



Michaelmas Term

[2017] UKPC 40

Privy Council Appeals No 0067 of 2016 and 0073 of 2016

JUDGMENT

Paymaster (Jamaica) Limited and another (Respondents) v Grace Kennedy Remittance Services Limited (Appellant) (Jamaica)
Paymaster (Jamaica) Limited (Appellant) v Grace Kennedy Remittance Services Limited and another (Respondents) (Jamaica)
From the Court of Appeal of Jamaica

before

Lord Sumption

Lord Carnwath

Lord Hughes

Lord Hodge

Lord Briggs

JUDGMENT GIVEN ON

11 December 2017

Heard on 24 October 2017

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| Appellant/Respondent | Respondent/Appellant (Paymaster (Jamaica) Limited) |
| B St Michael Hylton QC | Charles Hollander QC |
| Courtney A Bailey | Denise Kitson QC |
| Kevin O Powell | |
| (Instructed by Myers Fletcher and Gordon) | (Instructed by Jones Day) |

Respondent
(Lowe)
Vincent A C
Leonard G
Sylvan Edw

LORD HODGE:

1.

This appeal concerns the ownership of the copyright in a computer program and also allegations of breach of confidence.

2.

Paymaster (Jamaica) Ltd (“Paymaster”) was a start-up company, incorporated by Ms Audrey Marks, who was a resident of Jamaica and the United States of America, to develop in Jamaica a multi-payment agency system which allowed consumers to pay their bills to various utility companies and other payees in one branch or kiosk. She had developed the idea of introducing such a system in Jamaica in 1994 while in the United States after she paid an overdue telephone bill from a kiosk in a shopping mall, using a service which guaranteed that her account would be updated on the following day. While bill payment services already existed in Jamaica to enable customers to pay one payee company and payments could also be made through commercial banks, her plan was to develop a facility in Jamaica for the payment of many client companies which would pay her company a fee for the provision of those services.

3.

In 1994 Paymaster employed a consultant, Dr Maurice McNaughton of Jamaica Online Information Services Ltd (“JOL”), to assist it in developing its multi-payment agency concept by identifying the tasks for which software would be designed. This involved (a) a network linking all of the collection outlets to a head office, (b) multi-client cashiering software at the collection outlets and (c) head office software to collect and consolidate payment information from the outlets at the end of each operating shift. In about April 1995 JOL commissioned Mr Paul Lowe (“Mr Lowe”), a computer programmer, to prepare a suitable program. Mr Lowe’s business was the development of software for monetary transfers. He had developed a cashiering program which collected payments for a single company directly, called CSSREMIT, which he marketed to companies in Jamaica, the Cayman Islands and Tortola BVI and to agencies of the Government of Jamaica. Mr Lowe’s business practice was to modify his basic CSSREMIT program to meet the specific needs of each client and, retaining his copyright, to grant the client a non-exclusive licence to use the program as so modified. Mr Lowe granted Paymaster a non-exclusive licence to use CSSREMIT for the multi-payment program which he developed at Paymaster’s request and expense. Paymaster used the modified program to operate its business.

4.

The software for the multi-payment agency concept involved (a) a branch function which enabled a customer to settle bills from different companies from one location or branch and (b) a head office function by which data from that branch were transmitted to an intermediary which collated the data and transmitted the correct data and payments to each of the client payee companies.

5.

In about March 1996 Paymaster showed its business plan to Mr Brian Goldson, the managing director of Grace Kennedy Remittance Services Ltd (“GKRS”), on a confidential basis when it was seeking investment in its proposal. Later Paymaster showed GKRS a copy of a second business plan. GKRS

was an agent in Jamaica of a Jamaican subsidiary of Western Union Corporation, a United States corporation which provided electronic bill-payment and money transfer services in the United States and several other countries. Ms Marks and Mr Goldson discussed the possibility of investing in Paymaster but those discussions stalled as a result of delays in the development of the Paymaster business after JOL withdrew from the project and certain utility companies withdrew from the testing of the system. After further discussions in 1998, GKRS decided not to invest in Paymaster. In the meantime, Paymaster set up various outlets and incurred expense to Mr Lowe for improving and rectifying the software. Over time Paymaster won contracts with several utility companies and sought to increase the number of its branches in order to expand the availability of its services to the public and win new client companies.

6.

In 1999 Mr Lowe approached GKRS with a proposal to grant a non-exclusive licence of the CSSREMIT software which he had developed for Paymaster and to customise it to meet GKRS's needs. After negotiations, Mr Lowe gave GKRS a non-exclusive licence to use the program. Using this software GKRS entered the market for the provision of a multi-payment agency system in Jamaica in competition with Paymaster in about April 2000.

7.

Paymaster contended that both GKRS and Mr Lowe had infringed its copyright in the software which Mr Lowe had prepared for it. In August 2000 Paymaster obtained an interlocutory injunction restraining GKRS and Mr Lowe from using the software. GKRS has not used that software since being enjoined against so doing. The software, which was a DOS-based program, has long since become obsolete and both Paymaster and GKRS have operated their businesses using different software. Notwithstanding that, the dispute has not been resolved.

8.

Paymaster has advanced three claims. First, it seeks damages from GKRS and Mr Lowe for breach of copyright. Secondly, it seeks damages from Mr Lowe for breach of confidence on the basis that the software which he licensed to GKRS contained references to Paymaster's business. Thirdly, Paymaster seeks damages from GKRS for breach of confidence on the allegation that GKRS used Paymaster's business plan, which had been shown to it on a confidential basis, to develop its competing business.

9.

After a seven-day trial, Jones J issued a judgment in 2010 in which he rejected each of Paymaster's claims. Paymaster had initially pleaded that it had the copyright of the program because it had designed the multi-payment program. But after evidence had been led which established Mr Lowe's authorship of the program, Paymaster's counsel submitted that a term should be implied into its contract with Mr Lowe that Paymaster would own the software which Mr Lowe created for it. Counsel adopted this stance because section 22(1) of the Copyright Act 1993 provides that the author of a protected work is the first owner of any copyright in that work unless there is an agreement to the contrary. Jones J rejected a pleading point raised by the defendants, holding that Paymaster had pleaded enough about its contract with Mr Lowe to allow it to argue for an implied term. But he held that no such term could be implied into the contract. He referred to the guidance which Lightman J gave in his nine-point legal test in *Robin Ray v Classic FM Plc*[1998] 25 FSR 622, 641-644 and cited five factors which pointed against the implication of such a term. First, Mr Lowe's business model was to modify his software for particular clients but to keep ownership and control of the modified product by giving his customer a licence to use the product, as he had done in this case. Secondly, Mr Lowe had not used any copyright material belonging to Paymaster in creating the multi-payment software:

the idea of the multi-payment agency and the specified requirements for the software which JOL had prepared on Paymaster's behalf did not enjoy copyright. Thirdly, Mr Lowe alone had written the program. Fourthly, Mr Lowe's business was to create software for the bill payment industry by updating his CSSREMIT software, from which it could be inferred by the custom of the trade that he would retain the copyright and give licences to his clients. Fifthly, Mr Lowe did not give the source code of either the pre-existing CSSREMIT or the added multi-payment software to Paymaster, enabling him to control any amendment of the software and Paymaster did not claim ownership of the source codes until it sought an injunction in legal proceedings.

10.

In relation to the claim of breach of confidence against GKRS, Jones J referred to the three requirements for the tort which Megarry LJ set out in *Coco v A N Clarke (Engineers) Ltd*[1968] FSR 415. He held that the first two requirements were met because Paymaster's business plan contained confidential information and GKRS had received the information in circumstances which imported an obligation of confidence. He held (para 80) that Paymaster's business plan was confidential because it was a novel one and demonstrated significant preparation. But he held that Paymaster had failed to prove the third requirement, namely that GKRS had used the information in that plan to Paymaster's detriment. He accepted as credible Mr Goldson's evidence and found as fact that GKRS had conducted its own research into a multi-payment business by sending an employee, Marcia Chon Tong, to the United States for a year to study the business in 1997/1998, that GKRS had located a software provider overseas and then used Mr Lowe in the process of two years' preparation and planning. He also relied on an exhibit which Ms Powell, who was Mr Goldson's successor as managing director of GKRS, had produced, which he described as exhibit 2, which showed in tabular form a comparison between Paymaster's business plan and the businesses operated in Jamaica by Western Union and GKRS.

11.

Jones J did not discuss the breach of confidence claim against Mr Lowe in any detail. He accepted that the demonstration program which Mr Lowe gave GKRS contained Paymaster's name, the location of certain of its branches and the names of certain client companies but said that the claim did not stand up to scrutiny. Jones J also rejected Paymaster's claim of passing off and Paymaster did not pursue that claim on appeal.

12.

The Court of Appeal (Harris JA, McIntosh JA and Lawrence-Beswick JA (acting)) rejected Paymaster's appeal on breach of copyright and on its claim for breach of confidence against Mr Lowe. It allowed the appeal against the judge's finding that GKRS had not acted in breach of confidence, holding that GKRS had used Paymaster's business plan. The Court of Appeal also allowed Mr Lowe's cross appeal that Paymaster had by obtaining the interim injunction caused him loss by compelling him to terminate his contract with GKRS and lose the benefit of a service contract with it.

13.

In reaching these conclusions the Court of Appeal in a lengthy judgment given by Harris JA discussed the parties' submissions on the many grounds of appeal which Paymaster advanced. But it is sufficient for the purposes of this appeal for the Board to summarise the court's reasoning briefly. In relation to the breach of copyright claim, Paymaster, recognising that it had only a licence for the CSSREMIT program, sought to argue that it owned copyright in "the additional functionalities in the CSSREMIT program". The Court of Appeal rejected the defendants' renewed pleading challenge to Paymaster's case that there was an implied term assigning the copyright to it. But the court rejected that case

after considering Paymaster's challenges in considerable detail. In summary, the Court of Appeal upheld the judge on the first, second, third and fifth grounds to which the Board referred in para 9 above. The Court of Appeal qualified the fourth ground by holding that there was no evidence to support the custom of trade of which Jones J had spoken. The Court also rejected Paymaster's contention that it owned part of the software; Paymaster's pleaded case was that it owned all of the software and it had never asserted joint ownership of the complete multi-payment software.

14.

The Court of Appeal overturned the judgment of Jones J on Paymaster's claim against GKRS for breach of confidence. The Court agreed with Jones J as to the applicable law and the questions to be resolved. It held that GKRS had received two versions of Paymaster's business plan. The Court of Appeal took a different view from Jones J on what gave the business plan its confidential status. The Court held (paras 198-199) that it was the business concept of a multi-payment system, which was a novelty in Jamaica, which had the necessary quality of confidentiality. The court agreed with Jones J that the plan had been given to GKRS in circumstances importing an obligation of confidence. Where the Court disagreed with Jones J was in its finding that GKRS had used the plan to Paymaster's detriment. In a brief discussion (paras 203-211 of its judgment) the court inferred that GKRS had used Paymaster's business plan to create its own. The court referred to Mr Goldson's evidence that GKRS had sent an employee to the United States for a year and had developed its own marketing plan. It referred also to Ms Powell's exhibit 2. But the court found it astonishing that Mr Goldson had produced with his affidavit a marketing plan which post-dated the commencement of the legal proceedings in an effort to show that GKRS's marketing plan emanated from its own research. That plan referred to cooperation with two companies which were incorporated in late 2000 after GKRS had commenced its multi-payment agency business. Further, the court asserted that exhibit 2 revealed "a preponderance of similarities between Paymaster's business plan and that of GKRS". The court stated that the process governing the multi-payment system was embedded in the software which Mr Lowe licensed to GKRS and "the concepts and ideas detailed in the multi-payment system" were available to GKRS only. From these factors the court inferred that GKRS had used Paymaster's plan to create its own.

15.

The Court of Appeal rejected the claim of breach of confidence against Mr Lowe on the basis that GKRS had obtained Paymaster's business plan directly from Paymaster and not from Mr Lowe. The Court did not discuss Paymaster's allegation of Mr Lowe's use of confidential information within the computer program.

16.

The Court of Appeal gave GKRS and Paymaster final leave to appeal to the Board on 6 June and 1 July 2016 respectively.

Discussion

17.

The Board addresses, first, the copyright claim and secondly the claim of breach of confidence against GKRS before turning to the claim of breach of confidence against Mr Lowe.

(i) Ownership of copyright

18.

Section 6 of the Copyright Act 1993 provides for the subsistence of copyright in original literary works and includes within literary works a computer program. Section 22(1) of the 1993 Act provides:

“Subject to the provisions of this section, the author of a protected work is the first owner of any copyright in that work unless there is an agreement to the contrary.”

Paymaster, having failed to establish its authorship of the multi-payment agency software, recognised that it had to establish such an agreement. Paymaster’s contract with Mr Lowe was oral and informal. As there had been no discussion as to the ownership of the multi-payment agency software, Paymaster sought to prove that there was an implied term of the contract which provided for the assignment by Mr Lowe of the copyright in the software.

19.

In order to imply a term into a contract one must show that the term is necessary to give the contract business efficacy in the sense that without it the contract would lack commercial or practical coherence: *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*[2016] AC 742, para 21 per Lord Neuberger. Jones J and the Court of Appeal concluded that a term assigning the copyright of the software could not be implied into the oral contract between Paymaster and Mr Lowe. The Board agrees for the following reasons.

20.

First, the Board considers that the assignment of the copyright of the complete multi-payment agency software would be inconsistent with Mr Lowe’s pre-existing business model, which involved his maintaining control over the products which he created for his clients. Unless the court could conclude that the underlying purpose of the informal oral arrangement was to give Paymaster exclusive use of the software which Mr Lowe had produced, there is no basis for implying any term into the agreement to give it business efficacy.

21.

Secondly, even if such a purpose could be ascertained, Paymaster has not shown that an assignment of copyright would have been the contractual solution which would without doubt have been preferred over an exclusive licence to use the software. In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 482, Bingham MR stated:

“The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. ... [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred.”

In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*[1973] 1 WLR 601, a case concerning a detailed written building contract, Lord Cross of Chelsea stated (613-614):

“[W]hat the respondents are asking the court to do is, in effect, to rectify the clause by the addition of some words which will make it accord not indeed with the actual intention of the parties but with the intention which the respondents say must be imputed to them. In such a case, as I have always understood the law, it is not enough for the party seeking to have the words varied to say to the court, ‘We obviously did not mean what we have said, so please amend the clause so as to make it read in

what you think is the most reasonable way.' He must establish not only that the parties obviously did not mean what they said but also that if they had directed their minds to the question they would obviously have framed the clause in the way for which he contends."

It is significant in the Board's view, that the multi-payment agency software was commissioned for Paymaster to use in its business. There was no proposal that Paymaster's business would involve the sale of the software to others. It was therefore not necessary that Paymaster should own the copyright. If it had been an implicit part of Paymaster's arrangement with Mr Lowe that it would have exclusive use of the multi-payment agency software, an exclusive licence of that software and an obligation on Mr Lowe to preserve that exclusivity by upholding his copyright might have sufficed. It cannot be said without doubt that the assignment of copyright would have been preferred.

22.

Thirdly, there is no clarity as to what is the work the copyright of which Paymaster asserts was assigned to it. This is unsurprising as Paymaster's pleaded case was that it was the author of the multi-payment agency software in its entirety and it only argued a case of a contractual assignment of the software after evidence had been led at the trial. As a result, Paymaster never set out in written pleadings the precise term which it wished to be implied into the contract. It is not disputed that Mr Lowe gave Paymaster a non-exclusive licence of his CSSREMIT program, which would be wholly inconsistent with any arrangement to assign the copyright of the whole program to Paymaster, if certain functionalities in the program were treated as a separate program. But there appears to have been no exploration in evidence of whether and if so how the additional functionalities which Mr Lowe added onto his CSSREMIT program could be separated from that program. In particular, the head office software which Mr Lowe produced for Paymaster depended for its operation on its compatibility with the software which he developed for the outlets where customers would pay their bills.

23.

Fourthly, it is not now asserted that any of the material which Paymaster, or JOL as its agent, gave Mr Lowe was copyright material and was included in the multi-payment agency software. In *Robin Ray v Classic FM Plc* [1998] 25 FSR 622, 642 Lightman J identified the use of pre-existing work of the client which was itself entitled to copyright protection as a pointer towards the necessity of an assignment of copyright in the contractor's work. That pointer is absent in this case.

24.

In conclusion, while Paymaster expended considerable sums of money in developing its business proposition and in commissioning Mr Lowe to produce the software to give effect to that proposition and to modify the software after testing, the Board finds no scope for implying the term into the informal contract between Paymaster and Mr Lowe for which Paymaster has argued. With hindsight, Paymaster may consider that it should have sought in its contract to prevent Mr Lowe from using the multi-payment agency software in his business by marketing it to others and that it should have secured the ability to enforce or to require Mr Lowe to enforce the copyright against third parties. But it did not do so.

25.

Having come to this view, the Board does not need to address the pleading point that Paymaster should not have been allowed to argue for an implied term. There was no suggestion that the defendants had been prejudiced by the absence of written pleadings on this point. It suffices to say that the Board would have been reluctant to disagree with the judge and the Court of Appeal on a matter of practice in the Jamaican courts.

(ii) The claim of breach of confidence against GKRS

26.

The next question is whether the Court of Appeal was correct to overturn the finding of Jones J that GKRS had not used Paymaster's business plan when setting up its business in competition with Paymaster.

27.

Jones J accepted Mr Goldson's evidence that GKRS had spent about two years developing the idea of introducing a multi-payment system into Jamaica. The evidence of Mr Goldson, which Jones J accepted as credible, included (a) that GKRS was familiar with the multi-payment business through its connection with Western Union, (b) that GKRS had sent Marcia Chon Tong, one of its managers in Trinidad, to New York for one year in late 1997 or 1998 to study that business and to advise on how the business would operate, including its software needs, (c) that GKRS had located an overseas supplier to provide it with the needed software, but had also obtained assistance from a local owner of software (ie Mr Lowe) and (d) that GKRS rolled out their business product called "BillExpress" after two years of preparation and planning.

28.

As the Board has stated in para 14 above, the Court of Appeal in paras 203-211 of its judgment disagreed with Jones J's assessment of the evidence in its discussion of this point. In so doing the Court of Appeal appears to have relied on three things, which the Board discusses below. First, it expressed astonishment that Mr Goldson had produced as documentary evidence of GKRS's preparations, a marketing plan which post-dated the commencement of the litigation. Secondly, it considered the document which the Board has called "exhibit 2" revealed a preponderance of similarities between Paymaster's business plan and GKRS's operation. Thirdly, it held that the process governing the multi-payment system was contained in the software which GKRS obtained from Mr Lowe. From those three things the Court of Appeal inferred that GKRS used Paymaster's business plan to create its own. The Court of Appeal (at para 211) concluded that "Paymaster's concepts and ideas in respect of the multi-payment model were private" and that GKRS had used that information to Paymaster's prejudice.

29.

The Board is mindful of the constraints on an appellate court when called upon to review the findings of fact of the judge at first instance who has heard and seen the witnesses give oral evidence in court. In *Thomas v Thomas*[1947] AC 484 the House of Lords and more recently in *McGraddie v McGraddie*[2013] 1 WLR 2477 and *Henderson v Foxworth Investments Ltd*[2014] UKSC 41; [2014] 1 WLR 2600; 2014 SC (UKSC) 203 the United Kingdom Supreme Court have given guidance on the circumstances in which an appellate court may interfere with the findings of fact by a trial judge. In *Thomas v Thomas*, 487-488 Lord Thankerton stated:

"[T]he principle ... may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from

the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then be at large for the appellate court.”

In Henderson (para 67) Lord Reed stated:

“in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

The Board itself has recently given similar guidance in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21; [2014] 4 All ER 418, paras 11-17 and in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11; [2016] 1 BCLC 26, paras 4-8.

30.

Mr Hollander QC for Paymaster submits that the Court of Appeal was entitled to reverse the trial judge’s findings of fact because Mr Goldson’s evidence had been wholly undermined on cross-examination and the trial judge had failed to take that into account. The Board disagrees with both propositions.

31.

In relation to the first proposition, there was evidence, which the Board discusses below, to support GKRS’s case which was not challenged on cross-examination. Mr Goldson’s evidence was criticised in at least two respects. First, Mr Goldson gave evidence that he did not recall seeing the Paymaster business plan, but the judge found that GKRS had received the business plan. Secondly, Mr Goldson in his first affidavit presented GKRS’s marketing plan as part of the company’s preparation for starting the multi-payment business. But, when challenged by Ms Marks’ second affidavit, he conceded in his second affidavit that the marketing plan to which he had referred in his first affidavit was produced in the second half of 2000 after GKRS had commenced its multi-payment agency business. It therefore could not vouch GKRS’s preparatory work before starting the business. The Board accepts that these points could weaken the reliability of Mr Goldson’s evidence but it is not persuaded that those matters were sufficient to undermine his credibility, where there was other evidence which corroborated important parts of his evidence.

32.

In relation to the second proposition, the judge might have acknowledged in his judgment GKRS’s failure to produce internal documentation from 1998 and 1999 in order to vouch its assertion that it prepared for the launch of its bill payment product over two years. He might have explained why he accepted GKRS’s evidence about its preparations, notwithstanding the absence of such documentation. But, as there was otherwise sufficient evidence to establish GKRS’s case, the judge’s failure to acknowledge the absence of certain documentary evidence cannot be equated with a failure to consider relevant evidence.

33.

The Board is persuaded that the Court of Appeal erred in overturning Jones J’s conclusions on the case against GKRS for breach of confidence both because it has not been demonstrated that the judge disregarded relevant evidence or otherwise was plainly wrong in his assessment of the evidence and because the evidence on which the Court of Appeal relied does not support its conclusion. In the Board’s view there was evidence before the judge which entitled him to reach the conclusion which he

did and there was not sufficient contrary evidence to allow the Court of Appeal to make the inferences which it did. The Board has reached this view for the following seven reasons.

34.

First, there was evidence that the idea of an independent multi-payment system was not novel even though it had not been developed in Jamaica until Paymaster established its business. Both Mr Goldson and Ms Joan-Marie Powell, who was his successor as managing director of GKRS, gave evidence that commercial banks in Jamaica were already collecting money for utility companies. Bill collection services already existed in other countries such as the United States and Canada, including services for multiple payees, such as Western Union's Quick Collect system in the United States. Ms Marks did not deny the existence of such bill collection systems overseas. Her evidence was that her model was better than most bill collection services because Paymaster used software to obtain data from and send data to the payee clients whereas most collection systems at that time did not have such software.

35.

Secondly, there was no evidence to undermine Mr Goldson's contention that Marcia Chon Tong had spent a year in the United States in late 1997 or 1998 studying various money services, including the multi-payment agency business, and identifying a potential software provider. On the contrary, there was corroboration of Mr Goldson's evidence of Marcia Chon Tong's work in the witness statement of Joan-Marie Powell, who also confirmed that she had identified a United States company, BEST Inc, which was a software provider in the money services business, as a possible provider of software for GKRS's multi-payment agency business. GKRS had been working with BEST Inc to customise its program when Mr Lowe offered to license his program to GKRS. Mr Goldson gave evidence that GKRS demonstrated both programs to prospective customers. Joan-Marie Powell also explained that GKRS had used BEST Inc's CEMSUP program after it was enjoined against using Mr Lowe's program and had replaced CEMSUP in 2004 with a more advanced program called "Navigator" which had been developed by a company in Florida.

36.

Thirdly, GKRS already had a platform in Jamaica from which to launch its new service. It did not need to study and use Paymaster's business plan to create a network of collection outlets. GKRS in its role as Western Union's agent in Jamaica already had a branch network in stores and other outlets from which people could use Western Union facilities to transfer money and pay the bills of companies based overseas. It was able to use that network to establish its multi-payment service alongside its existing service. It was also able to use marketing techniques which it used to promote its existing services. That is not to say that the establishment of a domestic multi-payment system did not require changes to be made to GKRS's operations. The paying customer paid for the Western Union's services, such as Quick Pay, in which GKRS was involved. The multi-payment system, which Paymaster adopted, involved the payee client paying a commission for the services, although the model could also, and later did, involve a charge to the paying customer. Further, it required the provider of the service to have access to the payee client's database in order to allow the customer to ascertain the balance due on his or her account. It also required the service provider to facilitate the transmission of data to the different payee clients. Access to appropriate software was essential to the system; and that is what Mr Lowe provided.

37.

Fourthly, the Board does not accept that exhibit 2 reveals a preponderance of similarities between Paymaster's business plan and the multi-payment agency business which GKRS established. The

document, which GKRS had prepared, was a comparison of business of Western Union in Jamaica, Paymaster's 1996 business plan and GKRS's multi-payment agency business in 2000. The GKRS model bore a very strong resemblance to the Western Union model and differed from the Paymaster plan in terms of the number and location of outlets, opening hours, the use of agents rather than employees, and the charging of a set fee to the payees. Those matters which were similar to the Paymaster model, such as locations in every parish, the collection of sums at the front-end by tellers who issued receipts generated by the computer system, and the possession of a comprehensive insurance plan, were equally similar to the Western Union model, which GKRS would have known as Western Union's agent. In the Board's view the document suggests that GKRS had drawn on its experience as an agent of Western Union and its existing network and practices in that capacity in creating its network for a multi-payment agency system. It did not point to the use by GKRS of Paymaster's business plan. The Court of Appeal erred in so asserting.

38.

Fifthly, the contents of the business plan and the use which GKRS was thought to have made of it were not explored in any detail in the evidence. In para 190 of its judgment the Court of Appeal recorded the contents pages of the two business plans. The summaries were very similar and it is sufficient to set out the summary from the second business plan:

"Mission statement; establishment; background; mission statement; service; Paymaster's services target customer convenience; reasonable rates attract client companies; service advantage to client companies include: How Paymaster can best serve client companies; how it works for you; the technology; security and insurance; fees; implementation schedule; achievements; collections network architecture; how we operate; software; Paymaster head office; Paymaster Head Office to client companies; locations, Paymaster service capabilities."

The Court of Appeal did not identify any particular aspect of the business plans which GKRS used in breach of confidence. There had been no exploration of such detail whether in the evidence of Paymaster's witnesses or in the cross-examination of GKRS's witnesses. Instead the Court of Appeal relied on GKRS's use of the concept of the multi-payment model. It stated (para 210):

"The process governing the multi-payment system would have been embedded in the software which was in GKRS's possession notwithstanding [Mr Lowe's] ownership of it. The concepts and ideas detailed in the multi-payment system are of some value to Paymaster and were available to GKRS only, as there is no evidence that anyone other than GKRS was conversant with the contents of Paymaster's business plan. Paymaster's name and logo appeared on GKRS's computer system, in early 2000 when GKRS commenced operation. In all the circumstances of this case, it is reasonable to infer that GKRS used Paymaster's plan to create its own. ..."

In para 211 Harris JA concluded:

"I am firmly of the view that GKRS made use of Paymaster's business plan obtained in confidence and clearly took an unfair advantage of Paymaster while it had it in its possession. ... Paymaster's concepts and ideas in respect of the multi-payment model were private and GKRS should have exercised special care not to have used the information contained therein, prejudicially to Paymaster."

The Board discusses the assertion that the concept was confidential in para 40 below.

39.

The Court of Appeal also recorded (para 191) that Ms Marks had stated in her affidavit of 25 August 2000 that the business plan which was sent to Mr Lowe included among other things "Paymaster's operational model, a description of Paymaster's network, and architecture, its expansion plan, its marketing plan and important information on Paymaster's programming and technology personnel". But if Mr Lowe received this material, there is no evidence that he gave it to GKRS or that GKRS used such material in developing its service.

40.

Sixthly, the Court of Appeal nowhere specifies what were the concepts and ideas which GKRS used in breach of confidence. It is not suggested that the concept of a bill collection system funded by the payee was novel or confidential. The idea of outlets located in supermarkets, shopping malls or other commercial centres where people could go to transfer money or pay their bills was not novel or confidential: Western Union already had such outlets in Jamaica which enabled customers to remit funds overseas or to pay the bills of an overseas supplier. The use of software to transfer data to the payee and give receipts to the customer was similarly well-established. The development of the software to enable Paymaster to process payments to multiple client payee companies and give the customers information of the balances on their accounts with the payees may well have been novel, at least in Jamaica. But GKRS did not obtain that software from the written business plan. Unfortunately for Paymaster, their contract with Mr Lowe left him free to provide the software to others and to adapt it to their needs.

41.

The Board recognises that a subconscious use of information obtained in confidence as a springboard for activities detrimental to the person who made the confidential communication may give rise to a claim of breach of confidence, as for example in *Seager v Copydex Ltd* [1967] 1 WLR 923. Conscious plagiarism is not a necessary component of the claim. But it is necessary to identify the information which was so used.

42.

Seventhly, the Court of Appeal erred in its reliance on the use by GKRS of the software which Mr Lowe provided to it under licence in support of the assertion that GKRS used Paymaster's business plan. That software was an essential part of the multi-payment agency business as it provided the means by which (a) data could be sent from a branch or kiosk to a head office for processing, (b) customers could access their account balances at the branch or kiosk and (c) the head office transmitted relevant information to each of the service provider's clients. The software was created in implementation of Paymaster's business plan. But as the copyright in that software belonged to Mr Lowe, who was free to license others to use it, and he approached GKRS to do so, GKRS's use of the software does not support any inference that GKRS had used Paymaster's business plan in breach of confidence.

43.

In summary, therefore, (i) it was not contested that multi-payment agency services existed overseas and could provide a model for use elsewhere; (ii) at trial there was no overt challenge to the evidence of Mr Goldson and Ms Powell that GKRS had researched the multi-payment agency business in the United States in 1997-1998, nor did the Court of Appeal give any reason for impugning that evidence; (iii) GKRS already had in place a network of outlets in Jamaica through their agency contract with Western Union, which it used when it set up its multi-payment agency; (iv) the document, exhibit 2, which GKRS produced, supported the view that GKRS had modelled its new business network on its existing agency for Western Union in Jamaica and the Court of Appeal erred in holding otherwise; (v)

it was not established that GKRS used any particular element of Paymaster's business plan, and Jones J was correct so to conclude; (vi) instead the Court of Appeal held that the business concept of a multi-payment agency system, which was a novelty in Jamaica, itself had the necessary quality of confidentiality (paras 198-199) and that GKRS had used Paymaster's concepts and ideas (para 211) but the Board disagrees with those conclusions; and (vii) the facts that Mr Lowe was able to give GKRS a licence to use the software which he had developed for Paymaster and GKRS used that software until enjoined from doing so do not mean that GKRS used Paymaster's business plan.

44.

The Board therefore is not persuaded that the Court of Appeal had a sufficient basis to overturn Jones J's acceptance of both Mr Goldson's credibility and the evidence which suggested that GKRS had used information about multi-payment agency systems, which it obtained in the United States, and its existing network of agents and its business practices, which it had developed when acting as agent of Western Union, to set up its bill payments business.

(iii) The claim of breach of confidence against Mr Lowe

45.

Paymaster no longer asserts that Mr Lowe gave its business plan to GKRS. The only remaining claim for breach of confidence against Mr Lowe concerns the pieces of information relating to Paymaster which were contained in the software which he licensed GKRS to use. In its written case Paymaster asserts that it was obviously wrong for Mr Lowe to provide a copy of the software "with all Paymaster's information there contained". But the evidence shows that this information was only (a) Paymaster's name, (b) the names of three of Paymaster's clients and (c) the location of six of its branches. The information was in the user manual which was delivered along with the software which Mr Lowe provided GKRS. There is no suggestion that that information about Paymaster was of any value to Mr Lowe or GKRS. The information in the user manual was in illustrations of the operation of the system. Mr Lowe had the copyright of that software. The Board is not persuaded that that information was confidential or that Mr Lowe exploited it in any way. The claim against Mr Lowe therefore fails.

The costs appeal

46.

In view of the Board's decision on GKRS's breach of confidence appeal it is not necessary for the Board to consider at this time GKRS's appeal against the award of costs which the Court of Appeal made against it. The Board will deal with that matter when it considers any submissions on costs following the promulgation of its judgment.

Conclusion

47.

The Board therefore will humbly advise Her Majesty that the appeal by GKRS in relation to the finding of breach of confidence should be allowed and that Paymaster's appeal in respect of both the ownership of copyright in the software and also the claim for breach of confidence against Mr Lowe should be dismissed. Parties are invited to make written submissions on the form of order in relation to costs within 21 days of the handing down of this judgment.