

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 78/2010**

**APPLICATION NO 103/2010**

<b>BETWEEN</b>	<b>PAYMASTER (JAMAICA) LIMITED</b>	<b>APPLICANT</b>
<b>AND</b>	<b>GRACE KENNEDY REMITTANCE SERVICE LIMITED</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>PAUL LOWE</b>	<b>2<sup>ND</sup> RESPONDENT</b>

**Dr Lloyd Barnett, Mrs Denise Kitson and Mrs Suzanne Riden-Foster instructed by Grant, Stewart, Phillips & Co for the applicant**

**Michael Hylton, QC and Miss Teri-Ann Lawson instructed by DunnCox for the 1<sup>st</sup> respondent**

**Vincent Chen instructed by Chen Green & Co for the 2<sup>nd</sup> respondent**

**28 September 2010 and 18 January 2011**

**IN CHAMBERS**

**HARRIS, JA**

[1] This is an application in which Paymaster (Jamaica) Ltd seeks to stay the execution of a judgment of Jones, J in which he made the following orders:

- “i) On the claim brought by Paymaster: GKRS and Paul Lowe shall have their judgment on the issue of liability with costs to be agreed or taxed.
- ii) On the Counterclaim brought by Paul Lowe: He shall have his judgment against Paymaster with costs. Damages to be assessed at a date to be fixed by the Registrar of the Supreme Court.
- iii) The Court orders an enquiry into damages consequent on Paymaster’s undertaking given to the court on the granting of the interim injunction in this matter. The enquiry is to be fixed on a date to be set by the Registrar of the Supreme Court.”

[2] The application emanates from an appeal filed by Paymaster (Jamaica) Ltd (“Paymaster”) against Grace Kennedy Remittance Services Ltd (“GKRS”) and Paul Lowe, the 2<sup>nd</sup> respondent. I must state at the outset that Mr Chen, on behalf of the 2<sup>nd</sup> respondent, stated that he would not be consenting to nor would he be opposing the application.

[3] Sometime in 1994, Paymaster, through its director Miss Audrey Marks entered into an agreement with Dr Maurice McNaughton, through his company, Jamaica Online Information Services Ltd, to provide consulting services for the purpose of developing a multi-payment agency payment system. Sometime during the following year, Dr McNaughton produced an architecture for the system and formulated a business plan for Paymaster. Prior to the arrangements between Paymaster and Dr McNaughton, the 2<sup>nd</sup> respondent had previously developed a cashiering programme through a company called CSSRemit which was owned by him, the 2<sup>nd</sup> respondent.

[4] In April 1995, Dr McNaughton sought Paymaster's permission to licence CSSRemit's software and customize it to Paymaster's specification. A month later, the Jamaica Online Services completed a system designed for Paymaster's head office and commenced the system development work.

[5] Sometime in 1996 Miss Marks entered into discussions with GKRS with a view to having a Western Union sub-agency installed at a location which she had rented for her first store. At that time, she demonstrated the multi-payment system. Following this, she invited the GKRS to invest in the Paymaster project and supplied GKSR with a copy of Paymaster's business plan which the applicant stated was given to GKSR in confidence.

[6] In the meantime, Dr McNaughton continued his work on the project. He continued the development of the multi-payment software and revised the specifications for the cashiering system of the software. He requested the 2<sup>nd</sup> respondent to write the software for Paymaster's multi-payment plan and to implement the architecture and specifications for the software. Dr. McNaughton duly advised Paymaster about these developments.

[7] In or about September 1996, the 2<sup>nd</sup> respondent adapted and customised his CSSREMIT programme to Paymaster's specifications. Paymaster began testing its multi-payment system but the testing was halted due to the utility companies' withdrawal from it and also by reason of Dr McNaughton's withdrawal from the project. Thereafter, Paymaster assigned the 2<sup>nd</sup> respondent

the task of completing the development of the software. Following this, Paymaster entered into contracts with Jamaica Public Service Company Ltd and Cable and Wireless Ltd with respect to the use of its multi-payment system. During this time, however, Paymaster had to embark on a process of testing and debugging the system and meeting the costs occasioned thereby.

[8] In October 1998, the final version of the multi-payment software as well as a payment system for the Paymaster multi-payment software was delivered by the 2<sup>nd</sup> respondent. Paymaster expressed its satisfaction with the product. It declared that it met the requisite specifications for its multi-client operations.

[9] The 2<sup>nd</sup> respondent, although already engaged in a contract with Paymaster, requested a separate maintenance contract and upon Paymaster's refusal in acceding to the request, he disconnected the Paymaster multi-payment software programme. An agreement was subsequently brokered between the applicant and the 2<sup>nd</sup> respondent in which the 2<sup>nd</sup> respondent was given a maintenance service agreement by which he would be paid on each pay day of each month and would be required to attend all Paymaster's internal and external meetings.

[10] The 2<sup>nd</sup> respondent, on 4 October 1999, licensed his CSS Front End Cash Remittance programme to GKRS and sent the Paymaster Multi-Payment Software programme and manual to GKRS and subsequently licensed the Paymaster multi payment software to GKRS. A month later GKRS commenced

entering into contracts with the utility companies for bill collection and began marketing operations.

[11] Being aggrieved by the steps taken by GKRS, Paymaster instituted proceedings against GKRS and the 2<sup>nd</sup> respondent, claiming damages for:

1. Breach of copyright.
2. Breach of confidence.
3. Passing off.
4. Breach of contract and inducing breach of contracts.

[12] The 1<sup>st</sup> respondent filed a defence to the claim and the 2<sup>nd</sup> respondent filed a defence and counterclaim.

[13] The following grounds of appeal were filed:

- “(1) The learned Judge erred on the facts in limiting the Appellant’s contention that the Court ought to imply a term in agreement between the Appellant and the Second Respondent. Paymaster is the owner of the copy right only to the fact that the requirements were provided by the Appellant.
- (2) The learned Judge erred on the facts in limiting the Appellant’s case as presented by its Counsel and the evidence to two reasons for its contention that there should be implied in the said contract a term that Paymaster is the owner.

- (3) The learned Judge erred in law and/or misdirected himself in treating the Appellant's case as limited to the fact relating to the commissioning of the second Defendant to write the programme and this factor as antithetical to the principle that ownership depends on the terms of the contract.
- (4) The learned Judge thereby failed to conduct the essential task of assessing all the relevant facts and considering the circumstances as a whole since in addition to the fact that the second Respondent was commissioned to write the programme to meet the Appellant's needs and objective the following factors were advanced and supported by evidence:
  - (i) Paymaster developed/produced the original business concept;
  - (ii) Paymaster retained Jamaica Online Business/McNaughton to assist in creating the Business Plan with the "Collections Network-Architecture and Operations".
  - (iii) Paymaster paid Lowe to license his base program and for him to customize it with Paymaster's specifications and to write the new Head Office program to be operated together with the customized CSS Remit.;
  - (iv) Paymaster provided continuous instructions and consultation in relation to the requirements of the project.
  - (v) Paymaster incurred considerable costs in time and money in the testing and debugging of the

programs, for which Lowe expected and received payment.

- (vi) Paymaster solely assumed very significant financial, reputational and operational risks for the software. Lowe did not offer, nor did Paymaster demand from him any indemnity against losses arising from deficiencies in the software and Paymaster paid considerable sums for solving problems related to the software.
- (vii) At the meeting on May 24, 2000 at which Lowe's conduct in licensing the Paymaster program to GKRS was questioned, it is recorded that Lowe acknowledged that in the circumstances in which that program had been created it was exclusively Paymaster's property, and although at the subsequent meeting he proposed amendments to the minutes, he did not seek to correct or contradict the record in respect of his admissions as to Paymaster's ownership.
- (viii) At the meeting on June 21, 2000 at which a draft service agreement which had been given to Paul Lowe was discussed, Mr. Lowe requested that certain amendments be made. In relation to Intellectual Property he proposed that the ownership of Paymaster should relate to "the functionalities requested by Paymaster instead of "the Paymaster Remit System" acknowledged that the additional functionalities (sic). BG10 exhibited by Brian Goldson pp 219- 229 contains hand-written amendments which are consistent with the amendments that the

minutes record Lowe to have proposed. (See **Affidavit of Audrey Marks dated September 8, 2000, para. 27**). It is clear that in such circumstances, copyright in the additional functionalities vests in the owner of those functionalities and the owner of one part of the program cannot license the entire program without the consent of the owner of the other part.

- (ix) The fact that Paymaster's name appears on the screen of a program that was in operation at GKRS is indicative of Lowe's understanding that the program was the property of Paymaster.
- (5) The learned Judge erred in law by failing to find that since there was clear evidence that at least the Appellant was intended to own the additional functionalities requested by it, copyright in these functionalities could not vest in Paymaster while the Second Respondent could grant a license to the First Respondent or any third party of the entire program without the Appellant's consent.
- (6) The learned Judge failed to appreciate or failed to take sufficiently into account that the formulations of the principles relating to implied terms on which he relied were essentially directed at the cases in which there were written contracts and that whereas the more detailed the express terms of a contract the more difficult it is to imply additional terms conversely the less detailed the express term of a contract the less difficult it is to imply additional terms:  
(sic)
- (7) The learned Judge erred in law and on the facts in equating the modification of the



base CSSREMIT software to meet the needs of varied circumstances with the writing of new software to meet the specific needs and objectives of the Appellant.

- (8) The learned Judge erred in law and on the facts in holding that the Second Respondent was not required to use or did not use any copyright and material belonging to Paymaster while creating the Multi-Payment Software for the Appellant, since the uncontradicted evidence is that the Appellant's concept of a multi-agency payment system, the architecture and operations plan designed by Dr. McNaughton for the Appellant was supplied to him and he was engaged in the internal discussions about the development and implementation of the project, thereby using both confidential information and copyright material belonging to the Appellant to write the software.
- (9) The learned Judge erred in law and on the facts in finding that the customary inference in the trade world be for the Second Respondent to retain copyright in his software and license it to his clients as there was no evidence to that effect and the evidence was to the contrary with respect of the circumstances of this case.

(10) The learned Judge failed to take into account that the question of the ownership of the source code only arose after the dispute emerged, since Paul Lowe continued to be engaged in the maintenance and implementation of the new system throughout the initial period.
- (11) The learned Judge erred on the facts in holding that there was no evidence that the First Respondent used the Appellant's business plan although there was

uncontradicted evidence that important material and information belonging to the Appellant was transferred to the First Respondent by the Second Respondent and that the First Respondent was able within one day to establish the multi-payment business plan which it had taken years for the Appellant to design and develop and which the First Respondent had previously failed to develop or implement.

- (12) The learned Judge erred in law and on the facts in holding that Paul Lowe is the owner of the copyright and entitled to license it to other persons and further that by reason thereof the Appellant's cause of action for breach of contract and including breach of cannot succeed although the evidence was clear that the Second Defendant did communicate confidential information belonging to the Appellant to the First Defendant.
- (13) The findings of the learned trial Judge are against the weight of the evidence, particularly evidence elicited from the Respondents' witnesses in cross-examination."

[14] The 1<sup>st</sup> respondent filed a counter-notice of appeal which was as follows:

"1. The Appellant having failed:

- (a) to allege in its pleadings any implied term in any agreement with the 2<sup>nd</sup> Respondent which provided that the Appellant would be the owner of the copyright in the software which is the subject of the claim (so as to displace the statutory attribution of first ownership of copyright to the

author of the protected work under **s.22 (1)** of the **Copyright Act** and;

- (b) to particularize in the said pleadings the facts and matters being relied on as giving rise to the alleged implied term;

was not entitled to raise and/or rely on, for the first time during its closing submissions at the trial, an allegation that the appellant was the owner of the copyright in the software by virtue of an implied term in an agreement between the Appellant and the 2<sup>nd</sup> Respondent that the Appellant would be the owner of the said copyright. Accordingly, the Appellant could not succeed on its claim for breach of copyright and/or inducing breach of contract on this basis."

[15] Two affidavits by Athina Campbell in support of the application were filed.

The first was sworn on 10 June 2010 and the second was sworn on 16 September

2010. Paragraphs 6- 8 and 10 of the affidavit of 10 June state:

"(6) That the Appellant has a realistic chance of success on the Appeal as in making his decision the Honourable Mr. Justice Jones came to several erroneous conclusions on the facts and the law as follows:

- (i) The learned Judge erred on the facts in limiting the appellant's contention that the Court ought to imply a term in agreement between the Appellant and the Second Respondent, Paymaster is the owner of the copyright only to the fact that the requirements were provided by the Appellant.
- (ii) The learned Judge erred on facts in limiting the Appellant's case as presented by its Counsel and the evidence to two reasons for

its contention that there should be implied in the said contract a term that Paymaster is the owner

- (iv) The learned Judge thereby failed to conduct the essential task of assessing all the relevant facts and considering the circumstances as a whole since in addition to the fact that the second Respondent was commissioned to write the programme to meet the Appellant's needs and objectives.
- (v) The learned Judge erred in law by failing to find that since there was clear evidence that the Appellant intended to own the additional functionalities requested by it, and that copyright in these functionalities could not vest in Paymaster while the Second Respondent could grant a license to the First Respondent or any third party of the entire program without the Appellant's consent.
- (vi) The learned Judge failed to appreciate or failed to take sufficiently into account, that the formulations of the principles relating to implied terms on which he relied were essentially directed at the cases in which there were written contracts and that whereas the more detailed the express terms of a contract, the more difficult it is to imply additional terms conversely the less detailed the express term of a contract the less difficult is it to imply additional terms:
- (vii) The learned Judge erred in law and on the facts in equating the modification of the base CSSREMIT software to meet the needs of varied circumstances with the writing of new software to meet the specific needs and objectives of the Appellant.
- (viii) The learned Judge erred in law and on the facts in holding that the Second respondent was not required to use or did not use any copyright and material belonging to Paymaster while creating the Multi-Payment Software for the Appellant.

- (ix) The learned Judge erred in law and on the facts in finding that the customary inference in the trade would be for the Second Respondent to retain copyright in his software and license it to his clients as there **was no evidence to that effect and the evidence was to the contrary** with respect to the circumstances of this case.
  - (x) The learned Judge failed to take into account that the question of the ownership of the source code only arose after the dispute emerged, since Paul Lowe continued to be engaged in the maintenance and implementation of the new system throughout the initial period.
  - (xi) The learned Judge erred on the facts in holding that there was no evidence that the First Respondent used the Appellant's business plan although there was uncontradicted evidence that important material and information belonging to the Appellant was transferred to the First Respondent by the Second Respondent and that the First Respondent was able within one day to establish the multi-payment business plan which it had taken years for the Appellant to design and develop and which the First Respondent had previously failed to develop or implement.
- 7) Indeed the learned Judge erred in law and on the facts in holding that Paul Lowe is the owner of the copyright and thus entitled to license it to other persons and further that by reason thereof the Appellant's cause of action for breach of confidence and breach of contract could not succeed although the evidence was clear that the 2<sup>nd</sup> Respondent communicated confidential information belonging to the Appellant to the 1<sup>st</sup> Respondent.
- 8) That in all circumstances, I am of the view that the Judgment is unreasonable and wrong in law.

...

- 10) The Appellant will suffer irreparable harm if the respondents are permitted to pursue an enquiry and the assessment of damages while the appeal is pending as if such actions were pursued and steps were taken to recover such sums prior to the conclusion of the appeal they could ruin the Appellant and render the appeal nugatory." [emphasis supplied]

[16] Paragraphs 6 to 8 of the affidavit of 16 September 2010 state:

- "6. Paymaster's profitability and earnings are more than sufficient to meet a final judgment as well as in respect of the costs of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents associated with the hearing of this appeal, as well as the costs associated with the trial of the action in the Court below in the event that Paymaster is unsuccessful in its appeal. That the annual turnover of the company was in excess \$244.3 Million at the financial year end, March 31, 2010 and is projected at approximately \$300.1 Million at March 31, 2011.
7. That the last financial year's unaudited financial statements of Paymaster indicates that Paymaster had realized a profit of \$25.3 Million for the year ended March 31, 2010 and this trend is expected to continue in the future. I exhibit hereto marked "**AC-1**" for identity a copy of the last financial year's unaudited financial statements.
8. Paymaster also had realizable assets totaling \$52.3 Million that would also be available to meet liabilities if necessary."

[17] Dr Barnett argued that the applicant has a good appeal. He contended that the judgment entered against the applicant relates to liability and the case is incomplete in that the question of damages is yet to be determined and there would be injustice to the applicant for it to be engaged in an assessment of

damages pending the hearing of the appeal. If damages are assessed, he argued, this would require the applicant to pay, while, the respondents would not be at risk. Although there is no monetary amount payable immediately, the risk still exists since the assessment has not yet been done and there is a risk that the appeal could be heard before the assessment is done, he submitted.

[18] Mr. Hylton QC submitted that the applicant is seeking a stay against orders with respect to liability and on the evidence before the court, the application should fail. The affidavit of Miss Campbell, he argued, deals with liability as to the question of the success of the appeal and it states that, without a stay, the applicant would be ruined but neither Miss Campbell's affidavit nor Dr Barnett's submissions, addressed the question of costs. Further, he contended, Miss Campbell asserted in her second affidavit that the applicant would have no difficulty in meeting liabilities and paying the costs but by the same token the applicant is declaring in Miss Campbell's first affidavit that it cannot pay.

[19] Rule 2.11 (1) (b) of the Court of Appeal Rules 2002 permits a single judge of this court to order a stay of execution of a judgment pending the hearing of an appeal. The power of the court or a judge to order or refuse a stay of execution of a judgment is discretionary. This discretionary right is unfettered. The foregoing proposition is propounded by the learned authors of Halsbury's Laws of England 4<sup>th</sup> Edition, Volume 17 at paragraph 455 in the following terms:

“The court has an absolute and unfettered discretion as to granting or refusing of a stay, and as to the terms upon which it will grant it and will as a rule, only grant a stay if there are special circumstances, which must be deposed to an affidavit unless the application is made at the hearing.”

[20] In **Linotype-Hell Finance Limited v Baker** [1992] 4 All ER 887 which has been often cited, accepted and approved by this court, Lord Staughton sets out the test in granting a stay to be two fold, in that an applicant must show that he has some prospect of success of his appeal and that without a stay he would be ruined.

[21] It has been observed however, that since **Linotype-Hell Finance Limited v Baker**, the courts have adopted quite a liberal approach, in that, they seek to impose the interests of justice as an essential factor in ordering or refusing a stay. In **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 Clarke LJ proposed the adoption of a balancing exercise within the context of the interests of justice in granting or refusal of a stay. At paragraph 22 he said:

“Whether the court should exercise its discretion to grant a stay will depend upon the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails what are the risks that the respondent will be unable enforce the



judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any moneys paid from the respondent?"

[22] In **Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited** FC 297/6273; [1997] EWCA 2164 delivered on 23 July 1997, Phillips L J stated the proper approach to be as follows:

"In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

[23] In the cases of **Watersport Enterprise Ltd v Jamaica Grande Limited & Others** SCCA No 110/2008 delivered 4 February 2009; **Reliant Enterprise Communications Limited & Another v Infochannel Limited** SCCA No 99/2009 Application Nos 144 & 181/2009 delivered 2 December 2009; **Cable and Wireless Jamaica Ltd v Digicel Jamaica Ltd** SCCA No 148/09 Application No 169/09

delivered 16 December 2009, this court has given approval and support to the proposition that the interests of justice is an essential element in a decision to grant or refuse a stay.

[24] In balancing the risks in granting or refusing a stay, the evidentiary material before the court must justify an order for a stay. The risks would not only flow from the merit of a party's appeal but would also revolve around the question as to which party would be more likely to suffer harm. There can be no dispute that there was no written agreement between the applicant and the 2<sup>nd</sup> respondent as to the ownership of the copyright of the software system. However, the heart of the applicant's complaint is its entitlement to the ownership of the copyright of the Paymaster Multi-Payment software, by contending that an implied agreement between the 2<sup>nd</sup> respondent and itself existed as to the ownership. The 1<sup>st</sup> respondent, on a preliminary point, in the court below, contended that any implied agreement between the parties on which the applicant placed reliance, ought to have been expressly pleaded and particularized.

[25] The applicant, in paragraphs 3, 4, 5 and 6 of the statement of claim, pleaded as follows:

#### Paragraph 3

“The Second Defendant was at all material times a computer programmer who was contracted to the Plaintiff since about 1999 under a

consultancy contract as the plaintiff's technical consultant. From January 199 until August 2000 the Second Defendant was so retained under a monthly contract for services."

#### Paragraph 4

"The Plaintiff company in or about late 1994 to early 1995 designed and created Multi-Payment collection system software. This software (hereafter called the Paymaster Software) inter alia provides a unique multi-client, multi branch function and greatly reduces the convenience of paying several bills by providing a 'one stop shop' for bill payments thus increasing speed and efficiency."

#### Paragraph 5

"The Plaintiff will say that the Plaintiff has expended substantial funds in researching, formulating, developing and fine tuning the Paymaster computer program which is the foundation on which the multi-payment system is built. The Plaintiff company owns the Copyright in the Paymaster computer program."

#### Paragraph 6

"The Plaintiff contracted the Second Defendant to convert the scripted written words of the architectural plan of the Paymaster computer program formulated by the Plaintiff and its expert Mr Maurice McNaughton to computer language, and from time to time do such maintenance and upgrading of the system that was necessary by implementing new features specified by the plaintiff to improve the capabilities of the Paymaster multi-payment computer program. The Plaintiff says that it purchased a licence for

\$300,000.00 from Software System as a base upon which the Plaintiff developed its computer program.”

[26] The learned trial judge in dealing with the issue relied on the following extract from **Bullen and Leake and Jacob’s Precedent and Pleadings** 12<sup>th</sup> edition at page 345:

“Where an action is brought upon an agreement under seal, the Statement of Claim should show whether the agreement relied on is in writing or made by word of mouth or is to be implied or inferred from the conduct of the parties ... In the case of an implied agreement the facts and circumstances from which the implication arises should be stated ... Where the agreement is to be implied from a series of letters or conversations or from circumstances, it is sufficient to allege the agreement as a fact, and to refer generally to the letters, conversations or circumstances, without setting them out in detail. (My emphasis)”

[27] The learned trial judge found that the averments in paragraphs three to six of the statement of claim contained an allegation of an agreement between the applicant and the 2<sup>nd</sup> respondent to develop its Multi-payment software as well as an allegation as to the ownership of the copyright of the applicant’s payment plan. He found that no additional pleading was required to raise the issue as to an implied agreement between these two parties relating to the ownership of the Paymaster’s Multi-Payment software as alleged. The 1<sup>st</sup>

respondent, in its counter notice of appeal, stated that the learned trial judge was wrong.

[28] It is arguable that the contents of paragraphs three to six of the statement of claim, as pleaded, would have been in compliance with the law and would have disclosed sufficient material to satisfy an averment and an allegation of an implied agreement between the 2<sup>nd</sup> respondent and the applicant as to the disputed ownership of the copyright. It could be argued that the averments upon which it placed reliance on the agreement were adequate.

[29] There is also a further matter of significance. It was observed by the learned judge that there was a lack of clarity in the contractual arrangements between the applicant and the 2<sup>nd</sup> respondent. He found, among other things, that the customary inference in the trade would be for the 2<sup>nd</sup> respondent to retain the copyright in the software and license it to his client. It appears that the learned judge sought to rely on a custom of the trade by way of judicial notice. There was no evidence to support a finding as to retention of ownership of a copyright in the software being a notorious fact of the trade. Arguably, the mere drawing of an inference that such a custom exists would not satisfy proof of such a custom. The matter of the ownership of the copyright is a live issue. The applicant contends that it designed the architecture and provided the specification for the software and hired the 2<sup>nd</sup> respondent to create the software. The question is, whether in the scope the 2<sup>nd</sup> respondent's work and

the circumstances surrounding his involvement and arrangements with the applicant, there was an agreement that the 2<sup>nd</sup> respondent would have assigned the right of the ownership of the copyright to the applicant and/or whether the 2<sup>nd</sup> respondent could issue a license to the 1<sup>st</sup> respondent to use the Paymaster software programme in the absence of Paymaster's consent. In my view the applicant has a good appeal.

[30] I now turn to the applicant's complaint of ruination if the stay is refused. The evidence from the applicant as to its ability to meet its liabilities ensuing from a final judgment, is conflicting. In paragraph 10 of the Affidavit of Athina Campbell sworn on 10 June 2010 she states that the applicant would suffer irreparable harm if the respondents were allowed to proceed with the inquiry as to damages. However, paragraphs 6 and 8 of her affidavit of 16 September 2010 expressly state that the applicant's income was more than enough to meet a final judgment as well as the costs of the appeal and of the court below. She went on to specify that the applicant would be able to meet these liabilities should it be unsuccessful in the appeal.

[31] A judgment for liability is outstanding against the applicant. An inquiry as to damages is pending against it. The applicant's disclosure that it would be able to meet all monetary amounts if required so to do does not support its assertion that it would suffer irremediable harm if steps are taken to recover

any damages ordered, should the inquiry proceed. Consequently, it could not be said that it would be at risk of being ruined.

[32] Despite this, I will nonetheless look at the applicant's assertion of being ruined if a stay is not granted. An assertion of ruination speaks to the inability to meet the payment of a sum awarded under a final judgment as well as the costs. The applicant has not shown any detriment by demonstrating that an estimated amount could accrue as damages exceeding that which it would be in a position to pay. A bald statement that it would be ruined if it is required to make payment consequent on an assessment of damages, is insufficient. There is no evidence to substantiate any likelihood of ruination on the part of the applicant. Further, it is unlikely that the court below would proceed with the inquiry prior to the hearing of the appeal. Additionally, there is no evidence of any risk of the applicant not being able to recover any amount paid for damages, in the event that it is required to pay damages before the appeal is heard. In all the circumstances, there is nothing to show a risk of the applicant suffering any irremediable harm to warrant a stay. Accordingly, the application for a stay of execution of the judgment is refused with costs to the respondents.