



[2025] JMCC COMM. 21

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2023CD00229

BETWEEN	SEAN KINGHORN	1ST CLAIMANT
AND	K & K (MANAGEMENT & HOLDINGS) COMPANY LIMITED	2ND CLAIMANT
AND	REVERENT MARLON ST. CLAVER GOWDIE (t/a) MJ SYSTEMS	1ST DEFENDANT
AND	JANICE PATRISE GOWDIE	2ND DEFENDANT
AND	GAILICK TECHNOLOGIES LIMITED	3RD DEFENDANT

IN OPEN COURT

Mr Steven Jackson instructed by Kinghorn & Kinghorn for the Claimants

Ms Shanique Gaye for the Defendants

Breach of Contract – Professional Negligence – Fraud – Ownership of Intellectual Property for Work done during Employment

Heard: January 13, 14, 15, 17, 31 and June 11, 2025

JACKSON-HAISLEY, J

BACKGROUND

[1] The 1st Claimant, Mr Sean Kinghorn, is an attorney-at-law and is one of two directors of the 2nd Claimant. The 2nd Claimant is a limited company engaged specifically in the

business of managing the investments of the 1st Claimant and his wife Judy Ann Kinghorn, also an attorney-at-law. The 2nd Claimant was in charge of managing the entities known as (i) The Law Firm of Kinghorn & Kinghorn; (ii) The Kayla Acacia Company Limited; (iii) The KL Deli; and (iv) The Kings Landing Gas Station.

[2] The 1st Defendant, Reverent Marlon St. Claver Gowdie (t/a) MJ Systems, is a Minister of Religion, IT professional and Microsoft Technology Associate.

[3] The Claimants allege that in or about 2015, the Claimants and the 1st Defendant entered into an agreement for the provision of IT services by the 1st Defendant, to the Claimants and their affiliate businesses. This included the development of various software to assist the Claimants in the efficient running of the Law Firm and the other affiliate businesses.

[4] The 1st Defendant's services were terminated and then re-engaged in 2020. The Claimants were again dissatisfied with the service of the 1st Defendant and in 2022 decided to retain the services of another IT developer. In doing so, the Claimants requested information from the 1st Defendant relating to their IT infrastructure so that they could provide the necessary information to the new IT developer. The Claimants aver that in response, the Defendants issued the Claimants with invoices in the sum of \$2,200,000.00 and \$2,305,000.00.

THE CLAIM

[5] The Claimants caused a Claim Form to be filed against the Defendants on May 9, 2023, for damages for breach of contract, and/or negligence, and/or fraud.

[6] It was claimed that in breach of the 'Agreement', the 1st Defendant:

- (i) Developed programs which are flawed and fraught with discrepancies;*
- (ii) Failed and/or refused to carry out repairs, fixes and maintenance in respect of the flawed programs he has developed;*

- (iii) Failed and/or refused to disclose and reveal vital proprietary information in respect of the Claimant's Information Technology Infrastructure.*
- (iv) Fraudulently and intentionally sabotaged the Claimants' business operations by attempting to prevent the Claimants from employing and/or engaging the services of other IT personnel by failing and/or refusing to provide the Claimant and the said IT Personnel with any information in respect of the Claimants' IT infrastructure.*
- (v) Fraudulently demanded the sum of \$2,200,000.00 to be paid over to him prior to releasing of pertinent and necessary information of the Claimants' IT infrastructure.*
- (vi) Fraudulently and unlawfully, passed to the 2nd and 3rd Defendants, sensitive data and information secured on the Claimants' IT infrastructure as well as information of the operations of the IT infrastructure of the Claimants;*
- (vii) Fraudulently conspired with the 2nd and 3rd Defendants to extort the sum of \$2,305,000.00 from the Claimants for the due releasing of pertinent and necessary information of the Claimant's IT infrastructure.*

The following were sought against the Defendants:

- 1. Damages*
- 2. Aggravated Damages*
- 3. Exemplary Damages*
- 4. Vindictory Damages*

...

[7] The Claimants also claimed against the 1st Defendant for negligence in the performance of his duties as an IT Manager, IT Expert and Microsoft Technology Associate. The claim for negligence was particularised as follows:

- i) Developing programs which were flawed and fraught with discrepancies*
- ii) Failing and/or refusing to carry out repairs, fixes and maintenance regarding the flawed programs that the Defendant has developed*

- iii) Failing and/or refusing to disclose and reveal vital proprietary information in respect of the Claimant's Information Technology Infrastructure.*
- iv) Failing to complete the conversion of the desktop version of the LAP to a Web/Online Version despite being paid the sum of \$1m*
- v) Unlawfully sabotaging the Claimant's business operations by attempting to prevent the Claimant from employing and/or engaging the services of other IT personnel by failing and/or refusing to provide the Claimant and the said IT personnel with any information in respect of the Claimant's IT infrastructure.*
- vi) Unlawfully demanding the sum of \$2,200,000.00 to be paid over to him prior to releasing of pertinent and necessary information of the Claimant's IT infrastructure.*
- vii) Unlawfully disclosing or passing to the 2nd and 3rd Defendants, sensitive data and information secured on the Claimants' IT infrastructure as well as information of the operations of the IT infrastructure of the Claimants;*
- viii) Unlawfully failing to disclose or reveal information regarding where on the Claimants IT infrastructure the Claimants' software is housed, specifically the Kinghorn Client Portal, the West Stock Management Program and the Kayla Property Management Program;*
- ix) Unlawfully conspiring with the 2nd and 3rd Defendant to extort the sum of \$2,305,000.00 from the Claimants for the due releasing of pertinent and necessary information of the Claimant's IT infrastructure.*
- x) Failing to provide written information to the Claimants of the IT infrastructure established and maintained despite the Claimants' reasonable request for the 1st Defendant to do so.*
- xi) Failing to provide documentation of the IT infrastructure setup and maintain by the 1st Defendant on behalf of the Claimants.*
- xii) Failing in all the circumstances to conduct himself at a standard reasonably expected of an IT professional.*

[8] Further, the Claimants claimed against the Defendants damages for fraud. The Claimants aver that the Defendants conspired to hold the Claimants at ransom regarding the release of information regarding the Claimants' IT infrastructure and have attempted to extort the sum of \$2,200,000.00 and \$2,305,000.00 from the Claimants.

[9] The claim of fraud was particularised as follows:

(i) *With a view of extorting the sum of \$2,305,000.00 from the Claimants, the 1st Defendant has fraudulently, unlawfully and illegally disclosed information secured on the Claimants IT infrastructure and the set up of the Claimant's IT infrastructure to the 2nd and 3rd Defendants as follows:*

- *Details of the functions of each Server;*
- *Details of the security protocols and systems in place to protect our data and our IT infrastructure;*
- *Details of the system of back up for the information housed on each server;*
- *Details of where the data is stored for each of the Applications;*
- *Details of the set-up of the Internet Service providers at each of the locations. Commodore and Angels for example, have several internet supplies. We are unsure how you have utilized each;*
- *An Inventory of the IT equipment presently owned by the Group, to include those which are not being used and where they can be located;*
- *Details of the set up of the phone system;*
- *Details of the set up of the Email system, and in particular the interaction of the email system with the LAP;*
- *Details of the set up of the text messaging system and its interaction with the LAP;*
- *Details of the protocol of uploading changes from the Development Server to the Production Servers. We searched your email and saw no reference to the Github feature you now use. Is this Github feature in the name of the Company or in your personal name?;*
- *Details of the camera system at each location to include the passwords to get onto the relevant DVR or NVR;*
- *Details of the access control systems to each of the location in so far as you have set them up and linked them to our Network;*

- (ii) Conspiring to hold the above information and not release it unless the Claimants paid the sum of \$2,200,000.00 to the 1st Defendant and the sum of \$2,305,000.00 to the 3rd Defendant;*
- (iii) Extorting the sum of \$2,200,000.00 and \$2,305,000.00 from the Claimants for the due release of disclosed information secured on the Claimants IT infrastructure and the set up of the Claimants IT infrastructure;*
- (iv) Conspiring to hold the above information and not release it unless the Claimants released the 1st Defendant from his rent debt owed to the Kayla Acacia Company Limited;*
- (v) Defrauding the Claimants;*
- (vi) Scamming the Claimants;*
- (vii) Fraudulently hosting the Claimants' softwares [sic] on an IT infrastructure that is not owned or controlled by the Claimants, namely, the Kinghorn Property Management Program, which said IT infrastructure was set up to host these softwares [sic];*
- (viii) Fraudulently refusing to give information on where the Claimants' softwares [sic] are hosted without first being paid the sum of \$2,305,000.00;*
- (ix) Fraudulently extorting, coercing or requiring the Claimants to pay over the sum of \$2,305,000.00 and then sign a Release and Discharge to prevent any legal actions, before proceeding to release the said IT information.*

[10] The Claimants also claimed special damages, which were particularised as follows:

<i>(i)Purchase of New Routers</i>	<i>US\$5,935.51</i>
<i>(ii)Labour cost to change out IT Infrastructure (and cont)</i>	<i>\$3,000,000.00</i>
<i>(iii)Sum paid for incomplete Web Development</i>	<i>\$1,000,000.00</i>

[11] Only the 1st Defendant was served. Therefore, the 2nd and 3rd Defendants did not participate in these proceedings.

DEFENCE

[12] The 1st Defendant caused a Defence to be filed on January 5, 2024, in which he averred the following:

- a) That the Claimants were fully aware of the 3rd Defendant and had no objections with the services offered to the 1st Claimant and the company he alleges to own. The 1st Defendant said that the agreed tasks were executed with the requisite technical skills and technical support and that the IT infrastructure was in fact created and utilised by the Claimants for all the years that the 1st Defendant was in the employ of the Claimants. Further, that technical support was never withheld by the 1st Defendant or his company and all minor adjustments requested by the Claimants were addressed promptly and professionally.
- b) That the 1st Defendant provided the requested information regarding the technical aspect of how the infrastructure worked in so far as the 1st Defendant's intellectual property was not demanded. The 1st Defendant provided all access codes and information requested by the Claimants promptly and professionally. The information requested on January 11, 2017 was emailed to the Claimants on the said day with the assurance that they could contact the 1st Defendant directly should any questions arise.
- c) That the 1st Defendant shared a good and productive work relationship with the Claimants from 2012 to 2018 until the 1st Defendant left the 1st Claimant to build and further develop his companies. All credentials and requested information for the Claimants' IT infrastructure were handed over during the period of April and May 2018.
- d) That between 2018 and 2020, the Claimants employed Miguel Graham t/a Com Solution to work with the infrastructure and as far as could be observed, this new company made many mistakes with their use and handling of the system due to

the fact that when the 1st Defendant's services were re-engaged in 2020, he had to make many adjustments and correct many errors made over the two years.

- e) That requests made by the Claimants were for routine maintenance, passwords and rectifying any issues faced by the users, as well as routine updates and improvements to the system to match the growing workload of the businesses.
- f) That at no point in time did the 1st Defendant refuse to fix, repair or maintain the system and he denied fraudulently or intentionally sabotaging or sharing sensitive data from, or extorting money for service done on the Claimants' IT infrastructure.
- g) That any sums demanded by the 1st Defendant were either for work done on the IT infrastructure or an invoice of the costing for work requested by the Claimants to be done in short order.

EVIDENCE

Mr Sean Kinghorn

[13] The 1st Claimant, Mr Sean Kinghorn, was the sole witness for the Claimants. His witness statement dated June 6, 2024 and filed June 7, 2024 stood as his evidence in chief. He stated that in 2011, he was approached by Mr Gowdie about the idea of writing a software for the needs of the law practice, followed by Mr Gowdie writing a software that was sufficiently impressive for him to seriously consider Mr. Gowdie's proposal to write a software to assist with the management of the growing practice at the time. After discussions with him followed by him teaching Mr Gowdie the nuances and challenges of the particular type of practice that they had, the equipment needed to efficiently and effectively create and maintain this software was purchased. That was the birth of the Legal Assist Pro which started as a basic program to track and account for files and morphed into a super program that has become the engine of the Law Practice of Kinghorn & Kinghorn.

[14] In or about 2014 to 2015, Mr Kinghorn and Mr Gowdie formalised their arrangement and it was agreed that Mr Gowdie would provide the following services to the law firm:

1. *Provision of Technical Support;*
2. *Monitoring Performance, Application/System/Security Log for each Branch & Head Office Servers;*
3. *Preventative Maintenance/critical updates application of Angels, Linstead, St Ann, Old Harbor [sic] servers;*
4. *Network Security breach prevention monitoring and network traffic analysis for each location;*
5. *Database backup, corruption prevention and data integrity checks;*
6. *Software Application design, development/training;*
7. *Consultation;*
8. *End user technical support*

[15] He said as they grew beyond the investment of the Law Firm, he and his wife formed the K & K Management company that would effectively manage the different entities and the contract with Mr Gowdie was extended to include all of the affiliate entities.

[16] Mr Kinghorn articulated that an expressed term of the said Agreement was that Mr Gowdie would create and build out an IT infrastructure for the Claimants and the said affiliate entities under the Claimants' management, that could and would effectively and efficiently be the vehicle for the several pieces of software that Mr Gowdie would create. He also said that it was an expressed term of the Agreement that Mr Gowdie would create software or programs for the use and benefit of the Claimants' several entities.

[17] Further that pursuant to that Agreement, the Claimants paid Mr Gowdie for the following programs to be created and maintained and developed by him: The Legal

Assist Pro, The Kinghorn Client Portal, The Kayla Property Management Program, The Wet Stock Management Program; and The Deli Program.

[18] He also stated that it was expressly agreed between the Kinghorns and Mr Gowdie, and also expressly warranted and represented by Mr Gowdie, that:

- The IT infrastructure's information, particularly the technical aspects thereof and how it worked, would be provided by Mr Gowdie to the Kinghorns, whether demanded or not.
- The information and data stored and secured on the Kinghorns' IT infrastructure, and the information of the setup of this IT infrastructure would be kept strictly confidential and would not be disclosed to any third party, without the express consent of the Claimants.

[19] Mr Kinghorn said that the servers in each location were connected through routers that were extremely high tech and secure, which were referred to as Cisco routers. He also said that the system was so sophisticated that he was able to access files, information and other necessary information through his phone, wherever he was in the world, once he had an internet connection.

[20] Mr Kinghorn said that from the beginning of the contract, they started to experience difficulty with Mr Gowdie and that the pieces of software were not free from errors and problems and there was always an issue with the programmes that needed fixing and this became increasingly frustrating as the workload increased and they took on other investments. Further that Gowdie consistently failed and/or refused to honour the terms of his contract within a timely manner.

[21] It was said that the consistent breaches of Mr Gowdie's obligations under the contract resulted in the Claimants' operations being disrupted and it also caused the Claimants frustration as they attempted to carry out their operations efficiently. Further that the said sub-standard provision of IT Services and what Mr Kinghorn described as

the malfunctioning and defective pieces of software that were produced and filled with their consistent problems, caused the Claimants great loss and damage.

[22] Mr Kinghorn stated that he instructed Mr Gowdie to seek the assistance of other IT personnel to assist with the growing work load and to carry out repairs on the defective pieces of software, and that he explained to Mr Gowdie that the Claimants would cover the cost of the extra help. However, Mr Gowdie failed and/or refused to do so and never showed an interest in bringing other IT personnel into the work space. Therefore, in or about 2022, the Claimants took steps to employ other developers, as independent contractors, to assist with the creation of other programmes that were needed for the smooth and efficient operation of the Claimants' various entities and to assist with carrying out repairs on Mr Gowdie's defective software. He said that this resulted in the deterioration of the relationship between the Claimants and Mr Gowdie.

[23] Despite Mr Kinghorn's request that Mr Gowdie carry out the repairs needed to fix the discrepancies regarding all the software programmes and to provide the Claimants with the IT infrastructure information that he had built, so that the independent developers could fully appreciate how this infrastructure worked, he said that Mr Gowdie flatly refused to do so. Mr Kinghorn asserted that Mr Gowdie's actions are in breach of the Technology Partnership Agreement and in breach of his express warranty, representation and agreement to disclose IT infrastructure information when demanded.

[24] It is Mr Kinghorn's assertion that the Defendants have held all the entities under the K & K (Management and Holdings) Company Limited as hostages, that the Claimants have no control over their IT infrastructure and that Mr Gowdie still has remote access to the network that he constructed and configured. He also asserted that the pieces of software that were created cannot be found on any of the servers or any other IT platform that Mr Gowdie has handed over to the Claimants. Therefore, although the Claimants presently have access to the software, they have no control over the said software as they are not located on the infrastructure that they have in their control. Further, this software contains sensitive information that is of utmost confidentiality.

[25] Under cross examination, Mr Kinghorn insisted that Mr Gowdie did not maintain the system efficiently and that is why the Claimants sought to get other developers to assist them. Mr Kinghorn admitted that Mr Gowdie created, developed and maintained the Legal Assist Pro. He later said that Mr Gowdie did not create the Legal Assist Pro, but that he created all other four programmes, as the Legal Assist Pro already existed when Mr Gowdie came. Mr Kinghorn explained that another person started the Legal Assist Pro and that the other four programmes were created by Mr Gowdie from scratch with Mr Kinghorn's assistance.

[26] In cross-examination, Mr Kinghorn reiterated that the software would crash repeatedly, that the support to have the system fixed was never forthcoming from Mr Gowdie, that the data collected from the pieces of software, excluding Legal Assist Pro, had been placed on Mr Gowdie's servers and that Mr Gowdie, by putting the Claimants' data on servers other than their own, left them exposed to the software continuously going down.

[27] Mr Kinghorn said that he was not aware that he did not own any of the servers that the information was placed on. He said Mr Gowdie told him that the information was on his servers, just as how the Legal Assist Pro is on his server. He said he became aware of this in 2022 when he employed another IT developer to come in and take over the IT needs of the company due to his frustration, and so they called a meeting with Mr Gowdie.

[28] When asked why he did not terminate the contract with Mr Gowdie, Mr Kinghorn said that all of the systems were built in a way to meet each of the particular needs of the locations and that the benefits that come with having such technology in a fast moving practice like his, far outweighed the inefficiencies that came with Mr Gowdie.

[29] He said that he has no access to anything that Mr Gowdie has written for them. He disagreed that the IT property that he requested from Mr Gowdie was sent to him on May 1, 2018, as he did not own the affiliate entities in 2018. He agreed that Mr Gowdie

sent him information for access codes for his servers and his Wi-Fi upon request, in 2018, and that this was for all of his offices.

[30] In relation to the system repeatedly crashing, Mr Kinghorn explained that as it relates to the Wet Stock Management programme, there are occasions when they are unable to use the software because of error messages that sometimes come up or technical information indicating that the system is not working. He said there are also times when after a new feature or module was introduced, when trying to use the system, it would shut down. As it relates to the Kayla Property Management software, he said when rental payments are paid into their account and they would try to issue receipts from the system, that consistently caused the system to 'hang up', meaning it would freeze and they would have to restart the computer. As it relates to the Legal Assist Pro, he said the system would either crash, meaning it would shut down, or it would freeze. Regarding the Client Portal, the main issue was that it would shut down indiscriminately. Regarding the Deli programme, which Mr Kinghorn designed to allow customers to place their orders at the Deli on tablets that were provided on the walls, he said there was a perennial problem where it would take an inordinately long time for customers to place their orders, followed by the system shutting down on its own.

[31] Mr Kinghorn said he would not have internet problems in relation to his servers, because, on advice from Mr Gowdie, the Claimants invested in fibre internet from Flow, called DIA, which he understands to mean direct internet access.

[32] When asked if he received an email from Flow stating that they are working on the internet in the surrounding area, Mr Kinghorn said he does not recall and if an email was sent, and that they would have contacted Mr Gowdie as he was in charge of IT for the firm and companies.

[33] Mr Kinghorn denied that Mr Gowdie had a technician on site although he recalled seeing a Dwayne Phillips who he said is the technician that fixes the hardware at the office but expressed that one cannot ask a technician to do what Mr Gowdie does as it is impossible.

[34] When asked if when he again requested his IT information from Mr Gowdie, if he didn't receive that information, Mr Kinghorn said that he has received nothing but an invoice for \$2.3 million from Gailick Technology Limited. He disagreed that he received this information via email on April 28, 2023 from Mr Gowdie. At first, he did not recall a conversation via WhatsApp between himself and Mr Gowdie dated October 25, 2019. However, he later said that he recalled the conversation, at first said that he did not know what SSMP is, then said that SSMP means Service Station Management Programme.

[35] Mr Kinghorn could not recall if a request was made for his IT infrastructure in April 2023. When asked if he recalled receiving an email dated Sunday April 16, 2023 from Mr Gowdie, giving Mr Kinghorn all source codes that would give Mr Kinghorn access to the pieces of software, Mr Kinghorn denied receiving an email from Mr Gowdie giving him the source codes for the four pieces of software that he has been complaining about.

[36] When it was suggested to him that on April 16, Mr Gowdie sent him an email with the subject 'Software Application-Source Codes' with seven (7) attachments, all of which had access codes, usernames, passwords and server credentials that would be needed to access all the software in every single business that Mr Kinghorn owned at the time, Mr Kinghorn disagreed. He disagreed that the source codes for the software applications, the subject of this matter, were emailed to both himself and Mrs Kinghorn on April 16, 2023 at 7:16PM.

[37] Mr Kinghorn also disagreed that he was given the router access credentials on Friday April 28, 2023 at 11:42AM. He further said the routers had to be changed because they did not get access to their routers. It was suggested that on April 28, 2023 at 3:16, Mr Gowdie answered Mr Kinghorn in an email, in response to a WhatsApp message Mr Kinghorn sent to him where he instructed that Mr Gowdie not interfere with the Claimants' servers, routers, programmes or any IT infrastructure until further notice. In response, Mr Kinghorn said he does recall requesting that Mr Gowdie not interfere

with their IT infrastructure. A copy of the email dated April 28, 2023 at 3:18PM was admitted as 'Exhibit 2'.

[38] When he was asked if at this time he has access to the software, Mr Kinghorn said he does not and that it is by choice that he would not use those pieces of software even if Mr Gowdie were to allow him to use them, because data would be collected by Mr Gowdie and kept in his possession.

[39] In re-examination, email dated April 29, 2023 was tendered as 'Exhibit 3'.

[40] Mr Kinghorn was then asked questions by the Court. Mr Kinghorn said that he does not have control over the software created by Mr Gowdie. He agreed that if he got the access codes then he could access all the information about the clients, and also agreed that after Mr Gowdie left he was unable to use them.

[41] He said that if he got the source codes then that would help as they would be able to take control of the software both on the front end and the back end. He also said that access to the programmes was not discontinued immediately and that right up to the middle of last year, whenever he sought to access them, he would be able to. Mr Kinghorn agreed that if he got the source codes, then that is how he would become the master.

Mr Marlon Gowdie

[42] The witness statement of Mr Marlon Gowdie dated August 27, 2024 and filed September 4, 2024 stood as his examination-in-chief. Mr Gowdie said that in 2012, he began working for Mr Kinghorn as a Microsoft Technology Associate for the Kinghorn & Kinghorn law firm and Mr Kinghorn's other businesses. He also said that in 2015, he entered into an agreement with Mr Kinghorn to provide software development services to the entities that Mr Kinghorn had existing under his business portfolio.

[43] Mr Gowdie said that it was agreed and acknowledged that he would create and build an IT infrastructure for Mr Kinghorn, that would work efficiently as a vehicle for the

several software that he was building for him. Further that he provided Mr Kinghorn with cutting edge technology giving them recognition and competitive edge among their colleagues and similar businesses. These services entailed:

- *Provision of Technical Support*
- *Monitoring Performance, Application/system/security log for each branch and Head Office servers.*
- *Preventative Maintenance/critical updates application of Angels, Linstead, St. Ann and Old Harbour servers.*
- *Network Security breach prevention monitoring and network traffic analysis for each location;*
- *Database back up, corruption prevention and data integrity checks*
- *Software application design, development/training*
- *Consultation*
- *End user technical support*

[44] He said that the agreed tasks were executed with the requisite technical skills and technical support, which was never withheld from the Claimants and all minor adjustments requested by the Claimants were addressed promptly and professionally.

[45] He stated that he also provided all access codes and information requested of him by Mr Kinghorn. He said he specifically remembers emailing the requested information on January 11, 2017 which is the date on which it was requested by Mr Kinghorn, with the assurance that Mr Kinghorn could contact him directly should they have any questions or if any problems arose. He said that all the credentials he had in his possession were handed over to Mr Kinghorn during April and May of 2018.

[46] Mr Gowdie said that during the period of 2012 to 2018, he provided the Claimants with an efficient and fully functioning database. He also said that they continued to have a productive arrangement, that he was available to upgrade the software and systems, when necessary, and maintenance checks were done in a timely manner. He provided

such great service to the Claimants over the years because in 2020 Mr Gowdie's company's services were re-engaged by the Claimant and they entered into a Technology Partnership Agreement in 2020.

[47] He said that when he left, the Claimants engaged the services of another individual/company, Miguel Graham t/a Com Solution, to work with the infrastructure, and this individual/company worked with the system between 2018 to 2020. He said that Com Solution, as far as could be observed, may have made many mistakes with their handling and use of the system due to the fact that when he, Mr Gowdie, was re-engaged (seen in Appendix 1 of the Claimant's Particulars of Claim), he had to make many adjustments and correct many errors made over the two (2) years.

[48] Mr Gowdie said that over the years, his company skilfully created, developed and ably maintained the Legal Assist Pro, The Kinghorn Client Portal, The Kayla Property Management Programme and the Wet Stock Management Programme and Deli Programme. Further that at no point in time did he refuse to fix or repair or maintain the system.

[49] He said he has neither fraudulently nor intentionally sabotaged, shared sensitive data from or extorted money for service done on the Claimants' IT infrastructure. He also denied all claims of negligence, fraud, extortions and all other damaging allegations. He said that he has never conspired to extort the Claimants, he has not demanded payment for work that he has not done, nor has he provided an invoice that was not in accordance with the requests of the Claimants.

[50] During cross-examination Mr Gowdie insisted that he sent all codes, software and instructions for those software, credentials, network infrastructure and other information relating to the IT infrastructure to the Claimants. He said that this information was sent via email to Mr and Mrs Kinghorn at 11:42AM on April 28, 2023 to the email addresses of the claimants (skinghorn@kinghornja.com and jkinghorn@kinghornja.com) and also said that at no point did he receive a failure notice that it wasn't sent to the email addresses. He said a total of seven emails were sent and the software was sent as an

attachment to the said emails. Further that those attachments, which are the software, have all credentials, addresses and locations of the data for each of those software, which gives Mr Kinghorn full access to the use of the software to make modifications to the software and also provides full access to the database and its data.

[51] In that set of instructions, it clearly states the server name, the server location address otherwise called the IP address, the username, the password, the provider name and the protocol used. This set of instructions is called the connection string and it is the standard operating procedure that is used internationally for all developers to follow.

[52] Mr Gowdie denied that he has access to Mr Kinghorn's software or infrastructure, as Mr Kinghorn had claimed. He said he does not have access to the software because the new IT team would have firstly made sure to secure the network by changing all passwords and access codes for the software and routers.

[53] In order to access the software, he said that firstly, he would need to be inside Mr Kinghorn's building. Secondly, he would need to be given a fresh copy of those software which includes those changes. Thirdly, he would need to be given usernames and passwords to access the servers. Fourthly, he would need to be given access to Mr Kinghorn's Wi-Fi and lastly, he would need to be given access to Mr Kinghorn's network switch and router. In order to access Mr Kinghorn's network switch, Mr Gowdie would need to be at Mr Kinghorn's office physically to plug his laptop into Mr Kinghorn's network switch.

[54] Regarding Mr Kinghorn's evidence that the software that Mr Gowdie created would repeatedly crash, Mr Gowdie said that is not true. He stated that Mr Kinghorn would use the web version which was directly connected to his internet which has been unstable from his internet service providers, Flow. Mr Gowdie said they repeatedly made formal complaints regarding the quality of service and how it affects his operations. Mr. Gowdie further said that the software works but because Mr Kinghorn is a remote user that relies on internet stability, once there is a disruption in internet service then connecting would

fail and give the impression as though the software itself was not working. Therefore, in trying to access the database it would give an error message that it is not able to connect

[55] He said that the Deli operates from the Commodore location, which was known for frequent disruptions of internet service. He said this would have caused the order not to go through.

[56] Mr Gowdie said that he did not breach any of the terms of contract between himself and the first and second claimant and that he did not sell nor give any of Mr Kinghorn's data to the company stated or to any third party. He denied giving Mr Kinghorn an invoice for his source codes.

[57] He insisted that Mr Kinghorn was aware of the 3rd Defendant as he rented an office from Mr and Mrs Kinghorn where he operated MJ Systems and Gailick Technologies Limited. He also said that on October 25, 2019 he and Mr Kinghorn were communicating via WhatsApp messenger, for Gailick Technologies Limited to design and develop what they call the SSMP- service station management programme, on Mr Kinghorn's behalf. He said he indicated, when Mr Kinghorn raised a concern that the programme should not be sold or given to any of Mr Kinghorn's competitors, that he could assure him that he, Mr Gowdie, would in no way sell codes. However, further that if anyone approaches Gailick Technologies Limited to develop a petrol reconciliation management system, that Gailick Technologies Ltd would have the legal right to accept and develop. He said Mr Kinghorn indicated via WhatsApp that he would not have a problem with that.

[58] A screenshot of this message dated October 25, 2019, taken from Mr Gowdie's phone by Mr Gowdie himself on May 24, 2023, was tendered into evidence and marked as Exhibit 6; the information page marked Exhibit 6A and the conversation screenshot marked Exhibit 6B.

[59] He agreed that certain glitches were outlined to him by Mr Kinghorn but that usually once those glitches are brought to his or his team's attention, they would address them.

SUBMISSIONS

[60] No submissions were filed by the Claimants and the court's efforts in procuring the said submissions proved futile.

[61] Counsel Ms Gaye on behalf of the 1st Defendant submitted that in order to successfully prove a breach of the service contract between the parties, the Claimant must first prove the existence of a contract, the terms of the contract and the Defendant's breach of the said contract. She relied on the case of **Trollope and Colls Limited v North West Metropolitan Regional Hospital Board** [1973] 2 All ER 260. Ms Gaye submitted that the Claimants failed to exhibit the contract being relied upon in order to prove the alleged breach.

[62] She said that based on the sworn evidence of Mr. Kinghorn, he had unrealistic expectations of how the software and systems would operate and that he expected the unique software to operate without a glitch. She further submitted that Mr. Kinghorn's complaints that the system would fail, crash on numerous occasions, was slow in processing orders and showed technical notes indicating that the system was not working, were consistent with poor internet and signal services.

[63] She contended that there was no evidence that Mr Gowdie did not develop and maintain the software requested by the Claimants and also no evidence that Mr. Gowdie was not competent in his field. In fact, Mr. Gowdie was referred to by Mr. Kinghorn as a genius and not an ordinary man.

[64] Ms Gaye submitted that the exhibited emails demonstrate that the 1st Defendant responded in a matter of minutes to the demands of Mr. Kinghorn and gave him the liberty to contact him at any time. Further, that when Mr. Kinghorn was asked about receiving the access codes by way of email, on one of the occasions he responded that *"I don't recall receiving such an email because I asked for the software and not the access codes"*. Ms Gaye submitted that had Mr. Kinghorn been versed in information

technology, he would understand that the said codes that he was given granted him unlimited access and control of the software he requested.

[65] Regarding the claim for negligence, Ms Gaye submitted that there ought to have been expert evidence, especially in light of there being an allegation of professional negligence. She referred to the case of **Caribbean Steel Company Limited v Price Waterhouse (A FIRM)** 1998/ (C-166 particularly paragraphs 17 where it was stated by Jones J, that *“it cannot be gainsaid that the value of testimony of an expert witness depends on the extent of his expertise and experience. This is particularly so where the issue is on one of professional negligence.”* Counsel also referred to the text cited by Jones J in **Caribbean Steel** (supra) of **Jackson and Powell on Professional Negligence**, 5th Edition, London Sweet & Maxwell 2002 at page 1114, where the learned authors put forward the following proposition: *“A court is usually unwilling to find a professional person negligent in the absence of evidence from a professional in the same field.”*

[66] She firmly contended that the evidence given by Mr Kinghorn was biased and that his case needed to be bolstered by an expert in the information technology field, in order to provide the court with sound, reliable and comparable information about the proper development of systems and software for the court to determine whether Mr Gowdie executed his duties according to the contract and universal standards.

[67] Regarding fraud, Ms Gaye relied on the authority of **Paul Duncanson v Derrick Sharpe and Marva Sharpe** [2023] JMSC Civ 34, specifically paragraphs 30 and 31, and submitted that although fraud was specifically pleaded, the evidence does not point to any proof of alleged fraud committed by the 1st Defendant. She also articulated that Mr Kinghorn failed to provide any proof of Mr Gowdie extorting money or acting fraudulently. She further submitted that there has been no evidence of a conspiracy between Defendants. She said that the 3rd Defendant, Gailick Technologies Ltd, was already introduced to and known by Mr Kinghorn in a WhatsApp conversation between Mr Kinghorn and Mr Gowdie.

[68] Counsel also referred to **Old National Bank T/A National Wealth Management v Al Socrates Jobson et al** [2024] JMCA Civ 14, specifically paragraphs 47 to 49, and reiterated that there was no evidentiary material to prove fraud on the part of the 1st Defendant.

[69] Ms Gaye submitted that the Claimants cannot be found to be credible, as their evidence, as put forward, was biased, unrealistic, dishonest and malicious. On the other hand, Mr Gowdie's testimony was forthright, professional and very informative. She asked the Court to find and that he was a credible witness, that he sent the source codes, as requested, in a timely manner and that he provided the location of the servers that support the Claimants' systems.

[70] Ms Gaye asked the Court to find that the Claimants have failed to prove that there was a breach of contract, negligence on the part of the 1st Defendant, or that he attempted or conspired to defraud or scam the Claimants.

ISSUES

- a) Whether the 1st Defendant was negligent in carrying out his professional his duties to the Claimants?
- b) Whether there was a breach by the 1st Defendant of the Agreement between himself and the Claimants?
- c) Whether the actions of the 1st Defendant in requesting payment for services captured in the final invoice constituted a fraudulent act on the part of the 1st Defendant?
- d) Whether the ownership of the software created by the 1st Defendant during his time as an independent contractor of the Claimants, rests with the 1st Claimant or the 1st Defendant?

LAW AND ANALYSIS

Whether the 1st Defendant was negligent in carrying out his professional duties to the Claimants?

[71] The Claimants allege that Mr Gowdie was negligent in the performance of his duties as an IT Manager, IT Expert and Microsoft Technology Associate. The overarching issues to be determined are that of credibility and the lack of expert evidence concerning the operation of the software.

[72] Under cross examination, Mr Kinghorn said that he communicated his dissatisfaction with Mr Gowdie's negligent work from the outset of the relationship, asserting that the software would crash repeatedly, that the support to have the system fixed quickly was never forthcoming from Mr Gowdie and that data collected from the various pieces of software, excluding Legal Assist Pro, were placed on servers owned exclusively by Mr Gowdie and not on the Claimants' servers. Further, that in putting the Claimants' data and information on these servers, Mr Gowdie left the Claimants exposed to the software continuously going down.

[73] In response to this, Mr Gowdie denied saying that the programmes created by him were all perfect, and reiterated that every programme has its margin of errors pointed out that this software was a customised software for Mr Kinghorn and his companies. He added that it is an international standard that all software comes with five (5) to ten (10) percent of an acceptable margin for errors which means that for developers, every software that is created has an allowance for errors and this is with all software right across the board until it is perfected. Mr Gowdie denied that Mr Kinghorn made several complaints to him about errors in the running of the programmes made by him and exhibited emails to show that he responded in a timely manner to the demands of the Claimants.

[74] The question as to whether there was negligence on the part of the Defendant in his operation of the system is a question of fact. I accept the evidence of Mr Kinghorn

that there were glitches and that the system did not always operate in the manner expected. The question as to whether this constitutes negligence would have been greatly assisted by evidence of what is required in the field and that would be best provided by someone with expertise in the field. The importance of expert evidence is demonstrated in the case of **Pantelli Associates Ltd v Corporate City Developers** [2010] EWHC 3189 (TCC), where the court was of the view that the amended defence and counterclaim that purported allegations of professional negligence should be struck out, the court said:

“[16] ...even though the work that is now the subject of these purported allegations was carried out three years ago, there is no expert evidence of any kind to suggest that that work was carried out inadequately, or was in some way below the standard to be expected of an ordinarily competent quantity surveyor. Not only is it simply not good enough to turn a positive contractual obligation into an allegation of professional negligence by adding the words “failing to” to the obligation, but it is also wholly inappropriate to do so in circumstances where there is no expert input to allow CCD to make such an allegation in the first place.

*[17] Save in cases of solicitors' negligence where the Court of Appeal has said that it is unnecessary (see *Brown v Gould & Swayne* [1996] 1 PNLR 130) and the sort of exceptional case summarised at para 6-009 – 6-011 of *Jackson & Powell*, Sixth edition, which does not arise here, **it is standard practice that, where an allegation of professional negligence is to be pleaded, that allegation must be supported (in writing) by a relevant professional with the necessary expertise. That is a matter of common sense: how can it be asserted that act x was something that an ordinary professional would and should not have done, if no professional in the same field had expressed such a view? CPR Pt 35 would be unworkable if an allegation of professional negligence did not have, at its root, a statement of expert opinion to that effect.**” (my emphasis)*

[75] In the case of **Wattret and Anor v Thomas Sands Consulting Ltd** [2015] EWHC 3455 (TCC), a case arising out of the Queen's Bench Division Technology, the court was tasked with determining the question of whether expert evidence should be permitted in that case, where the claimants sought damages in contract and tort in relation to the provision of professional services by the defendant. The court also

addressed the necessity of expert evidence in professional negligence cases at paragraphs 22 to 23:

*“22. In my view it is necessary to have expert evidence in this case. There is authority of long standing which is applicable to cases of professional negligence. I refer particularly to **Sansom v Metcalfe Hambleton** [1998] PNLR 542 at 549 in which Butler-Sloss LJ said:*

*“A court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party) without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard. It is not an absolute rule as Sachs LJ (in **Worboys v Acme Investments Ltd** [1969] 4 BLR 133 at 139) indicated in his example but unless it is an obvious case, in the absence of the relevant expert evidence, the claim will not be proved.”*

23. As was pointed out by Butler-Sloss LJ, this is not an absolute rule. One example in which expert evidence is not required is if the answer is obvious. Thus, one does not need an expert to provide an opinion that it was negligent to design a house without a front door. It is not suggested that this type of example applies in the present case...” (original emphasis)

[76] In Caribbean Steel Company Limited v Price Waterhouse (A FIRM) 1998/C-166, while Jones J accepted the position in **Sansom** and that of the authors in **Jackson and Powell on Professional Negligence**, he stated that:

*[20] While I accept the above position in general terms, it is clear from the passage cited above that the proposition that a court requires evidence from a professional in the same field in order to make a finding of professional negligence, it is not an absolute rule and is subject to exceptions. In **Sansom’s case** reference was made to the case of **Worboys v Acme Investments Ltd** where an allegation of professional negligence was made against an architect and the argument mounted that the case was one that the court could find a breach of professional duty without having evidence of what constitutes lack of care on the part of a professional man. Sachs L.J. made it clear that:*

“There may well be cases in which it would not be necessary to adduce such evidence – as, for instance if an architect omitted to provide a front door to the premises.” (original emphasis)

[77] The authority of **Sansom v Metcalfe Hambleton & Co** (supra) was also referred to by Counsel for the 1st Defendant, in support of her submission that expert evidence ought to have been introduced especially in light of there being an allegation of professional negligence. The portion of the judgment quoted by Ms Gaye is identical to that which was reproduced in **Wattret** (supra) and that referred to by Jones J in **Caribbean Steel Company** (supra).

[78] I am of the view that expert evidence in the area of information technology, especially software programming, would have been required for this Court to resolve the proceedings justly. This would be important in this context where Mr Kinghorn is the only witness and would obviously have an interest to serve and has not given any evidence of any particular training or expertise that he has in the field of information technology and software operation. Expert evidence was necessary for a determination of whether Mr Gowdie was negligent in the performance of his duties to the Claimants. In the absence of that the Claimant has failed to prove negligence.

Whether there was a breach by the 1st Defendant of the Agreement between himself and the Claimants?

[79] Mr Kinghorn said that in or about 2014 to 2015, Mr Gowdie agreed to provide a list of services to the Claimants including that Mr Gowdie would create and build an IT infrastructure for Mr Kinghorn. In addition, reference is made to the breach of the Technology Partnership Agreement.

[80] Counsel for the 1st Defendant submitted that the Claimants failed to exhibit the contract that was being relied on to prove the alleged breach. While it is true that no contract was exhibited by the Claimants, it is clear from the evidence of both parties that a contract existed between them and they are to a large extent agreed on the services

to be provided. Where they divert from each other is regarding whether there was in fact a breach.

[81] Although the Technology Partnership Agreement was never tendered into evidence, both the 1st Claimant and the 1st Defendant are agreed as to the list of services that were to be provided. In the Particulars of Claim, the Claimants have set out the elements constituting the allegation of breach of contract which will be dealt with separately in order to determine whether there has in fact been a breach.

Developed programmes which were flawed and fraught with discrepancies. –

[82] Mr Kinghorn gave evidence that the software would crash repeatedly and that he would attempt to access electronic files and the system would crash, rendering it inoperable. However, Mr Gowdie disagreed and said that the software operated locally and so the desktop version of Legal Assist Pro had to be installed on a computer that is directly connected to Mr Kinghorn's server at his office. Further, that when using the web version, it was directly connected to Mr Kinghorn's internet, which Mr Gowdie said had been unstable due to his internet providers.

[83] Mr Gowdie said repeated formal complaints were made regarding the quality of internet service and how it affected Mr Kinghorn's operations. He said once there is disruption in that service, connection would fail and give the impression that it was the software that was not working. Further that, as a layman, this means it would give an error message that it is unable to connect.

[84] Mr Kinghorn denied that he or other members of his staff tested the programmes in his office after they were developed and said that they do not have the aptitude and knowledge to test a software. However, Mr Gowdie said this is not true, as all software had to be approved by Mr Kinghorn prior to their release and that one of Mr Kinghorn's requirements was that he, Mr Kinghorn, be able to test, first hand, the updates to ensure that they meet his requirements and that they were an exact reflection of what Mr Gowdie was asked to do.

[85] Counsel Ms Gaye submitted that the issues complained of by Mr Kinghorn such as the slow processing of orders, system freezing or shutting down, are squarely in line with intermittent or poor internet and signal services. Mr Gowdie indicated that Mr Kinghorn's businesses experienced internet issues which led to them retaining the services of an independent internet service provider in order to lessen the occurrence of software malfunctioning in the various businesses owned and operated by them. I find that the evidence of Mr Gowdie that the issues relating to the slow loading, freezing and malfunctioning of software, are either due to internet connectivity issues or that they fall within the prescribed margin of error to be not only credible but also reasonable and understandable. In the absence of any expert evidence to counter Mr Gowdie's view, I accept his account to be more probable than that of the Claimants' version.

[86] What stands out is the Claimants' position that from the inception the programmes were replete with errors. It is of note that there was a point when Mr Gowdie's services were terminated. During that time, another company Com Solution was engaged but soon thereafter the Claimants re-engaged Mr Gowdie. Mr Kinghorn's evidence was that Mr Gowdie's expertise outweighed his inefficiencies, however, this also suggests that there is truth to Mr Gowdie's account that the system he provided did what it was agreed to do. Further, Mr Gowdie gave evidence that he was re-engaged to make many adjustments and correct many errors made over the two (2) years by Com Solution, because Com Solution, as far as could be observed, may have made many mistakes with their handling and use of the system. Without any expert evidence, it cannot be said that all of the flaws and/or discrepancies with the software programmes, could be attributed to Mr Gowdie.

Failed and/or refused to carry out repairs, fixes and maintenance in respect of the flawed programmes he developed.: -

[87] Mr Kinghorn testified that Mr Gowdie did not maintain the system efficiently and that as a result, the Claimants sought to get other developers to assist the Claimants.

Mr Kinghorn also said that the support to have the system fixed quickly was never forthcoming from Mr Gowdie and as a result, the Claimants would have downtime for half of the day or a full day.

[88] Counsel Ms Gaye submitted that the emails exhibited, showed that Mr Gowdie was careful to respond in a matter of minutes to the demands of the 1st Claimant, and that Mr Kinghorn could even contact Mr Gowdie on weekends. The email dated January 11, 2017 contained in Exhibit 1, does support Mr Gowdie's evidence that responses to Mr Kinghorn's emails were done within a reasonable time.

Failed to complete the conversion of the desktop version of the LAP to a Web / Online Version despite being paid the sum of \$1m: -

[89] Mr Kinghorn in his evidence stated that the system was so sophisticated that he was able to access files, information and other necessary information through his phone, wherever he was in the world, once he had an internet connection. Mr Gowdie said that Legal Assist Pro is the desktop version that had to be installed on a computer that is connected directly to Mr Kinghorn's sever at his office. He also said that Mr Kinghorn would use the web version which was directly connected to Mr Kinghorn's internet, and that this is the web version that Mr Kinghorn uses to access his database from anywhere in the world once he is authenticated.

[90] There was no evidence put forward regarding what the Claimants observed that would lead them to the conclusion that Mr Gowdie failed to complete the conversion of the desktop version of Legal Assist Pro. In fact, given that Mr Kinghorn was able to access the web version of Legal Assist Pro from anywhere in the world, it appears that sufficient work was done by Mr Gowdie in converting the Legal Assist Pro to a web version, to the standard that enabled Mr Kinghorn to be able to use it wherever in the world he was, once he had stable internet connection.

Failed and/or refused to disclose and reveal vital proprietary information regarding the Claimants' Information Technology infrastructure.: -

[91] The evidence before the court is that Mr Gowdie provided the Claimants with the access codes, the source codes and other IT information for the Claimants' IT infrastructure. The emails and visual diagram maps exhibited by the 1st Defendant, are proof of this.

Fraudulently and intentionally sabotaged the Claimants' business operations by attempting to prevent the Claimants from employing and/or engaging the services of other IT personnel by failing and/or refusing to provide the Claimant and the said IT personnel with any information regarding of the Claimants' IT infrastructure.: -

[92] There is no evidence before this court that Mr Gowdie refused to provide the Claimants or IT personnel with information pertaining to their IT infrastructure. Mr Gowdie has, in his evidence, stated that he sent all codes, software and instructions for the software, the credentials, network infrastructure and other information relating to the IT infrastructure. He said that this was all sent to Mr and Mrs Kinghorn via email. He said the software was sent as an attachment to the emails, and that those attachments gave Mr Kinghorn full access to the use of the software, the database and its data, as well as allows him to make modifications to the software. Mr Gowdie's evidence by way of email dated April 16, 2023 tendered as Exhibit 4 and the network diagrams tendered as Exhibits 5 to 5E, support this. Further, in Exhibit 3, an email dated April 29, 2023 at 2:36AM in response to an email from Mr Gowdie, Mr Kinghorn himself acknowledges that the source codes were sent to him. I will reproduce the relevant portion of the said email below:

"Please also refer to our email of the 15th April 2023 with the caption

"Request (again) for the source codes and proper information to allow us to seek the services of a Contractor Developer

*Not surprisingly, the issues raised by us in that email have gone unanswered **except to provide us with the source codes.***" (my emphasis)

[93] This supports Mr Gowdie's evidence that he provided the Claimants with information regarding their IT infrastructure. Mr Kinghorn's evidence on this issue has been inconsistent. In the first instance, he had asserted that the source codes were not provided but by the end of cross-examination, it became clear that Mr Gowdie has in fact provided the necessary codes.

Fraudulently demanded the sum of \$2,200,000.00 to be paid over to him prior to releasing of pertinent and necessary information about the Claimants' IT infrastructure.

[94] It is Mr Kinghorn's evidence that Mr Gowdie fraudulently and unlawfully demanded the sum of \$2,200,000.00 to be paid over to him. However, Mr Gowdie said that he did not give Mr Kinghorn any invoice for his source codes, as his source codes were issued via email to Mr and Mrs Kinghorn for them to forward to their IT teams.

[95] The invoice, although referred to by both parties and was attached to the Particulars of Claim, was not tendered into evidence. It would have been important to examine the invoice to determine exactly what the sums sought related to. There is therefore no evidence of any fraudulent demand by Mr Gowdie or by anyone acting on his behalf.

Fraudulently and unlawfully passed to the 2nd and 3rd Defendants, sensitive data and information secured on the Claimants' IT infrastructure as well as information of the operations of the IT infrastructure of the Claimants.: -

[96] There is no doubt that private data and client information generated by the various software created by Mr Gowdie, constitutes confidential information. There is also no doubt that Mr Gowdie had a duty to the Claimants, to protect that information. The issue as to what constitutes sensitive data is a question of fact. In the case of **Saltman Engineering Co Ltd & Ors v Campbell Engineering Co** [1948] 65 RPC 203, Lord Greene MR at page 215 stated "*the information, to be confidential, must, I apprehend,*

apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge". At page 218, the learned judge stated that:

"The first question in a breach of confidence case is whether the circumstances are such that the defendant owes his duty to the person who is asserting that the information in the hands of the defendant was his confidential information."

[97] Mr Kinghorn stated in his evidence in chief that it was expressly agreed between the Claimants and Mr Gowdie that the information and data stored and secured on the Claimants' IT infrastructure and the information of the set-up of the Claimants' IT infrastructure, would be kept strictly confidential by Mr Gowdie and would not be disclosed to a third party without the express consent of the Claimants. While there is no evidence of this clause/term before the court, this was not contested by Mr Gowdie and there would no doubt be an inference in the contract that there would be no disclosure of sensitive information. If there was in fact dissemination of the Claimants' sensitive and confidential information by Mr Gowdie, this would be a breach of confidence and could result in a breach of contract.

[98] Mr Gowdie said that he did not sell or give any of Mr Kinghorn's data to the company stated or to any third party. I interpreted Mr Gowdie's reference to "company stated" as being Gailick Technologies Ltd. There is therefore no evidence before the court that Mr Gowdie passed sensitive data and information secured on the Claimants' IT infrastructure and information of the operations of the Claimants' IT infrastructure, to the 2nd and 3rd Defendants. There is also no evidence that Gailick Technologies Ltd had the Claimants' IT information in its possession. The only evidence before the court is that Gailick Technologies Ltd issued the claimants with an invoice and that it rented a space in the same plaza as the 1st Claimant's law practice.

[99] The Claimants have failed to prove that the 1st Defendant or any agent of his or any person or company associated with him, disseminated any sensitive or confidential information belonging to the Claimants.

Fraudulently conspired with the 2nd and 3rd Defendants to extort the sum of \$2,305,000.00 from the Claimants for the due releasing of pertinent and necessary information of the Claimants' IT infrastructure.

[100] There is also no evidence that Mr Gowdie conspired with the 2nd and 3rd Defendants to extort the sum of \$2,305,000.00 from the Claimants for the release of information pertaining to the Claimants' IT infrastructure. Mr Gowdie said in his evidence that he did not give Mr Kinghorn any invoice for his source codes, as his source codes were issued via email to Mr and Mrs Kinghorn for them to forward to their IT teams.

[101] Although Mr Kinghorn denied receiving the access codes by way of email, this was found to be untrue based on the 1st Defendant's email sent to Claimants' email addresses that enclosed the very access codes that Mr Kinghorn denied receiving.

[102] In answering questions posed to him by the Court, Mr Kinghorn agreed that if he got the source codes that would help, as he would be able to take control of the software and that he also wanted to be the owner of the software and the data collected by the software.

[103] The evidence, specifically Exhibit 4 shows the email chain dated April 16, 2023 and up to April 28, 2023 with not only the source codes but also visual network layout diagrams.

[104] Mr Gowdie explained that in that set of instructions it clearly states the server name, server location address (otherwise called IP address), the username, the password, the provider name and the protocol used. These sets of instructions are called the connection string and it is the standard operating procedure that is used internationally for all developers to follow. Further that the set of instructions called the connection string is what gives the developer access to the data and database

[105] Mr Gowdie said all of this information was given to Mr and Mrs Kinghorn in the email sent on April 28, 2023, and that because the various software was attached, Mr Kinghorn and his IT team would simply need to open and view the connection strings. He said the email also listed the details of the development environment and the technology used to develop the software.

[106] Mr Kinghorn however said that he has no access to any of the software that Mr Gowdie has written for the Claimants and as a result is unable to use those programmes anymore. On this point I accepted the evidence of Mr Gowdie as being more credible and find that the source codes and other pertinent IT information was provided to the Claimants.

Whether the actions of the 1st Defendant in requesting payment for services captured in the final invoice constituted a fraudulent act on the part of the 1st Defendant?

[107] The often-cited case of William **Derry and Others v Sir Henry William Peek** (1889) 14 App Cas 337 sets out the requirements to prove fraud. The well-known principle emanating from that case is that in an action of deceit, the claimant must prove actual fraud. Furthermore, fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly without caring whether it is true or false.

[108] Mr Kinghorn has particularised the allegations of fraud in his pleadings, stating that the 1st Defendant has fraudulently, unlawfully and illegally disclosed information secured on the Claimants' IT infrastructure, to the 2nd and 3rd Defendants, with a view of extorting \$2,305,000.00 from the Claimants

[109] In the case of **Sunshine Dorothy Thomas and Ors v Beverley Davis** [2015] JMCA Civ 22, Brooks JA, as he then was, said the following in relation to importance of not only specifically pleading fraud, but also specifically proving fraud:

[43] *Attorneys-at-law dealing with civil litigation have traditionally been admonished to treat the issue of alleging fraud very cautiously and carefully. Lord Selborne LC in **John Wallingford v Mutual Society and the Official Liquidator** (1880) 5 App Cas 685 at page 697 stated the general rule. He said:*

“With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.”

[44] *In **Associated Leisure Ltd and others v Associated Newspapers Ltd** [1970] 2 All ER 754 at pages 757-8, Lord Denning MR cautioned that fraud should not be pleaded unless there was “clear and sufficient evidence to support it”. Similarly, in **Donovan Crawford and Others v Financial Institutions Services Ltd** [2005] UKPC 40, the Privy Council emphasised the standard in respect of the issue of fraud in civil litigation. It said, at paragraph 13 of its judgment:*

“It is well settled that actual fraud must be precisely alleged and strictly proved.” (original emphasis)

[110] Ms Gaye submitted that although fraud has been pleaded, there is no evidence to support the allegations of fraud. In support of this, she relied on the case of **Paul Duncanson v Derrick Sharpe and Marva Sharpe** [2023] JMSC Civ 34, where the learned judge also made reference to the cases of **John Wallingford** (supra) and **Associated Leisure Ltd** (supra).

[111] In **Paul Duncanson v Derrick Sharpe and Marva Sharpe** (supra), one of the attorneys referred to the case of **John Chin v Watson Off Course Betting** 1974 JLR 1535 where Rowe, J made it clear that to establish fraud in civil proceedings, fraudulent conduct must be distinctly proved and it is not allowable to leave it to be inferred from the facts.

[112] The Claimants herein have specifically pleaded fraud and have particularised its allegations of fraud, but there is insufficient evidence to prove the allegations of fraud, as pleaded.

Whether the ownership of the software created by the 1st Defendant during his time as an independent contractor of the Claimants, rests with the 1st Claimant or the 1st Defendant?

[113] Although, the ownership of the computer programmes was not an issue sought to be determined in the pleadings, the issue arose on the evidence, so I found it prudent to address the issue of the ownership of the computer programmes created by Mr Gowdie. Of note is the fact that the only computer programme/software that the evidence shows Mr Gowdie expressly asserting his ownership of, is the service station management programme (SSMP), which was spoken of in the WhatsApp conversation shown in Exhibit 6B.

[114] In the case of **Paymaster Jamaica Limited v Grace Kennedy Remittance Services Limited and Paul Lowe** [2015] JMCA Civ 20, the court was tasked with determining the ownership of a computer programme that was developed by the 2nd Respondent, which the 2nd Respondent had licenced to the 1st Respondent. Regarding whether Paymaster's ownership of the computer programme was to be by way of implication, the Harris JA stated:

"[149] By virtue of section 2 of the Act, the second respondent is the creator of the work and accordingly, the owner of the copyright. Paymaster sought to secure ownership in the computer programme by way of an implication. In order for it to succeed it must be shown that there is a presumed intention that the ownership of the programme vests in Paymaster. This requires me to embark on a journey into the circumstances of this case, in order to ascertain whether Paymaster falls within any of the principles enunciated by Lightman J in Robin v Classic FM Plc.

[115] Similarly, the circumstances and terms under which the contract was formed must therefore be examined. A term of the agreement between the parties was for the provision of the "Software application design, development/training". There is no evidence of a clause in the agreement dealing with the ownership of the software/computer programmes created by Mr Gowdie, regarding whether the software

created by Mr Gowdie, under his contract for services, was to be owned either by Mr Kinghorn or Mr Gowdie alone or by both parties by virtue of joint authorship.

[116] A computer programme is considered a literary work under **The Copyright Act**. Further, under the Jamaican **Copyright Act**, the author of a protected work is the first owner of any copyright unless there is an agreement to the contrary.

[117] **Section 22(1)** of **The Copyright Act**, 1993 (amended in 2015), provides that

“(1) ...the author of a protected work is the first owner of any copyright in that work unless there is an agreement to the contrary.”

Subsection (3) of the Act further states that

“(3) Where a protected work is a work of joint authorship the authors thereof shall be co-owners of the copyright in that work.”

[118] No such contrary agreement has been produced to this court, whether by way of a written agreement or in clear and express terms of an oral agreement. Similar to the **Paymaster** (supra) case, there was no written agreement in place between Mr Kinghorn and Mr Gowdie regarding the ownership of the computer programmes created by Mr Gowdie.

[119] Mr Kinghorn was asked by the court if when he engaged Mr Gowdie to create the software programmes, if there was any written agreement as to who would be the master and who would have access, Mr Kinghorn replied *“I can’t think of anything in writing right now but it would have been a clear understanding and expression between us that if you are developing a software at my instance then the ownership of that software must reside with me and I must have exclusive control over that. Especially when it comes on to the information from clients at the law firm.”*

[120] However, the law is clear on how ownership of a literary work is to be treated in circumstances where a body of work is created during employment where there is no agreement to the contrary of the creator being the first owner. Mr Kinghorn’s use of the phrase “would have been” in his response to the Court’s question of whether there was

any written agreement as to who would be the master and who would have access, raises doubt as to whether this was a clear and express term of an oral agreement between the Claimants and the 1st Defendant, that ownership would rest solely with Mr Kinghorn.

[121] In exploring whether the computer programmes the subject of this claim could be considered works of joint authorship, the case of **Cala Homes (South) Ltd et al v Alfred McAlphine Homes East Ltd** (1995) IP&T Digest 18 is helpful. That case concerned an action for copyright infringement and inducement of breach. It was held that joint authorship would exist where two or more persons had collaborated in creating a work, and each person's contribution is a significant part of the skill and labour protected by the copyright.

[122] At page 15 of **Cala Homes** (supra), Laddie J referred to and later affirmed the submissions of Mr Howe who submitted that there are two requirements which need to be fulfilled before a work can be said to be of joint authorship; 1. the work must be produced by the collaboration of the authors; and 2. there must be some significant contribution on the part of each author. Regarding the second requirement, Laddie J referred to this aspect of Mr Howe's submissions, the highlighted portion of which I find particularly useful to the case at hand:

*"The second requirement is that there must be some significant contribution from each of the authors. He says that the contribution must be "in the nature of authorship". By that he meant that the contribution must be in the nature of originating and creating something that finds its way into the finished work. ... He conceded that **mere instructions such as "paint me a yellow flower" would not make the person who gives those instructions a joint author of the resultant painting. If that case all the skill and labour in composition would come from the painter. On the other hand if very detailed input was provided, then a work of joint authorship could be created.** (emphasis added)*

Laddie J then went on to state that:

In my view, to have regard merely to who pushed the pen is too narrow a view of authorship. What is protected by copyright in a drawing or a literary

work is more than just the skill of making marks on paper or some other medium. It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected. It is wrong to think that only the person who carries out the mechanical act of fixation is an author. There may well be skill and expertise in drawing clearly and well but that does not mean that it is only that skill and expertise which is relevant. As Mr Howe has said, where two or more people collaborate in the creation of a work and each contributes a significant part of the skill and labour protected by the copyright, then they are joint authors.

[123] Mr Gowdie has not refuted the claims of Mr Kinghorn that the software was developed at Mr Kinghorn's instance and that the ownership of the software then resides with him. In fact, it is Mr Kinghorn's evidence that the computer programmes created by Mr Gowdie were specific to his, Kinghorn's, mind and that he would have to teach Mr Gowdie the basis of why the programme is to be written in a particular way. He also said that, in the beginning, he taught Mr Gowdie the nuances and challenges of the particular type of law practice that he had at the time, and that Mr Gowdie listened and advised Mr Kinghorn on the type of IT infrastructure to invest in. Further, it is Mr Gowdie's evidence that Mr Kinghorn required that he, Kinghorn, be able to test, first hand, the updates to the software so that he could ensure that they meet his requirements and that they were an exact reflection of what Mr Gowdie was asked to do. This is very clear evidence of a collaboration of Mr Kinghorn and Mr. Gowdie, to produce the computer programmes. However, it is important to state that the extent of the copyright held in the computer programmes is an issue that would have to be determined by an expert in the field of software/computer programming and is not necessary for the resolution of this matter.

[124] It is clear, based on the evidence, that Mr Kinghorn provided very detailed input in the production of the computer programmes that were created by Mr Gowdie to be used by the Claimants in their affiliate businesses. I therefore find that all the software Mr Gowdie created for the Claimants are works of joint authorship.

DAMAGES

[125] The Claimants claimed special damages, however, in light of their failure to prove any breaches there would be no basis on which to award damages whether special, aggravated, exemplary or vindictory damages.

DISPOSITION

[126] The Claimants' claim for negligence, breach of contract and fraud fails and Judgment is for the 1st Defendant with costs to the 1st Defendant to be agreed or taxed.

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Stephane Jackson Haisley

Puisne Judge