient to let in evidence of a particular kind of loss which was not a necessary consequence of the wrongful act, and of which the defendants were

entitled to fair warning (see p. 486, letters F to H, post)." [Emphasis supplied]

When a party is of the view that all necessary particulars have not been stated in the pleading of his opponent, he may request such further and better particulars by letter, and if they are not delivered, then he may obtain an order from the court "upon such terms as to costs and otherwise, as may be just." The further and better particulars which the party will be ordered to supply are those that are necessary in order that the party may know the case he has to meet and to prevent surprise. In *Lister v. Thompson* 7 T.L.R. 107, it was pointed out that "the court will not sanction an attempt to deliver interrogatories under the guise of seeking particulars."

But where the court has ordered further and better particulars, and default is made in obeying the order, wholly or in part, the proper course seems to be to apply for a pre-emptory order under the provisions of section 272 F(1) of the CPC, that in default the action be dismissed or be stayed.

In the instant case, Pitter J. had before him a summons to strike out the statement of claim on the ground that the plaintiff had failed to properly supply the further and better particulars in compliance with an order of the court. The affidavit in support complained of the answer given to the request for particulars of the goods mentioned in paragraph 6(c) of the statement of claim, but Mr. Goffe, Q.C. did not pursue that complaint before us. His efforts were directed at the answers given to the request for particulars in respect of paragraphs 10(I), (II), (III) and (IV).

The special damages listed at paragraph 10(I) of the statement of claim sets out the actual value of goods which the plaintiff says were taken away by the defendant and of which he has been deprived. Listed at (1) is Leasehold improvements - \$1,500,000.00. I do not think Mr. Goffe, Q.C. attacked the answer in respect to that item, but in respect of the other items listed as 2-7, he said the answer only repeated what was in the particulars and therefore did not obey the order of the court and were illusory. He submitted that what was required was a detailed listing of at least the major items that comprised each claim, so that the defendant would be in a position not only to know what is being claimed for, but also what would be a reasonable amount to be paid into court. Mr. Daley, on the other hand, said that was the best he could do - the items were in the possession of the defendant and the plaintiff was denied access to them. In the circumstances, he had done his best.

The items listed under 10(II) bear sums said to be estimated loss to the plaintiff by reason of items taken away and/or consequential loss by reason of the defendant's action. They are all listed under the general heading of "Particulars of Special Damage", but I interpret those items to be general damages of which particulars are required to be given in accordance with the decision in the **Perestrello** case (supra). It is the substance that one looks to and not the label. The same is true of the items listed as 10(IV). The value of the goods listed at 10(III) is said to be estimated, and though they may properly qualify as special damages, the plaintiff will be required at a trial to prove these amounts or substantially the same, or run the risk of having the claim disallowed.

Pitter J. dismissed the summons to strike out the statement of claim. He held "the further and better particulars are not illusory and in the circumstances of this case, properly supplied." I have not been convinced that the learned judge fell in error. Mr. Goffe, Q.C. submitted that the further and better particulars in some of the answers were illusory in that they contained only a repetition of the statements in the claim. Mr. Daley explained the reason why further details could not be supplied and the learned judge below found it reasonable in the circumstances.

There were no complaints mounted at those answers that supplied the particulars of the items, but the chief complaint was that no particulars were supplied to show how the amounts claimed were arrived at.

I am of the view that the plaintiff has acted in good faith and has fairly complied with the order of the court. The summons before Pitter J. did not seek the striking out of any particular pleading and where it is not shown that the pleading was vexatious or frivolous, I will not interfere.

Accordingly, I would dismiss the appeal with costs to the respondent to be agreed or taxed.

BINGHAM, J.A.:

I have read in draft the judgments prepared by the Honourable President and Patterson, J.A. I wish to state that the views expressed therein accord with my own.

Given what is being alleged by the plaintiff, the particulars supplied were the best that could be furnished in the circumstances. In my opinion, they were sufficient to alert the defendants as to the nature of the claim which they had to meet. In this regard, Pitter, J's conclusion that "the further and better particulars are not illusory and in the circumstances of this case properly supplied" was correct.

In considering whether or not the particulars supplied were proper, one needs to be reminded that what needs to be examined is the content and not the label.

As regards the complaint by learned counsel for the defendants in relation to paragraphs 10(II) and 10(IV) of the claim under the heading "Particulars of Special Damage" (pages 6 & 7 of the record), this ought properly to have been set out under the heading of general damages for which an amendment of the particulars to reflect this change would be sufficient to clarify the matter. Such amendment when done can be seen as being in the nature of a tidying up process and would not thereby be effecting a material departure from what was originally pleaded as particulars in the statement of claim.