

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

GRENADA

GDAHCVAP2021/0025

BETWEEN:

THE NATIONAL LOTTERIES AUTHORITY

Appellant

and

JEROME DE ROCHE

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom
The Hon. Mr. Trevor M. Ward

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Leslie Haynes, KC with him Mrs. Melissa Modeste-Singh for the Appellant
Mr. Ruggles Ferguson with him Ms. Danyish Harford for the Respondent

2022: September 23;
November 21.

Civil appeal – Breach of contract – Failure to present winning lotto ticket – Non-payment of winning jackpot – Pleadings – Rules 8.7 and 8.7A of the Civil Procedure Rules 2000 – Evidence – Witness statements – Whether the judge erred in law in permitting the respondent to adduce evidence that he had presented the winning ticket to the appellant’s agent when this fact was essential to the cause of action but was never pleaded in the statement of claim – Whether a party’s case can be conducted on a footing which formed no part of its pleaded case

The appellant, the National Lotteries Authority (“the appellant” or “the NLA”) is the agency in Grenada charged with responsibility for, *inter alia*, promoting the development of lotteries and games of chance in Grenada, including the Play Way and the Super 6 Lotto. On 3rd November 2017, the respondent Jerome De Roche (“the respondent”) placed a bet on the Super 6 Lotto by purchasing a ticket containing certain numbers from Parris Pharmacy in Grenville. This ticket was for draw #1761, which carried a winning prize of \$540,000.00.

Though the draw was scheduled for 3rd November 2017, it was deferred to 4th November 2017. The respondent claimed to have played the winning numbers and sought payment from the NLA although he could not produce the winning ticket. The NLA refused to pay the respondent the prize money.

On 12th October 2018, the respondent instituted a claim against the appellant, for general damages for breach of contract in failing to pay the prize money to him or, alternatively, special damages in the sum of \$540,000.00, and, in the further alternative, an order directing the appellant to pay to him the sum of \$540,000.00, which was said to be held on trust by the appellant for the respondent. The claim also alleged that the appellant had embarked on a series of fraudulent actions to mislead the respondent and thereby deprive him of his winnings.

On his pleaded case, the respondent alleged that he first discovered that he had played the winning numbers when he visited a lottery outlet to purchase additional tickets on 4th November 2017. He became aware that draw #1761 had occurred, and immediately recognised that he had drawn the winning numbers. He searched frantically for his ticket but realised that he had inadvertently disposed of it in the garbage that morning. The respondent pleaded that, at the first opportunity, he notified the appellant that he had purchased the winning ticket and was claiming the winnings, despite being unable to produce the ticket. The appellant informed the respondent that it would not be able to consider his claim unless the winning ticket was produced within three months. The respondent was unable to produce the ticket and the appellant refused to pay him the winning prize.

The appellant, in its defence, denied that it was in breach of contract. It pleaded that by the terms of the contract printed on the back of the ticket, the ticket is a bearer instrument and constitutes the only proof that a bet was placed. The appellant pleaded that the terms of the contract as endorsed on the back of the lottery ticket were that in order to claim the prize, the bearer was required to sign and present the ticket and present a valid form of identification within 90 days, unless otherwise decided by the manager of the NLA. The appellant pleaded that the respondent had failed to comply with any of these terms of the contract. The appellant further pleaded that an investigation was carried out and the findings showed that the point of purchase of the winning ticket was at the Grenville sub-office and not at the Parris Pharmacy as claimed by the respondent. The appellant also denied the allegations of fraud made by the respondent.

The learned trial judge accepted the evidence given by the respondent at trial and found that he had purchased the winning ticket at Parris Pharmacy on Victoria Street in Grenville. The judge further found that the respondent had satisfied the requirements to claim the winning prize, in that, on 7th November 2017, he signed and presented the winning ticket to the defendant's agent, who told him it had been cancelled. Accordingly, the judge held that the respondent had succeeded on his claim for breach of contract and further held that the appellant held the prize money in the sum of \$540,000.00 on trust for the respondent. The judge therefore awarded the respondent the said sum as special damages together with pre-trial and post-judgment interest.

Being aggrieved, the appellant appealed relying on four grounds of appeal. The central issue that arises for this Court's determination is whether the judge erred in law in permitting the respondent to adduce evidence that he had presented the winning ticket to the appellant's

agent when this fact was essential to the cause of action but was never pleaded in the statement of claim.

Held: allowing the appeal, setting aside the orders of the judge and ordering the respondent to pay two-thirds of the appellant's prescribed costs in the court below and, on this appeal, two-thirds of that amount, that:

1. The claimant must plead the essential facts that constitute its case, and those facts must be sufficient to establish a cause of action and to enable the other side to know the case it has to meet in sufficient detail. CPR 8.7A prohibits reliance on allegations or facts not pleaded unless the judge gives permission, or the parties agree. In this case, the respondent was required to plead, pursuant to CPR 8.7, the allegation that the respondent had presented and signed the winning ticket. This was a critical element of the cause of action, and was the central issue in dispute. However, the respondent's pleaded case rested simply on his having purchased the winning ticket.

East Caribbean Flour Mills Limited v Ormiston Ken Boyea; Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006 (delivered 16th July 2007); [2007] ECSCJ No. 110 applied; **McPhilemy v Times Newspapers Ltd** [1993] 3 All ER 775 applied; **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste** SLUHCVP2009/008 (delivered 11th January 2010, unreported) considered; Rules 8.7 and 8.7A of the **Civil Procedure Rules 2000** considered.

2. A witness statement constitutes the evidence to prove an allegation of fact made in the statement of claim. It provides the details or particulars of the issues that arise from the pleader's case. Its contents must, on analysis, be capable of being properly regarded as particulars or details of allegations already made in the pleadings. Once the case is sufficiently pleaded, then a witness statement may furnish the particulars and details of the allegations or facts contained in the pleadings. Additional particulars do not constitute a change of case, provided that the allegation was sufficiently pleaded.

Cedar Valley Springs Homeowners Association Incorporated v Hyacinth Pestaina and others ANUHCVP2016/0009 (delivered 18th January 2017); [2017] ECSCJ No. 5 applied; **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste** Saint Lucia HCVAP2009/008 (delivered 11th January 2010, unreported) considered.

3. There is a need for the trial court to give careful scrutiny to whether the impugned material in the witness statement can properly be characterised as particulars of allegations already made in the statement of case or are new allegations. In this case, where the respondent asserted for the first time in his witness statement that he had signed and presented the winning ticket, this was not a case of furnishing particulars of an allegation already pleaded; it was a new allegation. It follows that the judge fell into error to the extent that the judge's summary of the respondent's case states that the respondent pleaded that he had presented the winning ticket

but was informed by the agent that it was invalid because the draw was cancelled, as no such allegation is made in the respondent's statement of claim.

East Caribbean Flour Mills Limited v Ormiston Ken Boyea Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006 (delivered 16th July 2007); [2007] ECSCJ No. 110 considered.

4. Where a judge is minded to exercise his or her power to make orders of her own initiative, he or she is mandated, pursuant to CPR 26.2, to give the other party a reasonable opportunity to make representations. In this case, the judge seems to have missed an egregious and fundamental inconsistency; namely, the fact that the respondent never pleaded that he had presented the winning ticket but had in fact pleaded that when he discovered that he had purchased the winning ticket, he had already lost the ticket, but, inconsistent with that pleading, he had asserted in his witness statement that he had presented the winning ticket but was told it was cancelled. It is clear that the judge never apprehended that the pleadings did not in fact contain an allegation that the respondent had presented the winning ticket, accordingly there can be no question of her implicitly exercising her discretion to permit the respondent to rely on facts in his witness statement which he had not pleaded. It follows that in circumstances where the judge seems not to have been alive to the inconsistency, it cannot be said that she impliedly exercised her discretion to give permission for that fact (presentation of the ticket) to be relied on.

Rule 26.2 of the **Civil Procedure Rules 2000** considered.

5. Despite the advent of witness statements, there is a need for strict compliance with CPR 8.7. A concise statement of the facts relied on must still be included in the statement of case. Where pleadings are deficient for the failure to plead an important factual detail, which was an essential element of the cause of action, the defect could not be cured by simply inserting the evidence into a witness statement. It follows that in order to be compliant with CPR 8.7, the respondent was required to amend the statement of case to plead presentation of the ticket and to correct the dates and sequence of events.

Rule 8.7 of the **Civil Procedure Rules 2000** considered; **Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Seebalack** [2011] 2 LRC 176; [2010] UKPC 15 considered. **London Passenger Transport Board v Moscrop** [1942] 1 All ER 97, 105 considered; **George W. Bennett Bryson's & Co. Ltd. v George Purcell** ANUHC VAP2011/0023 (delivered 28th February 2018); [2018] ECSCJ No. 39 considered.

JUDGMENT

- [1] **WARD JA:** This appeal arises out of a dispute over the non-payment of the winning jackpot in the Grenada Super 6 Lotto. Its apparent simplicity belies an important issue relating to pleadings to which this appeal gives rise. In short, can a party's case be conducted on a footing which formed no part of its pleaded case?

Background

- [2] The appellant, the National Lotteries Authority, ("the appellant" or "the NLA") is the agency in Grenada charged with responsibility for, *inter alia*, promoting the development of lotteries and games of chance in Grenada. Among the games offered to the public under the auspices of the NLA are the Play Way and the Super 6 Lotto. The respondent, Jerome De Roche, who was the claimant in the court below, is a frequent player of the Play Way game. On Friday, 3rd November 2017, he placed a bet on the Super 6 Lotto by purchasing a ticket containing the numbers 08, 10, 11, 19, 26, and 28 from Parris Pharmacy in Grenville. This ticket was for draw #1761, which carried a winning prize of \$540,000.00. Though the draw was scheduled for 3rd November 2017, it was deferred to 4th November 2017.

- [3] The respondent's pleaded case, as set out at paragraphs 6-8 of his statement of claim, is in the following terms:

"6. The Claimant became aware on Saturday 4th November that Draw 1761 had taken place when he visited a Lotto outlet in St. George to purchase additional tickets. He immediately recognised that the numbers drawn for Draw 1761 were the numbers that he had played.

7. Upon frantically checking for the winning ticket he had purchased the Claimant realised that he had inadvertently disposed of the ticket in the garbage on the morning of Saturday 4th November.

8. At the first opportunity the Claimant notified the Defendant that he had purchased the winning ticket and that he was claiming the winnings despite the fact that he was unable to produce the ticket because he had inadvertently disposed of it."

- [4] The NLA informed the respondent that it would not be able to consider his claim unless the winning ticket was produced within three months. The respondent was unable to produce the ticket and the appellant refused to pay him the winning prize.
- [5] As a result, on 12th October 2018, the respondent instituted a claim against the appellant for general damages for breach of contract in failing to pay the prize money to him or, alternatively, special damages in the sum of \$540,000.00, and, in the further alternative, an order directing the appellant to pay to him the sum of \$540,000.00, which was said to be held on trust by the appellant for the respondent. The claim also alleged that the appellant had embarked on a series of fraudulent actions to mislead the respondent and thereby deprive him of his winnings. These acts were said to include wiping out all information connected with the purchase of the Super 6 lotto ticket at Parris Pharmacy, under the guise of performing maintenance on the lotto machine, and falsely representing that the winning ticket was sold by the NLA's Office in Grenville on 4th November 2017 and not by Parris Pharmacy on 3rd November 2017.
- [6] In its pleaded defence filed on 12th November 2018, the appellant denied that it was in breach of contract. It pleaded that by the terms of the contract printed on the back of the ticket, the ticket is a bearer instrument and constitutes the only proof that a bet was placed. The appellant pleaded that the terms of the contract as endorsed on the back of the lottery ticket were that in order to claim the prize, the bearer was required to sign and present the ticket and present a valid form of identification within 90 days, unless otherwise decided by the manager of the NLA. The appellant pleaded that the respondent had failed to comply with any of these terms of the contract. The appellant further pleaded at paragraph 13 of its defence that an investigation was carried out and the findings showed that the point of purchase of the winning ticket was at the Grenville sub-office and not at the Parris Pharmacy as claimed by the respondent. The appellant says these findings were presented to the respondent. The appellant also denied the allegations of fraud made by the respondent and pleaded that the 'Super 6 game data is encrypted and stored on a

server' in Saint Lucia and the appellant does not have the clearance to wipe any data from the Super 6 lottery database.

The evidence

[7] In due course, case management orders were issued by the learned master on 3rd October 2019. Witness statements were to be filed by 15th November 2019. Both parties filed their respective witness statements on that day, save that the appellant subsequently filed an additional witness statement on 23rd January 2020. A trial date was originally set for 13th April 2021 but later rescheduled for 17th May 2021.

[8] Given the issues that arise for consideration on this appeal, it is necessary to set out the material parts of the respondent's witness statement, which stood as his evidence in chief. The material parts of paragraphs 7-15 are in the following terms:

"7. I had won \$600 on the Play Way ticket for the midday Play way draw. I went to cash the Play way ticket on Tuesday 7th November 2017 at the Lotto office in Bruce Street Mall, St. George's where the Tourist boats come in. While at the mall Lotto office, I saw the Super 6 and Lotto numbers marked up on the board. I recall from memory that this was (sic) the same numbers on my Super 6 Lotto ticket. And the super 6 Lotto ticket which I kept confirmed the numbers.

8. I never wrote down the Super 6 numbers. I kept them in my head and I remembered them because they were selected by me using a timing code...

9. After recalling the numbers from my memory, I then went to the woman at the desk of the Lotto shop in the mall. I took out the Play way ticket #34, signed it and gave it to her to cash and I got cash for \$600.00.

10. After cashing my Play way ticket, I asked the woman when did the Super 6 numbers shown on the board got (sic) played because I did not see the number played on TV on the Friday night before. The woman said the Super 6 was played on Saturday night, 4th November 2017.

11. I told the woman I bought numbers for Friday's draw which are the same numbers shown on the board. The woman then told me to show her the ticket. So, I signed the ticket and handed it to her. The woman put the ticket in the Lotto machine then turn (sic) around and told me that the ticket is cancelled.

12. I then said to the woman how could the ticket be cancelled when there was no draw on Friday 3rd November 2017 but there was a draw or play on Saturday 4th November 2017?

13. The woman replied to me that I purchased the ticket for Friday the 3rd not Saturday the 4th. That made me feel like my Super 6 ticket was not valid.

14. I thought the woman at the Mall Lotto's reply could not be right since there was no call or play or draw of the numbers on the Friday night. I know from playing Play Way that if a ticket is purchased for a midday draw and numbers on that ticket were not called on the midday draw, I cannot win even if the same numbers are called for the night draw. But when there is no call or draw on Friday but on Saturday instead, I thought I should still win.

15. Not believing what the woman in the mall lotto office told me, I went to see the manager of the National Lotteries Authority, Mr. Gilbert, at their main office on the Carenage in the afternoon of the same day, Tuesday 7th November. The secretary to Mr. Gilbert told me he is not in."¹

The judgment in the court below

- [9] The learned trial judge ("the judge") accepted the evidence given by the respondent at trial and found that he had purchased the winning ticket at Parris Pharmacy on Victoria Street in Grenville. The judge further found that the respondent had satisfied the requirements to claim the winning prize, in that, on 7th November 2017, he signed and presented the winning ticket to the defendant's agent, who told him it had been cancelled. Accordingly, the judge held that the respondent had succeeded on his claim for breach of contract and further held that the appellant held the prize money in the sum of \$540,000.00 on trust for the respondent. The judge therefore awarded the respondent the said sum as special damages together with pre-trial and post-judgment interest.

The appeal

- [10] Being aggrieved, the appellant filed four grounds of appeal. In summary, the appellant contends by ground 1 that the judge erred in law in permitting the respondent to adduce evidence in chief contrary to paragraphs 6 and 7 of his

¹ Record of appeal, Vol. 1, pgs. 101-102

statement of claim and wrongly decided the issue of the appellant's obligation to pay out the prize winnings by reference to that evidence, which formed no part of the respondent's pleaded case. Grounds 2 and 3 take issue with the judge's findings of fact in relation to three matters, namely: (a) whether the appellant could alter or manipulate the ticket information stored on the lottery terminal; (b) that there was an announcement by the appellant that the winning ticket was sold at Parris Pharmacy; and (c) that the winning ticket was signed and presented by the respondent to the lottery agent on 7th November 2017. Ground 4 contends that the judge erred in law in ruling that the Super 6 lotto ticket was not a bearer instrument and in failing to find that it was a term of the contract.

The appellant's submissions

Ground 1

- [11] On behalf of the appellant, learned King's Counsel, Mr. Leslie Haynes, took as his starting point, rule 8.7(1) of the **Civil Procedure Rules 2000** ("CPR") which states that: '[t]he claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.' Learned King's Counsel advanced the propositions that pleadings are still required to mark out the parameters of the case that is being advanced by each party and are critical to identify the issues and the extent of the dispute between the parties; that they should make clear the general nature of the case to let the other side know the case it has to meet so as to prevent ambush; and must, therefore, contain the particulars necessary to serve that purpose. The cases of **McPhilemy v Times Newspapers Ltd and others**,² and **Shaista Trading Company Limited d.b.a. Diamond Republic v First Caribbean International Bank (Barbados) Ltd.**³ were cited in support of these propositions.

- [12] Mr. Haynes submitted in oral argument that a witness statement cannot change pleadings but is limited to particularising and enlarging pleadings. He submitted that

² [1999] 3 All ER 775, at paras 792J - 793A.

³ ANUHCVP2018/0021 (delivered 26th April 2021); [2021] ECSCJ No. 534.

a court must decide the case within the parameters of the pleadings. It was further argued that the judge incorrectly summarised the respondent's pleaded case when, in purporting to summarise the statement of claim, she stated at paragraph 2 of the judgment that the respondent pleaded that he presented the ticket to the appellant's agent prior to inadvertently disposing of it, when in fact the statement of claim states that the respondent disposed of the ticket prior to discovering he had won on 4th November 2017.

[13] Mr. Haynes referred the court to paragraphs 3 – 7 of the statement of claim and submitted that it fails to allege that the lottery ticket was ever presented for payment, in sharp contrast to the respondent's witness statement where this assertion is made. Mr. Haynes invited the court to note a number of deviations from the pleadings as reflected in the witness statement. This is significant, he submitted, given that the essence of the defence was that it was a term of the contract between the appellant and the respondent that to claim the prize, the respondent had to present and sign the winning ticket. The respondent was therefore required to specifically plead that he presented and signed the ticket.

[14] Mr. Haynes drew attention to inconsistencies in the respondent's position with respect to whether the ticket was presented. He noted that the respondent's witness statement and pre-trial memorandum filed on 11th February 2020, both assert, contrary to the statement of claim, that the respondent had signed and presented the winning ticket on Tuesday 7th November 2017 but was told that it was cancelled. The witness statement, submitted Mr. Haynes, also represents a shift from the statement of claim, in that, the respondent's discovery that he had played the winning numbers is now said to have been made on Tuesday, 7th November and not Saturday 4th November as pleaded; and further, the respondent is now said to have lost the ticket on Saturday, 11th November 2017; not on Saturday 4th November 2017.

- [15] Furthermore, argued Mr. Haynes, in subsequent pre-trial skeleton arguments filed on 6th April 2021, in an apparent reversion to its pleaded case, counsel for the respondent wrote at paragraph 5: 'It is common ground that the winning ticket was never presented for the purpose of drawing the \$500,000.00 (sic) which was the prize played for in Draw 1761.'
- [16] Mr. Haynes submitted that in the face of these inconsistencies, the statement of claim must be paramount. Said to be compounding matters, was the fact that throughout all this the respondent never amended or sought to amend his statement of claim to plead presentation of the winning ticket. Thus, when the trial commenced, it was on the basis that the respondent had not presented the winning ticket and the issue was simply one of determining the terms of the contract. The appellant's apprehension of the respondent's case, based on the pleadings, was that he had not presented the winning ticket, but that the appellant's manager could have exercised his discretion to pay the prize money to him, notwithstanding his failure to present the ticket, and that the failure of the manager to do so and to insist on the strict terms of the contract was unfair in the circumstances. Mr. Haynes submitted that unfairness is no part of contract.
- [17] Mr. Haynes referred to the judgment below and submitted that in setting out the respondent's case, the judge failed to deal with the respondent's failure to plead that the winning ticket was presented, which is an element of the cause of action and so ought to have been pleaded. The essence of the defence was the non-presentation of the ticket which was in breach of the terms of the contract. Learned King's Counsel described this as the 'highwater' of the appellant's case which the respondent could not get around. Despite this, the only issue which the judge dealt with was the date when the ticket was lost. Mr. Haynes therefore submitted that the judge erred when she found as a fact that the respondent had presented the winning ticket and that she further erred in relying on this finding of presentation to hold that the respondent was entitled to payment of the prize money when presentation was never pleaded. Mr. Haynes contended that the judge tried a case that did not exist

on the pleadings, while holding (at paragraph 48) that the appellant had not rebutted that case.

- [18] Mr. Haynes submitted that although the appellant took no steps up to trial, such as applying to strike out the respondent's case or by putting the inconsistencies to the respondent during cross-examination, there was no burden on the appellant to prove the appellant's case; it was for the respondent's pleadings to set out a cause of action. Mr. Haynes submitted that this court must set aside the orders of the judge as a matter of law because the judge determined the case on a basis that was not pleaded.

Grounds 2 & 3

- [19] Mr. Haynes did not expend much energy on grounds 2 & 3 during oral submissions. Mr. Haynes submitted that when the central issue in the case is viewed in totality, findings in relation to whether the lottery machine was manipulated or whether there was an announcement by the appellant that the winning ticket was sold at Parris Pharmacy, while matters of fact for the judge, have no bearing on whether the respondent presented the winning ticket, and are therefore irrelevant.

Ground 4

- [20] In relation to ground 4, Mr. Haynes submitted that the ticket was a bearer instrument and that as a matter of law it had to be presented and signed within 90 days by the respondent for him to be paid the prize money, pursuant to the terms of the contract. The written ground of appeal contends that the judge erred in law in ruling that the Super 6 lotto ticket was not a bearer instrument and in failing to find that it was a term of the contract that the ticket be presented and signed within 90 days.

The respondent's submissions

Ground 1

- [21] On behalf of the respondent, learned counsel Mr. Ruggles Ferguson, readily conceded at the outset that the statement of claim did not plead that the respondent presented the winning ticket to an agent of the appellant on 7th November 2017 or

on any other day. Nonetheless, submitted Mr. Ferguson, three issues arose in the case. The first was whether the respondent purchased the winning ticket. This, he submitted, was answered in the respondent's pleadings and witness statement, and the judge accepted the respondent's evidence in relation to this issue. The second issue was said to be whether the ticket was presented to an agent of the appellant. Mr. Ferguson argued that the judge found on the evidence that the ticket was presented to an agent of the NLA and that evidence was never challenged in cross-examination. Mr. Ferguson submitted that the judge was plainly alive to the rule that all facts on which a party intends to rely should be pleaded given that, at paragraphs 32 and 33 of the judgment, she addressed that issue as a preliminary objection taken by the respondent – invoking CPR 10.7 – in relation to evidence of the time when the winning ticket was purchased being adduced by the appellant which it had not pleaded.

- [22] Mr. Ferguson further submitted that the fact that the pleadings were not amended to plead presentation of the ticket was not fatal, and the appellant cannot complain about ambush since it was in possession of the respondent's witness statement some eighteen months before trial and that witness statement provided the details of what was pleaded in the statement of claim. The statement of claim contained a genuine error in relation to the date when the ticket was lost, which was corrected in the witness statement, argued Mr. Ferguson. It was his further submission that though pleadings may be deficient, a witness statement can flesh out the details since the purpose of pleadings is to inform the other side of the case it has to meet. In this regard, Mr. Ferguson relies on **Nicholas Faisal v Saint Lucia Banana Corporation**.⁴ Mr. Ferguson submitted that the respondent's basic case, as pleaded at paragraph 8 of the statement of claim, was that he had purchased the winning ticket, he had notified the appellant that he had done so and he was claiming the winnings despite the fact that he was unable to produce the ticket because he had inadvertently disposed of it. Mr. Ferguson invited the court to find that, viewed that way, the respondent's witness statement is not necessarily inconsistent with

⁴ SLUHCv2006/0413 (delivered 15th November 2007, unreported).

paragraph 8 of his statement of claim. Further, submitted Mr. Ferguson, the conflict between the pleadings and the witness statement was not taken as an issue by the appellant at trial, even though it was open to them to apply to strike out or call evidence to rebut the respondent's evidence, or to cross-examine the respondent on the issue.

[23] In any event, submitted Mr. Ferguson, even accepting that there is a conflict between the pleaded case and the respondent's witness statement, this does not render the evidence inadmissible as a matter of law. Mr. Ferguson posited that this is to be deduced from the terms of CPR 8.7A which provides that the claimant may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out there, unless the court gives permission, or the parties agree. The effect of this provision is said to be to make unpleaded facts, not inadmissible, but undeployable, unless the parties agree or the court grants permission. The court's case management powers under CPR 26.2(1) empowered the judge to exercise her discretion to grant permission to deploy the unpleaded facts in evidence of her own motion.

[24] Though conceding that no application was made to amend the pleadings nor permission sought to deploy the unpleaded facts, Mr. Ferguson sought to get around this by submitting that, by implication, the judge gave permission and allowed the evidence of her own motion, and without objection by the appellant. In answer to a question from the court about whether such a course was permissible in light of CPR 26.2 which required the judge to invite the other side to make representations where she intended to act on her own initiative, Mr. Ferguson submitted that the requirements of that rule were satisfied because the appellant did not object to the evidence.

[25] Mr. Ferguson submitted that in exercising her power to admit the unpleaded facts, the judge acted in furtherance of the overriding objective.

Grounds 2 & 3

- [26] In relation to grounds 2 and 3, Mr. Ferguson submitted that these were issues of fact within the province of the judge and reminded the court of the well-settled constraints upon the appellate jurisdiction when asked to interfere with findings of fact by trial judges.

Ground 4

- [27] In relation to ground 4, Mr. Ferguson submitted that the appellant's contention that the judge erred in law in ruling that the Super 6 lotto ticket was not a bearer instrument and in failing to find that it was a term of the contract that the ticket be presented and signed within 90 days, betrayed an improper understanding of the judgment since the judge made no finding that the ticket was not a bearer instrument. On the contrary, she found, that on the evidence, the respondent had fulfilled the conditions stipulated on the back of the ticket for claiming the winning prize as articulated at paragraphs 52 and 53 of the judgment. For these reasons, Mr. Ferguson submitted that ground 4 lacks merit.
- [28] Mr. Ferguson's final submission was that should the court determine the appeal in the appellant's favour, then it should make no order as to costs.

Appellant's reply submissions

- [29] By way of brief reply, Mr. Haynes submitted that the respondent advanced no authority or precedent to support the proposition that a case could be conducted on the basis of facts contained in a witness statement which were not pleaded, and which were necessary to establish the cause of action.
- [30] As it relates to the issue of costs, Mr. Haynes conceded that, to a certain extent, the appellant's trial counsel's failure to challenge the evidence and, thus, to properly assist the court, may sound in costs. While the appellant had a duty to assist the court, however, this did not extend to assisting the respondent with his claim. The judge had a duty to review the pleadings in order to set the parameters of the case

but appears not to have noticed that an essential element of the cause of action, namely the presentation of the ticket, was not pleaded, and failed to note that paragraph 8 of the statement of claim actually pleaded that the winning ticket was not presented at all. Accordingly, submitted Mr. Haynes, in any apportionment of costs the respondent should bear the greater part of it because it was its responsibility to draft its pleadings properly.

Discussion

- [31] The resolution of this appeal turns on whether the judge erred in law in permitting the respondent to adduce evidence that he had presented the winning ticket to the appellant's agent when this fact was essential to the cause of action but was never pleaded in the statement of claim. The failure to present the winning ticket lay at the heart of the appellant's defence and was critical because, as was common ground, the respondent could not claim the prize unless he presented and signed the winning ticket. It was also common ground before this court that the pleadings contained no such allegation of fact, and no application was made to amend the statement of case at any stage.
- [32] The case therefore raises for consideration important issues relating to the proper interpretation of CPR 8.7 and 8.7A, the purpose of pleadings and witness statements, and the relationship between the two. Before doing so, however, the relevant provisions of the CPR will be considered briefly.
- [33] Rule 8.7 is headed: "Claimant's duty to set out case". CPR 8.7 provides, so far as is relevant:
- “(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.
- (2) The statement must be as short as practicable...”.
- [34] Rule 8.7A is captioned: "Permission to rely on allegation or factual argument" and provides:

“The claimant may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out there, unless the court gives permission or the parties agree.”

The purpose of pleadings

- [35] The purpose that pleadings are intended to serve has been articulated by this court on numerous occasions. Often cited in this regard is the case of **East Caribbean Flour Mills Limited v Ormiston Ken Boyea**⁵ which cites approvingly the case of **McPhilemy v Times Newspapers Ltd.**⁶ There, Lord Woolf MR articulated the function of pleadings this way:

“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 party's witness statements, 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 the 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.”

- [36] In **East Caribbean Flour Mills**, Barrow JA succinctly summed up the principles derived from this and other authorities, at paragraph 43:

“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 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.”

- [37] This court has adopted this stance as it relates to pleadings as reflected in cases such as **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste**.⁷

⁵ Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006 (delivered 16th July 2007); [2007] ECSCJ No. 110 at para. 43.

⁶ Supra note 2 at pp.792-793.

⁷ SLUHCVP2009/008 (delivered 11th January 2010, unreported).

[38] In short, therefore, the claimant must plead the essential facts that constitute its case, and those facts must be sufficient to establish a cause of action and to enable the other side to know the case it has to meet in sufficient detail.

[39] CPR 8.7A prohibits reliance on allegations or facts not pleaded unless the judge gives permission, or the parties agree. CPR 10.5 and 10.7 place similar strictures on the defendant by providing respectively that the defence must set out all the facts on which the defendant relies to dispute the claim and that a defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree.

The purpose of witness statements

[40] A witness statement constitutes the evidence to prove an allegation of fact made in the statement of claim. It provides the details or particulars of the issues that arise from the pleader's case. Its contents must, on analysis, be capable of being properly regarded as particulars or details of allegations already made in the pleadings.

[41] Once the case is sufficiently pleaded, then a witness statement may furnish the particulars and details of the allegations or facts contained in the pleadings. This is expressed concisely by the learned Chief Justice Pereira in **Cedar Valley Springs Homeowners Association Incorporated v Hyacinth Pestaina and others**⁸ where her Ladyship stated:

"[19] ... [I]t is now well settled that with the advent of witness statements that the strictures to which pleadings were required to conform in earlier pre-CPR times have now been ameliorated with the advent of [the] CPR, where, once the case is sufficiently pleaded to enable the party to know the case which he has to meet, fuller details may be fleshed out in the witness statements." (Underlining supplied)

[42] To similar effect is **Saint Lucia Motor & General Insurance** where George-Creque JA (as she then was) stated at paragraph 20:

⁸ ANUHCVP2016/0009 (delivered 18th January 2017); [2017] ECSCJ No. 5, at paragraph 19.

“I do not consider that the statement of Lord Woolf in *McPhilemy* and referred to by Lord Hope in *Three Rivers* and adopted in *East Caribbean Flour Mills* is to be understood in any other way than to make clear that the factual basis underpinning the allegation of fraud or dishonesty and the like, must be set out in the pleading; even if the details of those averments may properly be left to be fleshed out in the witness statements.” (Underlining supplied)

- [43] The need for the case to be sufficiently pleaded before a witness statement can be regarded as giving flesh to or furnishing particulars of pleadings is also implicit in Barrow JA’s observations in **Eastern Caribbean Flour Mills** at paragraph 45:

“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.” (Underlining supplied)

- [44] I understand Barrow JA to be saying that additional particulars do not constitute a change of case, provided that the allegation was sufficiently pleaded. Barrow JA also emphasised the need for the court to give careful scrutiny to whether the impugned material in the witness statement can properly be characterised as particulars of allegations already made in the statement of case or are new allegations. As he starkly put it:

“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.”

- [45] To this task I now turn.

The respondent’s pleadings

- [46] The respondent’s pleaded case is that he first discovered that he had played the winning numbers when he visited a lottery outlet in St. George’s to purchase additional tickets on Saturday, 4th November 2017. He became aware that draw #1761 had occurred, and immediately recognised that he had drawn the winning numbers. He searched frantically for his ticket but realised that he had inadvertently disposed of it in the garbage that morning. The respondent pleaded that, at the first

opportunity, he notified the appellant that he had purchased the winning ticket and was claiming the winnings, despite being unable to produce the ticket. The appellant informed the respondent that it would not be able to consider his claim unless the winning ticket was produced within three months. The respondent was unable to produce the ticket and the appellant refused to pay him the winning prize.

[47] It is evident from the statement of claim that the respondent never alleged that he signed and presented the winning ticket, and that the agent rejected it.⁹ He pleaded that he had disposed of it in the garbage that morning, prior to making the discovery that he had won. He nonetheless sought to claim the prize 'despite being unable to present the ticket.'

[48] The assertion that the respondent signed and presented the winning ticket is really the factual basis underpinning the claim for breach of contract. It is the alleged failure to pay the prize money to the respondent, despite him having signed and presented it to the appellant's agent, that grounds his claim for breach of contract. In his pre-trial memorandum, the respondent frames the issue thus: '[w]hether the defendant breached the contract by rejecting the ticket when it was first presented to the defendant by the claimant.'¹⁰ The respondent also recognised in his pre-trial memorandum that the factual contention being advanced by the appellant was that 'the claimant failed to present the winning ticket within the 90-day period from the date of the draw.'¹¹ Indeed, in its pre-trial memorandum, the appellant framed the issue this way: '[w]hether the defendant is required to pay the winning prize in the absence of the Claimant producing the winning ticket.'¹²

[49] It was therefore obvious to both sides that the allegation that the respondent had presented and signed the winning ticket was a critical element of the cause of action.

⁹ See paragraph 3 above.

¹⁰ Record of Appeal, Vol. 1, pg. 81 at para 5.

¹¹ Record of Appeal, Vol. 1, pg. 83 at para 25.

¹² Record of Appeal, Vol. 1, pg. 85.

It was the most critical fact on which the respondent relied in support of his claim, and the central issue in dispute. CPR 8.7 required it to have been pleaded. Instead, the respondent's pleaded case rested simply on his having purchased the winning ticket. Based on the pleadings, the appellant was not required to meet a case that the respondent had presented the winning ticket, which its agent failed to honour. On the contrary, the alleged failure of the respondent to sign and present the ticket constituted the appellant's defence to the claim, to which there was no reply.

The respondent's witness statement

[50] The case on the respondent's witness statement, filed over a year after the pleadings, represents a fundamental shift from the pleaded case in several respects. The respondent's discovery that he had drawn the winning numbers is stated to have occurred on Tuesday, 7th November 2017 and not Saturday, 4th November 2017. More significantly, and contrary to his pleadings, the respondent asserts for the first time that he signed and presented the winning ticket to the appellant's agent, who told him it had been cancelled. Additionally, the ticket is now said to have been lost on Saturday, 11th November 2017. At the time of filing his witness statement, the respondent would have been served with the defence since on or about 12th November 2018 and would have known since then that the appellant was denying his claim on the grounds that he had not signed and presented the winning ticket. Notwithstanding this, the respondent never sought to amend his statement of case. When therefore the respondent asserted for the first time in his witness statement that he had signed and presented the winning ticket, this was not a case of furnishing particulars of an allegation already pleaded; it was a new allegation. To be permitted to rely on it, the respondent would have had to obtain leave to amend the statement of case or obtain the court's permission or the agreement of the appellant.

[51] The respondent attempts to salvage the situation created by his failure to plead presentation of the winning ticket by contending that an inference may be drawn that the judge granted permission to adduce that evidence of her own initiative

pursuant to CPR 26.2 – no application having been made. This attempt is futile. If the judge were acting of her own initiative to permit reliance on facts not pleaded, she would first have had to acknowledge that the pleadings were deficient. There is no such acknowledgment. Rather, the judge appears to have misconstrued the respondent's pleaded case. The basis for saying this appears from the judge's summary of the claimant's pleaded case as set out at paragraph 2 of the judgment, which is captioned: "The Claimant's Case". The judge states:

"The claimant, (Mr. De Roche) in his statement of claim filed on 12th October 2018 says that on Friday 3rd November 2017 he purchased a Super 6 Lotto ticket from an agent of the National Lotteries Authority (Lotteries Authority) at Parris Pharmacy in Grenville, Saint Andrew for a draw on that same date. The draw instead took place on Saturday, 4th November 2017 and the winning prize of \$540,000.00 was announced. Mr. De Roche visited the Lotteries Authority outlet in St. George's and recognised that the numbers drawn for the Saturday draw were the numbers he had played. He presented his ticket but was informed by the Lotteries Authority Agent that the Friday ticket was invalid as the draw was cancelled. Upon further enquiries Mr. De Roche discovered that the information given by the agent was misleading, but by then he had lost his ticket."

[52] To the extent that the judge's summary states that the respondent pleaded that he had presented the winning ticket but was informed by the agent that it was invalid because the draw was cancelled, she fell into error as no such allegation is made in his statement of claim.

[53] In circumstances where the judge never apprehended that the pleadings did not in fact contain an allegation that the respondent had presented the winning ticket, there can be no question of her implicitly exercising her discretion to permit the respondent to rely on facts in his witness statement which he had not pleaded. As far as the judge was concerned, the discrepancy related to the date when the respondent lost the ticket, which he had previously presented to the appellant's agent. This is evident from paragraph 8 of the judgment in which the judge states:

"The court notes the inconsistent statement of Mr. Dr Roche in his pleadings where he stated that he lost the Super 6 ticket on Saturday 4th November 2017 when he visited the Lotteries Authority's Office in St. George's. However, Mr. De Roche in his witness statement and in his evidence at trial clarified that inconsistency and stated that he lost the ticket on Saturday,

11th November 2017. This inconsistency was not specifically challenged by the defence and in the court's view, it is also not fatal to his claim since it is not in dispute that Mr. De Roche lost or misplaced the physical Super 6 lotto ticket."

[54] In this passage, the only inconsistency between the respondent's pleadings and the witness statement recognised by the judge is the date when the ticket was said to have been lost. The judge seems to have missed the more egregious and fundamental inconsistency; namely, the fact that the respondent never pleaded that he had presented the winning ticket but had in fact pleaded that when he discovered that he had purchased the winning ticket, he had already lost the ticket, but – inconsistent with that pleading – he had asserted in his witness statement that he had presented the winning ticket but was told it was cancelled. These are contradictory positions. Plainly, in circumstances where the judge seems not to have been alive to the inconsistency, it cannot be said that she impliedly exercised her discretion to give permission for that fact (presentation of the ticket) to be relied on. Accordingly, those authorities deployed by the respondent relating to the need for appellate restraint when reviewing the exercise of a trial judge's discretion are not at play here.¹³

[55] Moreover, if the judge were minded to exercise her power to make orders of her own initiative, she was mandated to give the other party a reasonable opportunity to make representations. This requirement is imposed by CPR 26.2, which provides:

"26.2 (1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

(2) If the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations.

(3) The opportunity may be to make representations orally, in writing, telephonically or by any other means as the court considers reasonable."

¹³ See Michael Dufour et al v Helenair Corporation et al (1996) 52 WIR 188.

[56] There is no indication on the record that this was done, and there is no contention otherwise.

[57] As to the argument that the appellant impliedly consented to the evidence being adduced by its failure to object to the evidence, this is problematic for two reasons. In the first place, it would be surprising if this concession were made by the appellant, given that their pleaded defence was that the ticket is a bearer instrument and constitutes the only proof that a bet was placed and, as such, in order to claim the prize, the bearer was required to present the ticket with a valid signature and a form of identification within 90 days. The appellant's pleadings averred that the respondent did not satisfy the contractual terms for claiming the prize money because he did not sign and present the winning ticket. This formed the major plank of the appellant's defence. The cross-examination of the respondent sought to expose the implausibility of the respondent's account that he had presented the ticket. It was elicited from him that though he said he did not believe the agent's assertion that the ticket was invalid and intended to pursue the matter with the NLA, he nonetheless threw it out in the garbage at some point after he had unsuccessfully sought to see the appellant's manager on the afternoon of 7th November 2017, and on at least two occasions subsequently, to query the agent's claim that the ticket had been cancelled. The purpose of this line of cross-examination was to challenge the respondent's assertion that he had signed and presented the winning ticket.¹⁴

[58] There is therefore no rational basis for drawing an inference that the appellant agreed to allow the respondent to adduce evidence that he had signed and presented the winning ticket, when to do so would completely undermine the foundation of its defence to the claim. There is nothing in the appellant's conduct of the case to suggest that any ground was ceded on the important issue of non-presentation of the ticket.

¹⁴ See Transcript of Proceedings, Record of Appeal, Vol. 2 at pgs. 13 - 15 and page 17, lines 13-24.

- [59] The respondent argued that the evidence was not inadmissible per se but was merely undeployable unless leave was obtained to amend the statement of claim or the court's permission, or the agreement of the appellant was obtained to rely on it. Even if it could be said that the evidence was not inadmissible per se, based on the foregoing discussion, the respondent had not met the conditions for the evidence to be deployed.
- [60] Furthermore, once it is accepted that the pleadings were deficient for the failure to plead that important factual detail, which was an essential element of the cause of action, that defect could not be cured by simply inserting the evidence into a witness statement. In **Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Seebalack**,¹⁵ the appellant was the legal personal representative of the estate of the deceased, who was killed when he was struck by a truck owned by the respondent. The appellant (claimant) alleged that the deceased's death was caused by the negligence of the driver and claimed damages against the driver and the owner of the truck and a declaration that the insurer was liable to indemnify the driver and owner. The claim form and statement of case gave particulars of the driver's negligence and alleged that by reason of this negligence the deceased had suffered injuries as a result of which he died. Neither the claim form nor the statement of case gave any details of the claim for damages.
- [61] The respondent's defence was filed on 8th May 2006 and a separate defence on behalf of the insurer on 1st December 2006. At the first case management conference, which was held on 30th June 2006, the claimant was given permission to amend the claim form and statement of case to allege that the driver was, at all material times, the servant and/or agent of the respondent. Further case management conferences were held in April and May 2008. The appellant subsequently filed its list of documents in July 2008, which included a receipt for funeral expenses and pay sheets relating to the deceased's wages. The appellant also filed a witness statement on 17th July 2008. She stated that the funeral had

¹⁵ [2011] 2 LRC 176; [2010] UKPC 15.

been conducted by Dass Funeral Home and that the cost was \$8,625.00. She attached a copy of the receipt to the statement. She also gave details of the deceased's employment and his monthly income between 19th May 2000 and 25th October 2002 and attached copies of his pay sheets for that period. On 15th August 2008, she filed a bundle of documents which included the receipt for the funeral expenses and the pay sheets for the period between 19th May 2000 and 25th October 2002.

- [62] The pre-trial review was held on 11th November 2008. In November 2008, the appellant applied for permission to re-amend the statement of case to include particulars of special and general damages, namely, funeral expenses and a claim for lost years. The respondent objected and relied on CPR 20.1(3) which states that the court may not give permission to change a statement of case after the first case management conference. The trial judge overruled the objection and allowed the amendment on the basis that the re-amendment sought did not constitute a change in the statement of case for the purposes of CPR 20.1(3).
- [63] The respondent successfully appealed the judge's ruling to the Court of Appeal of Trinidad and Tobago. The appellant appealed to the Privy Council. The Privy Council dismissed the appeal. The Board held that an amendment to the statement of case was necessary as CPR 8.6 (Eastern Caribbean CPR 8.7) provided that the claimant had to include on the claim form or in the statement of case a short statement of all the facts relied on by the claimant. To satisfy this requirement, where general damages were being claimed, the statement of case had to identify all the heads of loss that were being claimed, which it had not done. In order to be compliant with Part 8.6, it was necessary to amend the statement of case, and to include the claim for special damages. The inclusion of the particularised heads of loss where none had been pleaded in the unamended statement of case was plainly a change within the meaning of CPR 20.1(3) and was not permitted at the stage at which it was sought.

[64] Importantly, immediately after citing the above quoted passage by Lord Woolf in **McPhilemy v Times Newspapers Ltd** in relation to the purpose of pleadings and witness statements, the Board made the following important point at paragraph 16:

“But a detailed witness statement or a list of documents cannot be used as a substitute for a short statement of all the facts relied on by the claimant.”

[65] This serves to emphasise the importance of the need for strict compliance with CPR 8.7, even with the advent of witness statements. A concise statement of the facts relied on must still be included in the statement of case. To be compliant with CPR 8.7, therefore, the respondent was required to amend the statement of case to plead presentation of the ticket and to correct the dates and sequence of events. I find apposite, the observations of Lord Russell of Killowen in the decision of **London Passenger Transport Board v Moscrop**¹⁶ (cited approvingly in **George W. Bennett Bryson’s & Co. Ltd. v George Purcell**¹⁷):

“Any departure from the cause of action alleged for the relief claimed in the pleadings should be preceded, or, at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the court’s record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be ‘deemed to be amended’ or ‘treated as amended’. They should be amended in fact.” (Emphasis added)

[66] Short of that, the respondent was required to obtain the court’s permission or the agreement of the other side. This he failed to do. CPR 8.7A precluded him from relying on that evidence. The judge therefore erred in considering and placing reliance on facts that were never pleaded to determine the case in the respondent’s favour. This was unfair to the appellant, who, in order to properly meet the case, would perhaps have had to call evidence from the agent to whom the respondent allegedly presented the winning ticket. No doubt, this course was not pursued because the respondent never pleaded that he had presented the winning ticket to the appellant’s agent. As this Court has emphasised: ‘it is the duty of the court to

¹⁶ [1942] 1 All ER 97, 105.

¹⁷ ANUHCVP2011/0023 (delivered 28th February 2018); [2018] ECSCJ No. 39 at para. 31.

firstly examine the pleadings and then to decide the case in view of, or more properly, on the basis of the pleadings.’¹⁸ This the judge failed to do.

The appellant’s failure to object

- [67] There is some merit in the respondent’s complaint that for some eighteen months prior to trial the appellant was in possession of the witness statement, which alerted it to the evidence that the respondent intended to adduce at trial yet took no steps to object to that evidence. The appellant could have applied to strike out the evidence. By the same token, however, the respondent was made aware of the nature of the defence since November 2018 and could have sought to amend his pleadings or sought the court’s permission to rely on the facts not pleaded. Neither course was pursued. Parties must always be mindful that they are enjoined by CPR 1.3 to assist the court in furthering the overriding objective. This includes dealing with cases expeditiously and in a manner that saves time and costs.
- [68] In the Court’s view, the appellant’s failure to object to the evidence does not, in the circumstances of this case, afford a basis for overlooking what was an error of law on the part of the judge, who is the ultimate gatekeeper. Rather, it is a matter that is relevant in determining the appropriate costs order. Mr. Haynes, KC candidly conceded this.
- [69] The Court’s conclusion on ground 1 is sufficient to dispose of the appeal. In oral argument before this Court, both sides recognised that the appeal turned on this ground and that grounds 2 and 3 concerned questions of fact which were essentially matters within the province of the trial judge and would have no practical impact on the outcome of the appeal given the Court’s conclusion on ground 1. Ground 4, while raising a point of law relating to whether the lottery ticket was a bearer instrument, is rendered academic given this Court’s conclusion on ground 1, and given that the judge seemed to accept that the signing and presentation of the ticket was a requirement to claim the winning prize.

¹⁸ See: *George W. Bennett Bryson’s & Co. Ltd. v George Purcell*; *Ibid*, at para 33.

Costs

- [70] The appellant has prevailed on the appeal. The general rule is that the unsuccessful party must pay the successful party's costs. The Court, in its discretion, may depart from the general rule but must exercise its discretion judicially, having regard to all the circumstances of the case and considering, in particular, the factors set out at CPR 64.6(6). The conduct of the parties before and during the proceedings is one such relevant consideration in the apportionment of costs. The appellant can rightly be criticised for not taking steps to strike out the respondent's statement of case or the impugned evidence. This was an option available to it and would have resulted in considerable costs savings.
- [71] By the same token, the respondent failed to avail himself of the opportunity to amend his statement of case or to apply for permission to rely on the evidence pursuant to CPR 8.7A. Weighing matters in the round, the appellant is the successful party on this appeal, and while its conduct may have contributed to the costs in this matter, it cannot be right that it should be deprived entirely of its costs when a large measure of blame must be shouldered by the respondent.

Disposition

- [72] For the reasons discussed above, the appeal is allowed. The orders of the judge are accordingly set aside. The respondent shall pay two-thirds of the appellant's prescribed costs in the court below and, on this appeal, two-thirds of that amount.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar