RULING ON PRELIMINARY POINT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009/HCV 00036

BETWEEN	**CABLE AND WIRELESS JAMAICA LTD. (trading as Lime)**	**1st CLAIMANT**
AND	**OCEANIC DIGITAL JAMAICA LIMITED (trading as Claro)**	**2ND CLAIMANT**
AND	**DIGICEL (JAMAICA) LTD.**	**DEFENDANT**

Mr. Gordon Robinson and Ms. Avrine Bernard instructed by Brady & Co. for the 2nd Claimant.

Mr. Paul Beswick, instructed by Ballantyne, Beswick & Co. for Defendant.
Mrs. Denise Kitson instructed by Grant Stewart Phillips & Co. for the 1st Claimant.

Heard: 26 April, 7th, 9th June 2010.

Mangatal, J:

1. On February 11, 2010, Anderson J. made an order dismissing an application by the Defendant Digicel for an order to set aside the joinder of the 2nd Claimant Claro to this Claim.
2. On February 19, 2010, the Defendant filed an application seeking the following order:
    a. That the 2nd Claimant's claim be struck out pursuant to Rule 26.3 of the Civil Procedure Rules 2002 "the C.P.R.".
    b. Further or alternatively, that summary judgment pursuant to Rule 15.6 of the C.P.R. be entered in favour of the Defendant against the 2nd Claimant.
3. On March 24, 2010, the Defendant filed an Appeal which includes an appeal by the Defendant against Justice Anderson's order refusing to set aside an order joining the 2nd Claimant.

4. On the 23rd of April 2010, the 2nd Claimant filed a Notice of Preliminary Objection objecting to the Defendant's application being heard, and asking that it be stayed pending the outcome of the Appeal No. S.C.C.A. 37/2010.

5. The Notice states the grounds upon which the 2nd Claimant relies as follows:

.....

II. If the Defendant/ Appellant's appeal should succeed then it would mean that the 2nd Claimant would not be a party to this matter ab initio and accordingly it would be an exercise in futility to consider whether or not a summary judgment should be entered against the 2nd Claimant;

III. Only in the event that the Defendant/ Appellant's appeal should fail would the necessity arise for the Supreme Court to consider the issues arising in this application for summary judgment;

IV. If the Defendant were to proceed with the application for summary judgment this would be a tacit admission that the 2nd Claimant was entitled to be joined as a party to the action and so the Defendant/Appellant would first be obliged to withdraw the appeal and pay the costs of the appeal to the 2nd Claimant/Respondent or be guilty of an abuse of the process of the Court;

V. Generally speaking when there are issues in a matter before the Court of Appeal it is a counsel of prudence for the Supreme Court to stay any further proceedings in that jurisdiction until the matter has been dealt with in the Court of Appeal.

6. In her Affidavit filed in support of the preliminary objection, at paragraphs 4 and 5, Ms. Bernard advises that the 2nd Claimant has filed a Notice of Preliminary Objection to the Appeal. She indicates that neither the Appeal nor the Notice of Preliminary Objection has been resolved. Her information up to time of filing the Affidavit was that the Court of Appeal registry is awaiting a certified copy of the Record of Appeal of the proceedings in the Supreme Court. So no hearing dates have yet been set regarding the Appeal.

7. Mr. Beswick, in response to the preliminary objection has argued that the Court's jurisdiction to hear the summary judgment application is unfettered. He submits that once the issue on the Appeal is not the same as the issue being heard in the Supreme Court, there is no sound basis upon which a party can contend that the jurisdiction of the Supreme Court has been overtaken by that of the Court of Appeal. He relies upon a decision of Anderson J. in Claim No. 2008HCV00118 **Olint Corp. Ltd v. N.C.B.**, delivered July 4, 2008.

8. Mr. Beswick has also relied upon Rule 2.14 of the Court of Appeal Rules as explicitly preserving the Supreme Court's jurisdiction in relation to proceedings in the Supreme Court other than the proceeding being appealed against.

9. As regards the nature of the Appeal which has been filed by the Defendant, it is interesting that Mr. Beswick had this to say at paragraphs 21 and 22 of his written submissions:

> *21. The appeal itself is one of extreme significance because it deals with a fundamental issue which will likely recur if not dealt with fulsomely by the Court of Appeal....*
>
> *22. If the learned judge's order is not appealed, the result will most likely be that in each and every action brought by or against the defendant in relation to its interconnection agreements, every holder of a telecommunications licence will be entitled to intervene in such an action. The result will be an increase in the cost, time and complexity of such litigation.*

10. I agree with Mr. Robinson who made submissions on behalf of the 2nd Claimant Claro, that the central issue here is not about whether the Supreme Court has unfettered jurisdiction to hear the application for summary judgment, absent an order restraining the proceedings. I think that we are all agreed upon that. The real question is whether hearing the application for summary judgment at this juncture is in keeping with the overriding objective set out in Part 1 of the C.P.R of dealing with cases justly. Rule 1.1(2)(e) of the C.P.R. states:

> *1.1(2) Dealing justly with a case includes:*

.....(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

11. For an interesting discussion on the equivalent English Rule where the English Court of Appeal refused to hear a number of Appeals because it would not result in the allocation of an appropriate share of the court's resources, see Stuart Simes popular work, **A Practical Guide to Civil Procedure**, 5th edition, page 25, paragraph 3.5.4. The Court refused to deal with these Appeals even though there was a right to be heard, strictly speaking.

12. I think that the circumstances dealt with by Anderson J. in the **Olint** case are quite different than those that I am considering here. In **Olint**, my brother judge was considering specific grounds which complained that the same issues to be decided before him were the issues to be considered by the Court of Appeal. Further, that: *The Claim is now in the Court of Appeal on a pending appeal and as such it would be improper for the Supreme Court to deal with any aspect of the matter until the Court of Appeal had exercised its jurisdiction and delivered a decision.* (my emphasis).

13. Anderson J. went on to dismiss the preliminary objection, essentially because he held that the issues that were before the Court of Appeal being issues to do with an interlocutory injunction, called for different considerations than those to be dealt with in a summary judgment application.

14. However, that is not the factual scenario here. In the Appeal which is before the Court of Appeal and yet to be considered, the relevant issue will be whether or not the 2nd Claimant is a proper party to this Law Suit in the first place. It does seem to me that if I embarked on this summary judgment application, it would be implicit that the 2nd Claimant is a proper party to the Law Suit, but that the question is whether this party properly before the court has a claim which has no real prospects of succeeding. In so far as the Defendant's application is alternatively for the striking out of the Second Claimant's Statement of Case, on the ground that it either is an abuse of the process of the Court or discloses no reasonable cause of action, in my judgment, it would also be implied that the Second Claimant is a proper party but that it's claim may be faulty or flawed. In

this case, I am not therefore concerned with whether the issues before the Court of Appeal are the same as those involved in the instant application but rather with the interrelationship of the respective issues involved.

15. I am of the view that the court should in keeping with the overriding objective take a practical approach to the matter, and concentrate on the essence of the considerations involved.

16. I am going to test the matter this way. If I go ahead and hear the summary judgment application, I would be hearing an application in respect of a party which I would have to assume is properly before the Court, but which assumption the Defendant/ Applicant is itself challenging in the Court of Appeal. If the Defendant is serious about the Appeal, (and indeed, Mr. Beswick in his submissions states that the Appeal is of extreme importance and deals with a fundamental issue), what would be the rationale for the Court charging ahead to hear a summary judgment application against a party that may improperly be before it? Obviously, as a matter of logic, it makes more sense not to consider the question whether a claim has a real prospect of success before a consideration takes place as to whether there should be a claim by that party in this suit in the first place. The issue of whether a party is a proper party to a Law Suit is a fundamental question that logically and chronologically arises before the question of whether that party has a claim with real prospects of success. Mr. Beswick has not indicated any intention of withdrawing this Appeal. If the Defendant's Appeal were to succeed, that would mean that the Second Claimant Claro would not be a party in the Suit ab initio. In those circumstances, the consideration of whether or not summary judgment should be entered against the Second Claimant would indeed, as Mr. Robinson submits, be an exercise in futility. Logically, the necessity for the Supreme Court to consider whether the Defendant is entitled to summary judgment against Claro, should only arise if the Appeal fails. To do otherwise would be to "put the cart before the horse", because if the Second Claimant is not a proper party to the Suit, then it is not entitled to have <u>any</u> claim at all, whether with or without prospects of success.

17. It seems to me that Mr. Beswick is focusing only on his client's right to apply for summary judgment, which is not denied, and on the effect for his client if the summary judgment application were to succeed. If the application for summary judgment were to fail and the Appeal were to succeed, would not the time and costs incurred in arguing, hearing and determining the summary judgment application have been wasted? Having seen the papers and many bundles filed in relation to the summary judgment application, I think it is quite probable that the hearing would occupy several days and I would likely have to reserve my judgment. If in the interim the Court of Appeal were to allow the Second Defendant's Appeal, then all of that judicial time would have been wasted.

18. Learned Counsel Mr. Beswick, has, I fear, only considered one set of outcomes. However, as judge, it is my duty to consider all of the possible outcomes and consequences. The factual situation is that the Appeal has not been withdrawn; it is alive and extant. In my judgment, hearing the application for summary judgment at this time would not be the best use of the Court's resources. It seems to me that hearing this application which it is not necessary for the Supreme Court to hear unless the Appeal fails, (and it has not yet failed and may not fail), will take up time, thought, consideration, and other judicial and court resources that could have been allocated to another matter. These are scarce resources with attached opportunity costs for other litigants and the justice system. The Supreme Court and the Court of Appeal are all part of our Court system .The proper use of the combined Court resources points in the direction of this Court awaiting and deferring to the outcome or the determination of the Court of Appeal.

19. The Defendant remains quite at liberty to proceed with the application for summary judgment in the event that the Appeal No. SCCA 37/2010 is unsuccessful.

20. I uphold the preliminary objection, and order that the application for summary judgment filed by the Defendant against the Second Claimant Claro is stayed pending the outcome of the Appeal.