[2012] JMSC Civ. No. 50

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2011 HCV00739

BETWEEN	**INDEX COMMUNICATION NETWORK LIMITED**	**CLAIMANT**
AND	**CAPITAL SOLUTIONS LIMITED**	**1ST DEFENDANT**
AND	**KENNETH TOMLINSON**	**2ND DEFENDANT**
AND	**SPECTRUM MANAGEMENT AUTHORITY**	**3RD DEFENDANT**
AND	**REGISTRAR OF COMPANIES**	**4TH DEFENDANT**
AND	**CLARO JAMAICA LIMITED**	**5TH DEFENDANT**

Mrs. Pamela Benka-Coker Q.C. and Ms. Gillian Mullings instructed by Mullings & Co. for the Claimant.
Mr. Christopher Dunkley instructed by Phillipson Partners for the 1st Defendant.
Mr. Paul Beswick instructed by Ballantyne Beswick & Co. for the 2nd Defendant.
Mr. Lackston Robinson, Deputy Solicitor General, instructed by the Director of State Proceedings for the 3rd Defendant.
Mr. Gordon Robinson and Mr. Harold Brady instructed by Brady & Co. for the 5th Defendant.

HEARD: 31ST May 2011, 13, 21 and 28 June 2011, 20th July 2011, 13TH September 2011, 22nd November 2011, 22nd December 2011 and 3rd May 2012.

Practice and Procedure - Application to strike out claim as disclosing no reasonable cause of action - Application to amend Particulars of Claim in the face of striking out application - Application before Case Management - Whether amendment can take place without permission of court - Rules 20.1, 20.2 , 20.4 of the CPR - Whether Rule 20.1 allows more than one amendment of Statement of Case without Court's permission - Principles guiding court - Whether Claimant has a real prospect of succeeding on the amendments at trial - Need for evidence upon which to find real prospect of success - Whether application disingenuous or insincere

Mangatal J:

[1] On the 31st of May 2011 the Notices of Preliminary objection of the 5th Defendant, Claro Jamaica Limited "Claro", and the 2nd Defendant Kenneth Tomlinson "Mr. Tomlinson", filed respectively on the 16 and 30 May 2011 came on for hearing before me.

[2] Claro's Notice of Preliminary Objection, so far as material, reads as follows:

> *TAKE NOTICE THAT the Fifth Defendant intends…….to object to the Claimant's application for interim injunctions filed herein on the 4th of May 2011.*
>
> *AND FURTHER TAKE NOTICE that …. (Claro) intends to rely on the Affidavit of Harold Brady sworn to on the 16th of May, 2011 and all other Affidavits that may hereafter be filed on behalf of the 5th Defendant in opposition to the said Application.*
>
> *THE GROUNDS OF THE SAID APPLICATION ARE:*
>
> 1. *This Defendant contends that the Claimant is a company in Receivership and, as such, is incompetent to bring this action against the Fifth Defendant without the consent of the Receiver which consent has not been pleaded or otherwise asserted.*

2. *The Claimant's Statement of Case discloses no reasonable ground for bringing a claim against the Fifth Defendant and, accordingly, should be struck out as against this Defendant.*
3. *The preliminary objection will save time and costs and will result in the just disposal of the proceedings.*

[3] Mr. Harold Brady's Affidavit filed in support of the Preliminary Objection exhibits an email communication from Mr. Tomlinson sent on the 13th May 2011 in which Mr. Tomlinson confirmed that he was still acting as the Receiver for Index Communication Network Limited (In Receivership).

[4] The Notice of Objection filed on behalf of Mr. Tomlinson, in so far as material, reads as follows:

> *TAKE NOTICE that…..(Mr. Tomlinson) intends to object to the Claimant's application for interim injunction…*
>
> *AND FURTHER TAKE NOTICE that at any subsequent hearing of the claimant's application…, the 2nd Defendant intends to rely on the Affidavit of Kenneth Tomlinson sworn to on the 25th day of February, 2011, and filed herein, and all other affidavits that may have been hereinbefore or thereafter filed by any defendant in opposition to the said application.*
>
> *THE GROUNDS OF THE 2ND DEFENDANT'S PRELIMINARY OBJECTION ARE :*
>
> 1. *The 2nd Defendant contends that the claimant is a company in receivership and, as such, is incompetent to bring this action against the 2nd Defendant who is the duly appointed Receiver of the claimant ;*
> 2. *The claimant's Statement of Case discloses no cause of action against the 2nd Defendant, as the 2nd Defendant is the validly appointed Receiver/ Manager of the Claimant appointed by the 1st Defendant and another creditor Novacell (St. Lucia) Limited on the*

21st day of September, 2010, and the 5th day of December, 2008, respectively, pursuant to debenture instruments dated the 6th day of September, 2004, and the 19th day of October, 2007, respectively.

3. *The claimant has no authority to make the application for an interim injunction nor to give an unlimited undertaking for the grant of such interim injunction when the 2nd defendant has as a matter of law, full control of the assets of the claimant and the management of its affairs during the period of receivership, and the said 2nd Defendant is legally accountable to the 1st Defendant as well as to Novacell (St. Lucia) Limited as well as sundry other creditors to whom the 2nd defendant is also legally accountable according to their respective priorities and prior to any beneficial entitlement or interest of the claimant;*
4. *The action herein and the application is an abuse of the process of the court and the application should be struck out pursuant to CPR r. 26.3(1)(b),(c), 17.10, 26.1(2)(j),(k).*

[5] This Claim was filed in February 2011. The Claim and Particulars of Claim were amended in April 2011, and by the date of the hearing of the preliminary objection, the Particulars of Claim had been amended yet again, with Further Amended Particulars of Claim having been filed on the 5th of May 2011.

THE CLAIM MADE IN THE FURTHER AMENDED PARTICULARS OF CLAIM

[6] The Claimant Index Communication Network Limited "Index" states that it is a licensed telecommunications company operating in Jamaica.

[7] The 1st Defendant Capital Solutions Limited "CapSol" is a registered company whose primary object, according to Index, is asset management and providing financial advice.

[8] Mr. Tomlinson is an accountant/ businessman operating from Business Recovery Services, 3rd Floor, VMBS Building, and 53 Knutsford Boulevard, Kingston 5, St. Andrew.

[9] The 3rd Defendant Spectrum Management Authority "Spectrum" is a statutory body that oversees the issue/transfer of mobile telecommunications Spectrum Licences within the island of Jamaica. Spectrum issued a 1900 Megahertz Spectrum domestic mobile "Licence" to Index on the 31st of January 2008. Index states that it paid valuable consideration for this Licence.

[10] The 4th Defendant the Registrar of Companies is a statutorily created public office and keeper of the Register of Charges for companies, and is also responsible for overseeing the functioning of corporate bodies operating in Jamaica. The Registrar of Companies has not taken any part in these proceedings.

[11] The 5th Defendant Claro is a licensed telecommunications company operating in Jamaica.

[12] Index issued a debenture over all its fixed and floating assets to Capsol on the 16th of September 2004. This debenture Index declares was duly registered with the Registrar of Companies.

[13] It is Index's pleaded case that the Licence did not grant Index any property rights in the electro-magnetic Spectrum or right to use the Spectrum except in accordance with the terms of the Licence. The Licence stipulated that it could not be assigned or transferred except pursuant to the terms of the Telecommunications Act. Index maintains that at no time was the Licence included in Index's assets charged under the debenture granted to Capsol on the 16th September 2004. Further, that the Licence was not then, and is not now, an asset of Index's which was capable in law of being subject to Capsol's debenture.

[14] In August-September 2007, pursuant to negotiations, discussions and agreement with Capsol, Index claims that it was released from its obligations under the debenture by letter and Memorandum of Complete Satisfaction from Capsol dated September 11 2007. This letter was signed by the Managing Director of Capsol, Mr. William Massias.

[15] Index avers that the letter from Capsol dated September 11 2007 was lodged at the offices of the Registrar of Companies by Attorneys-at-Law for a subsequent debenture holder so as to enable that second and subsequent debenture to be lodged and accepted by the Registrar of Companies.

[16] Index states that, unknown to it, in late September 2010, and contrary to the terms of the memorandum of Satisfaction and to the provisions of the debenture, Capsol purported to appoint Mr. Tomlinson Receiver/Manager of Index. Mr. Tomlinson had prior to this been appointed Receiver/Manager of Index by a subsequent debenture holder Novacell Limited. The debenture granted to Novacell by Index was given after Index had been released from the debenture granted to Capsol. (This pleading appears in paragraph 12 of the Further Amended Particulars of Claim and is central to the application under consideration).

[17] Index claims that it did not receive any notice of the purported receivership despite the fact that it was involved in litigation with Capsol in Claim No. HCV 01560 of 2010. It is alleged that at no time did Mr. Tomlinson visit Index's offices or speak to members of staff nor advise Index in any way of his purported legal stewardship of the assets of Index.

[18] It is Index's case that it discovered that Mr. Tomlinson held himself out to various third parties, particularly Claro and Spectrum as Index's Receiver /Manager entitled to dispose of Index's assets, particularly the Licence.

[19] Index pleads that it subsequently discovered that Mr. Tomlinson had approached the Minister in charge of Communications with the objective of securing the transfer of the Licence granted to Index on the 31st January 2008 to Claro.

[20] At paragraphs 17-22 of the Further Amended Statement of Claim, Index pleads :

> *17. That there seems to have been an attempt to transfer the said licence to the 5th Defendant. This the Claimant discovered as a consequence of its attorneys-at-law corresponding with the attorney for the 5th defendant, Harold Brady.*
>
> *18. Prior to this the 5th Defendant had made overtures to the Claimant expressing its desire to purchase the said mobile spectrum licence. The Claimant had not given favourable consideration to these overtures. The 5th Defendant was aware or ought to have been aware of the Claimant's dispute over the purported appointment of the 2nd Defendant as its receiver*

manager and that this dispute directly impacted any alleged capacity on the part of the 2nd Defendant to sell/transfer the said licence to the 5th Defendant or anyone else pursuant to the terms of the Debenture.

19. The action of the 1st and 2nd Defendant are misrepresentations of a fraudulent/negligent nature which jeopardize the Claimant's business and purport to proceed on the basis of a Debenture in favour of the 1st Defendant, well knowing that, that Debenture was no longer in existence, same having been duly released from as far back as September 2007.

PARTICULARS OF FRAUD OF THE 1ST DEFENDANT

i) Appointing a receiver on the debenture at a time when they were fully aware that the debenture previously held over the Claimants' assets was now discharged.

ii) *Engaging in the sale of the Claimant's mobile spectrum licence when they had no authority/basis to do so*

PARTICULARS OF FRAUD OF THE 2ND DEFENDANT

i) Accepting appointment of receivership when he was fully aware that the debenture previously held over the Claimants' assets was now discharged.

ii) *Engaging in the sale of the Claimants' mobile spectrum licence when they had no authority/basis to do so.*

PARTICULARS OF FRAUD OF THE 3RD DEFENDANT

i) Omitting to perform adequate checks before engaging in any transactions with the 1st and 2nd Defendant.

ii) Omitting to inform the Claimant of the 1st and 2nd Defendant's activities.

iii) *Failing to recognize that the mobile spectrum licence could not be considered an asset of the company which fell under the debenture of September 16, 2004 and therefore was not available for sale by receiver appointed under the said debenture.*

iv) *Failing to take account of the fact that the licence granted to the Claimant is still current valid and in effect.*

v) *Failing to take into account that the Claimant was and is still utilizing its rights granted under the said licence.*

vi) *Failing to take into account the fact that the Claimant has rights under the said licence to which it was at the* material (time?) *and still is entitled to enjoy.*

PARTICULARS OF FRAUD/NEGLIGENCE OF THE 4TH DEFENDANT

i) *Not exercising due care in the removal and acceptance of the debentures.*

ii) *Placing two debentures on the Register of Charges for one asset without seeking a proper explanation.*

In any event the 3rd and 4th defendants were added as parties for the purposes of discovery as they became engaged in fraudulent attempts to sell/transfer the said licence and are integral to the court ascertaining the mechanisms that were employed in the attempts to transfer the said licence from the Claimant to the 5th Defendant.

The Claimant is entitled to the rectification of the Register of Charges in respect of the 1st Defendant's Debenture.

The Claimant is entitled to have any transfer or assignment of the said mobile spectrum licence to the 5th Defendant revoked and /cancelled.

The Claimant claims:

1. *A declaration that the memorandum of satisfaction dated the 11th September 2007, given to Index by Capsol, the 1st Defendant is valid and effective.*
2. *A declaration that the purported appointment of the 2nd Defendant as a receiver pursuant to the debenture granted by the Claimant to the 1st Defendant is null and void.*
3. *A declaration that at the time the 1st Defendant purported to appoint the 2nd Defendant as a receiver of the Claimant pursuant to the debenture dated the 16th September 2004, there was no valid debenture over the assets and property of the Claimant.*
4. *A Declaration that the Domestic Mobile Spectrum Licence granted to the Claimant on the 31st January 2008 did not fall within the assets or property of the Claimant subject to the said debenture dated the 16th September 2008.*
5. *A declaration that if the said DomesticMobile Spectrum Licence did not fall within the property or assets of the Claimant subject to the said debenture, the 2nd Defendant would have had no right in law to take possession of or in any way purport to deal with the said Licence.*
6. *A Declaration that any dealings by the 2nd Defendant with the said Licence whether by way of charging, transferring, or disposing of the said Licence are null and void.*
7. *An order that the Register of Charges at the Office of the Registrar of Companies be rectified to reflect that the said debenture granted to the 1st Defendant in September 2004 was discharged and is no longer in effect.*
8. *Such further and/or other reliefs as this Honourable Court deems fit.*
9. *Costs.*

[21] I wish at the outset to express my gratitude to the Attorneys for the depth of preparation and thorough legal submissions. I was particularly appreciative of the background and summary provided by Mr. Beswick in the Bundle prepared by him in

which he traced this matter's developments. He also placed his updated written submissions dated the 21st of November 2011 in that Bundle. This was particularly helpful since this matter was heard over a fairly long span, has gone through a number of twists and turns, and has involved numerous submissions and consideration of many documents.

SUBMISSIONS ON PRELIMINARY OBJECTIONS AND STRIKING OUT APPLICATIONS COMPLETED BY APPLICANTS AND SUBMISSIONS COMMENCED BY INDEX

[22] After the application seeking striking out had commenced, and after I had heard submissions from Mr. Robinson on behalf of Claro, and from Mr. Beswick on behalf of Mr. Tomlinson, Queen's Counsel Mrs. Benka-Coker commenced her submissions on behalf of Index.

[23] Mr. Robinson and Mr. Beswick both relied upon the decision of Sir Nicolas Browne-Wilkinson VC in **Tudor Grange Holdings Limited and others v. Citibank NA and Another** [1991] 4 All E.R. 1. In **Tudor**, on the hearing of a striking out application, amongst other matters, it was held that (taken from the headnote):

> ***Held****- The statement of claim would be struck out and the action dismissed for the following reasons-*
>
> …..
>
> *(2) Although it was established that in certain circumstances company directors had power to bring proceedings on behalf of the company even after the appointment of a receiver who had power to bring proceedings on the company's behalf, they had no power to do so where the receiver's position would be prejudiced by their decision to bring proceedings. Since the action commenced by the directors of the plaintiff companies in the companies' name could directly impinge on the property subject to the receiver's powers because the directors held no indemnity against the liability of the companies' assets to satisfy a hostile order for costs made against the companies, it followed*

that the directors had had no power to start the proceedings. However, since there was a possibility of such an indemnity being forthcoming the action would not be struck out on that ground alone….; ***Newhart Developments Ltd. v. Co-op Commercial Bank Ltd.*** *[1978] 2 All.E.R. 896 distinguished.*

[24] Both Counsel referred in particular to paragraph 12 of the Further Amended Particulars of Claim which reads as follows:

> *12. Unknown to the Claimant in late September 2010, contrary to the terms of the said Memorandum of Complete Satisfaction and to the provisions of the said debenture, the 1st Defendant purported to appoint the 2nd Defendant Receiver/Manager of the said Claimant Company. The 2nd Defendant had prior to this been appointed Receiver/ Manager of the Claimant by a subsequent debenture holder Novacell Limited.*

[25] The significance of paragraph 12 is that, according to Counsel, Index has pleaded as a fact and acknowledged the existence of the debenture by Novacell. It was submitted that Mr. Tomlinson having also been appointed receiver/manager in relation to Novacell's later debenture, then it would be of no moment whether or not the debenture granted in favour of Capsol had in fact been satisfied.

THE STAGE AT WHICH APPLICATION TO AMEND WAS MADE

[26] Mid-stream in making her submissions in response to the preliminary objection on the 21st of June 2011, Mrs. Benka-Coker applied for an adjournment in order to file an application seeking to amend Index's Particulars of Claim, those having already been amended twice. The application to amend was set out in a Notice of Application for Court Orders filed on July 28 2011 by which Index has asked for an order, amongst others, that:

> *That the Further Amended Particulars of Claim be amended as set out in Exhibit "GN2" in the Affidavit of George Neil.*

[27] The proposed amendment seeks to raise a number of issues for the first time, including that the Novacell debenture has also been satisfied. Index also seeks to make allegations of fraud against Claro when it had not done so previously. On the 20th of July 2011, the hotly contested application to amend commenced. However, it became clear that the proposed Amended Statement of Case exhibited to the Affidavit of Mr. George Neil, filed June 24 2011, as GN2, did not contain all of the matters that Counsel were seeking to have amended. Further amendments were set out in Counsel's written submissions on behalf of Index which were not contained in GN2. The matter was again adjourned, this time until September 13 2011in order to have Index file a Supplemental Affidavit exhibiting the entire proposed Amendment.

[28] On September 13 2011, Mrs. Benka-Coker indicated that the Affidavit of Gillian Mullings, Attorney-at-Law, who appeared with Mrs. Benka-Coker, had been filed on July 29 2011. Ms. Mullings exhibited to her Affidavit a copy of a document which was said to embody the amendments sought and is headed "Second Further Amendment to Amended Particulars of Claim".

THE RELEVANT RULES OF PART 20 OF THE CPR GOVERNING AMENDMENTS

[29] Rules 20.1, 20.2 and 20.4 of the CPR govern Amendments to Statements of Case. They read:

> ***Amendments to statements of case without permission***
>
> *20.1 A party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one to which either -*
>
> *(a) rule 19.4 (special provisions about changing parties after the end of a relevant limitation period); or*
>
> *(b) rule 20.6 (amendments to statements of case after the end of a limitation period),*
>
> *applies.*

Power of court to disallow amendments made without permission

20.2(1) Where a party has amended a statement of case where permission is not required, the court may disallow the amendment with or without an application.

(2) A party may apply to the court for an order under paragraph (1)-

(a) At the case management conference; or

(b) within 14 days of service of the amended statement of case on that party.

Amendments to statements of case with permission

20.4 (1) An application for permission to amend a statement of case may be made at the case management conference.

(2) Statements of case may only be amended after a case management conference with the permission of the court.

(3) Where the court gives permission to amend a statement of case it may give directions as to-

(a) amendments to any other statement of case; and

(b) the service of any amended statement of case.

[29A] Rule 20.3(1) was recently amended. Notice of this was only received by me in May 2012 although the Jamaica Gazette Extraordinary is dated November 15, 2011. The Rule was merely changed to substitute "42" for "28" in relation to the number of days. Rule 20.3 now reads:-

Consequential Amendments

20.3(1) A defendant served with an amended particulars of claim or a claimant served with an amended counterclaim may amend the defence once without permission with 42 days of service of the amended particulars of claim or counterclaim as the case may be.

(2) A claimant who has served a reply who is served with an amended defence may amend the reply once without permission

within 28 days of the service of the amended defence.

THE CLAIMANT INDEX'S SUBMISSIONS

[30] Mrs. Benka-Coker Q.C. submitted that on a proper interpretation of Part 20.1 of the CPR, the Claimant Index has the right to amend the pleading without the permission of the Court. Mrs. Benka-Coker submitted that there has been no case management conference, the claim having been brought in the early part of 2011. She went on to submit, however, that if the leave of the court is required, which was not conceded, the applicant Index has met the requirements for obtaining the court's leave to amend.

[31] It was submitted that the relevant bases for obtaining the court's permission are in any event satisfied because:

a. The application is being made early in the proceedings.

b. There is no adverse effect on any of the defendants.

c. The issue of costs may be taken into account when considering the amendments.

d. The interests of justice demand that leave be granted to permit these amendments and to seek to ensure that all issues arising between the parties are resolved.

In relation to Claro, Mrs. Benka-Coker referred to the Affidavit of George Neil, sworn to on the 23rd of June 2011, in which he states that he had no knowledge of a number of matters before the filing of Claro's Defence, including an allegation that the Mobile Spectrum Licence has been assigned, and that this is one of the reasons that aspects of the amendment relating to Claro are only now being sought.

[32] Index's Counsel referred to and relied upon the decision of Brooks J., as he then was, in Suits Nos. HCV000361 and HCV 000362 of 2004 **National Housing Development Corporation v. Danwill Construction Limited et al** , delivered 4th May 2007. Brooks J. in a very helpful and clear judgment, referred to the changes made to the CPR in 2006 in relation to Part 20. He also discusses the relevant

principles by reference to the similar English rule and Stuart Sime's work **A Practical Approach to Civil Procedure**, 7th Edition, excerpting extracts from Blackstone's Civil Practice 2005. . At pages 3-5 Brooks J. stated:

> *Apart from the overriding objective, there is no guidance provided in the rules in respect of the principles governing the grant or refusal of permission to amend. The relevant rule which existed prior to the amendment of the CPR was quite restrictive as it provided that the Court….could not give permission unless the applicant could show some change in circumstances since the date of the Case Management Conference. That restriction produced some hardship and even some curious results. The amended rule gives the Court far more latitude, but of course, there should be some guiding principles which will allow for parties and their legal representatives to proceed with a degree of assurance as to the likely outcome of such applications….*
>
> *At page 145 Sime ….goes on to say that:*
>
> *"A Court asked to grant permission to amend will therefore base its decision on the overriding objective. Generally dealing with a case justly will mean that amendments should be allowed to enable the real matters in controversy between the parties to be determined".*
>
> *This Court is also to seek to achieve the overriding objective (rule 1.2 of the CPR).*
>
> *The UK rule 17.1(2) and our own rule 20.4 gives the Court flexibility, in exercising its discretion whether or not to grant permission to amend, of examining, the stage at which the case has reached, the effect on the opposing party and the extent to which costs will be an adequate remedy.*
>
> (Page 5)
>
> *My reading of the excerpt from Blackstone is that there must be an arguable factual basis for the proposed amendment. That interpretation, in my view, is more in keeping with the myriad cases in*

which amendments, minor and major, have been allowed over the years, without the addition of a cause of action or ground of defence.

[33] Mrs. Benka-Coker also referred to and relied upon the decision of Sykes J. in Claim No. HCV 01012 OF 2008, **Albert Simpson v. Island Resources Limited** , delivered April 24 2007. In **Simpson** , Sykes J. noted that cases before the CPR in England and in Jamaica applied the principle that amendments ought to be granted unless it cannot be done without injustice to the other party. Further, that courts do not exist for the sake of discipline but rather for the sake of deciding matters in controversy. Justice Sykes makes the important points in his judgment that, even before the advent of the new CPR, courts did, on the other side of the balancing exercise, take into account considerations such as the unfair stream of litigation, legitimate expectation of litigants, the efficient conduct of the case, and the interest of other litigants who are waiting to be heard. At paragraph 15, Sykes J. stated:

15. The passages from Lords Justices Peter Gibson and Waller were pre-CPR cases but they nonetheless capture important considerations that have now been given pride of place in the CPR. If these considerations were rising to prominence before the CPR then they should be given even greater weight now that the CPR has expressly stated that allocation of resources, saving expense and dealing with cases expeditiously and fairly. Fairness cannot mean only what one side wants. The courts are under an explicate mandate to consider the allocation of the courts resources to the particular case before the court and other cases pending before the courts.

THE DEFENDANTS' SUBMISSIONS

[34] The application to amend was vigorously opposed. It was agreed that Mr. Gordon Robinson, who had first argued the preliminary point and application to strike out, should make submissions first. Both oral and written submissions were made on behalf of Claro. Mr. Beswick on behalf of Mr. Tomlinson made both oral and written submissions, and Mr. Dunkley also made mainly written submissions on

behalf of Capsol. Mr. Lackston Robinson, Deputy Solicitor General who represented the 3rd Defendant, took the view, (I think quite rightly), that the ground having already been so well trod by other Counsel opposing the application to amend, there was nothing that he wished to add.

[35] The submissions were wide ranging and understandably, some submissions related to the amendment in relation to a particular Defendant while other grounds opposing the application were based upon more general foundation. I hope that Counsel will forgive me if I do not refer to each of their individual submissions, as there was some overlap amongst them.

[36] Mr. Robinson and Mr. Beswick reminded the Court that the context and timing of this application to amend were important. This aspect of the matter began with an application being sought by the Claimant for an interlocutory injunction. Claro and Mr. Tomlinson responded by taking preliminary objections. One basis of the objections was that the Claim should be struck out on the basis that there was no reasonable ground for bringing the claim against these Defendants. The other ground was that the Claimant is a company in Receivership and, as such, is incompetent to bring the action without the consent of the Receiver, which Consent had not been pleaded or otherwise asserted. Alternatively, in relation to the Receiver and the question of costs, that a suitable indemnity for costs should be given before the matter could proceed.

[37] It was submitted that there is no right to amend in perpetuity prior to Case Management Conference. It was argued that Rule 20.1 permits the amendment of a **Statement of Case** and not the amendment of an **Amended Statement of Case**. Reference was made to Rule 2.4, "Definitions", where it is stated that "statement of case" means a claim form, particulars of claim, defence, counterclaim, ancillary claim form or defence, reply and any further information given pursuant to Part 34. Mr. Robinson submitted that since no such words such as "and all amendments thereto" or "amended particulars of claim" are included, then the words "statement of case" must be interpreted in the manner limited in the definition section. Mr. Robinson accordingly submits that the position remains as it has always been, that

is, that a party gets one “free” amendment. Thereafter, it must seek the court’s permission.

[38] It was a fundamental aspect of Mr. Robinson’s submission that the fact that the application is made before the Case Management Conference is deceptive in relation to the “stage at which the case has reached”, which is distinguishable from “whether or not there has been a Case Management Conference”. It was submitted that the case has reached the stage where an application has been made to strike out the claim on the bases discussed above. Submissions were complete from all the applicants, and it was during Counsel for Index’s response, that she thought it necessary to make this application to amend. It was submitted that this is tantamount to a concession that the claim is in danger of being struck out. If that is so, then Claro’s Counsel submits that it is a very late stage indeed because there would be no more proceedings.

[39] It was submitted by Mr. Robinson and Mr. Beswick that the applicable principle is to be found in the decision of Brooks J. as he then was, delivered October 15 2008, as affirmed on appeal, in SCCA 112/2008 **Pan Caribbean Financial Services Limited v. Robert Cartade et al** , Ct. of Appeal judgment delivered 28 January 2011. That principle is that the applicant must show a real prospect of success on the proposed amendments at the trial. At paragraphs 74 and 76 of the judgment of the Court of Appeal Harrison J.A. stated:

> *[74] In his written judgment , Brook J. was of the view that if the application to amend the particulars of claim was successful, the claim would have been saved from the fate requested by the appellants in their respective applications to strike out. He held that the criterion for allowing an amendment in the face of an application to strike out is that there must be a real prospect of establishing the amended case. …*
>
> *[76] I see no reason to differ from the approach adopted by Brooks J.*

[40] In order to show this realistic prospect of success, it was submitted that Index must produce evidence that could lead a court to make such a finding. It was submitted that there was no such evidence here, that the Claimant is not being honest with the Court, is being disingenuous on the facts. It was submitted that there

are gross contradictions between the various pleadings, amended pleading, and original pleading and the claimant's own evidence. Mr. Dunkley submitted that the application lacks the necessary quality of *bona fides,* and Mr. Beswick submitted that the proposed pleading is insincere. Mr. Robinson submitted that Index is not being honest with the Court. Taken together these factors, it was submitted, patently show that Index cannot demonstrate a real prospect of establishing the amended case.

RESOLUTION OF THE ISSUES

WHETHER THERE IS ANY RIGHT TO AMEND WITHOUT THE COURT'S LEAVE AT THIS STAGE AND IN THESE CIRCUMSTANCES-WHAT DOES RULE 20.1 PERMIT?

[41] It is conceded that this application for an amendment is being made before the Case Management Conference. However, I entirely agree with Counsel for the Defendants, that Rule 20.1 of the CPR does not provide an unlimited licence to amend a pleading at will. I accept that what the Rule actually allows for is a single amendment to be made without leave prior to the case management conference.

In my view Rule 20.3 supports such an interpretation also, in so far as it permits only one without permission consequential amendment in response to an amended particulars of claim or an amended defence. (my emphasis)

After a party effects that one "free" amendment, under Rule 20.1, thereafter it must seek the court's permission for any other amendment. The rationale for this state of the Rules is well expressed by Mr. Beswick at paragraph 7 of his written submissions dated the 20th of July 2011 as follows:

> *7. The logic of this interpretation is not difficult to understand. Firstly, it is unreasonable to expect that a party should be allowed an unlimited number of amendments before Case Management. This would be a recipe for prolixity and indeed harassment of the opposing party. Secondly, it would promote the concept of purpose driven amendments,… Faced with a difficulty cause by an omission or admission which is relied upon by an opposing party in an interlocutory application, a party merely amends its pleading to remove the*

offending provision or adds averments sufficient to raise a defence to the issue.

[42] I am of the view that any other interpretation would not be in keeping with the overriding objective of dealing with cases justly. It would be preposterous, and lead to great absurdity, if parties could simply effect amendment after amendment at will prior to the case management conference. Sometimes the unacceptable nature of a proposition is best demonstrated when we test its logic by taking it to its extreme limits. For example, could the parties simply engage in a free- for- all battle, smashing amendments back and forth at each other like a tennis ball, without the umpire/judge's scrutiny? What if there are multiple Claimants, or Defendants (as there are in this case)? Surely there would be complete chaos if each party was free to make respectively (or worse, simultaneously) an unlimited number of amendments before case management? This plainly can not be a just and reasonable interpretation of the Rules. No judge-driven case management system aimed at achieving justice, and fairness to all, alongside greater efficiency in the administration of justice, could in my opinion permit such a practice.

[43] The circumstances in this case aptly demonstrate how important it is to interpret the Rule in the manner that I have held is applicable because in the instant case, the party proposing to amend has already amended its pleading more than once. The Particulars of Claim filed by Index were already succeeded by:

(1) Amended Particulars of Claim, filed April 2011; and

(2) Further Amended Particulars of Claim filed May 2011.

Index now seeks to impose a Second Further Amended Particulars of Claim. I agree with Mr. Beswick's submission that this claim has become a moving target. This Second Further Amended Particulars of Claim cannot take place without the Court's permission.

WHETHER THERE IS ANY RIGHT TO AMEND WITHOUT THE COURT'S PERMISSION IN THE FACE OF AN APPLICATION TO STRIKE OUT

[44] I am of the view that, even if a matter has not reached the case management stage, where an application to strike out the existing Statement of Case is being

heard, it is not correct that a party could simply, “pull the rug out” from under the feet of the party applying to strike out on the basis of alleged weaknesses in the pleaded case, or omissions or admissions, by simply turning up with a newly amended statement of case that has been filed without the court’s leave. In Jamaican parlance, leaving the applicant to simply “Hug, it (the amendment) up!” or “Love dat!” In my judgment, that would, at the very least, offend the rules of natural justice and the Constitutional right to a fair hearing. Even if the statement of case under attack has not been previously amended, and the case management conference has not yet taken place, once the application under consideration before the court is an application to strike out a party’s Statement of Case, the Statement of Case cannot be amended without the leave of the Court. As Mr. Robinson stated in his written submissions, the stage at which the case has reached is distinguishable from “whether or not there has been a case management conference”. I find that this application is being made at a late stage in the proceedings as the Defendants have argued, and not an early one as advanced by the Attorneys for Index. This is because, if the true position is that, but for the amendment, Index’s claim is in danger of being struck out, then that is a stage at which there could be no more proceedings if the application for an amendment should fail. As put by Brooks J. in the first instance judgment, at page 10 of **Pan Caribbean v. Cartade** “If the application to amend the Particulars of Claim is successful, the claim would have been saved from the fate requested by the Defendants in their respective applications to strike out”. (My emphasis). I wish to make it clear that I am not here deciding whether the Statement of Case as it stands now would be struck out. As I understand it, that is not my role at this time. It is only if the application for the amendment is refused, that I would then have to revert to dealing with the striking out applications on the basis of the present state of Index’s Further Amended Particulars of Claim. I am merely making the point that everything is relative. That the stage of striking out is a late stage since one is examining the question of whether or not a claim as pleaded will cease to exist. In other words, in my judgment, lateness of a stage is not limited to examining its closeness to trial or its timing in relation to case management conference. I am here examining the fact that

it could without leave being granted, be struck out. This is so even though, as stated in paragraph 16 of **Diamantes Diamantides v. JP Morgan Chase Bank et al** (2005) EWCA Civ. 1612, referred to by Brooks J, :

> *On an application to strike out particulars of claim on the grounds that they disclose no cause of action the court will normally consider any proposed amendment since, if the existing case can be saved by a legitimate amendment, it is usually better to give permission to amend rather than strike out the claim and leave the claimant to start again.* (My emphasis).

[45] Alternatively, even if it is not a late stage, it is a stage at which injustice could potentially be done to the party applying to strike out and they may be affected adversely.

PARTY APPLYING FOR AMENDMENT MUST SHOW REAL PROSPECT OF SUCCESS

[46] I wholly embrace and endorse the approach taken by my brother Brooks J, as he then was, in **Pan Caribbean v. Cartade**, and as affirmed on appeal. Brooks J. held that when the application is made at the stage of a striking out application, the applicant must show a real prospect of establishing the proposed amendments at trial. In other words, not only must the court's permission be sought, but the real prospect of success must be demonstrable on the evidence. I disagree with Mrs. Benka-Coker that in order for the real prospect of success principle to apply it must be demonstrated that there was a real likelihood that the application to strike out would have succeeded without the amendment. Indeed, in the English **Civil Procedure Practice**, Volume 1, 2010, which was cited to me by learned Queen's Counsel for Index, specifically paragraphs 17.35-17.39, there is a heading at paragraph 17.3.6 "Need to show some prospects of success", even though those sections do not appear to be dealing specifically, or at all, with applications to amend in the face of applications to strike out. Right under the heading, it is stated:

> *An application for permission to amend a defence was refused when it was clear that the proposed amendment had no prospect of success*

(Oil & Minerals Development Corp v. Sajjad [2002] EWHC 1258, QBD). The test to be supplied was the same as that in Pt 24 (Summary judgment); permission to amend was granted where the proposed amendments were arguable (Flexible Group Inc. v. T&N Ltd December 19, 2001, unrep. QBD), .

[47] In my view, this principle of claims or issues having to have a real prospect of success is an underlying base, or cardinal principle of the CPR, given its aim of being a new procedural code with the overriding objective of dealing with cases justly. This seems clear when one looks at the matters to be taken into account in accordance with Rule 1.1 when the court seeks to deal with a case justly. It runs like a common thread throughout a number of interlocutory situations (not all), when applications are brought before the court. A judge seeking to manage cases justly, in what is intended to be a more "judge-driven" situation will have to examine this question in certain situations. I am satisfied that one clear and obvious situation where the issue will arise for consideration by the judge will be where an application to amend is made in the face of an application to strike out on the ground that the claim discloses no reasonable ground for bringing the claim. This is because that will be a stage at which the Court must examine whether it makes any sense or serves any useful purpose. Whether it is just, reasonable and fair to the other party, for a party to be able to make changes to its case, bearing in mind that the application to strike out may be capable of disposing of the case. The court must weigh this in the balance in keeping with its mandate to deal with cases expeditiously as well as fairly. Whilst Mrs. Benka-Coker's submission was an interesting one, I do not think that such a gloss exists over the principle enunciated by Brooks J.

EVIDENCE REQUIRED

[48] In Rule 20.5(2) of the CPR, it is stated that "An amended statement of case must include a certificate of truth in accordance with rule 3.12." With regard to the need for evidence, at paragraph 17.3.6 of the **Civil Procedure Practice** it is stated:

Given the purpose of the statement of truth verifying an amendment…. A party will not be permitted to raise by amendment an allegation

which is unsupported by any evidence and is therefore pure speculation or invention (Clarke v. Marlborough Fine Art (London) Ltd. [2002] EWHC 11).

[49] In the course of the application before him, Brooks J. was referred to the case of **Moo Young and another v. Chong and others** (2000) 59 WIR 369. That was a case in which an application to amend the defence was made during the course of the trial to plead something contrary to a specific allegation of fact previously made. This application was ruled by our Court of Appeal to be impermissible and not made in good faith. In **Pan Caribbean v. Cartade** both Brooks J. and the Court of Appeal viewed the **Moo Young** case as being completely dissimilar since there was no back-tracking on allegations of fact. Although **Moo Young** involved an amendment in the course of trial, it seems reasonable that at any stage, a court will not countenance an application for an amendment not made in good faith, hence the need for evidence and legitimate amendment-**Diamantes** and for the allegations raised by the proposed amendment not to be an invention. In the instant case, the defendants are alleging that this application is insincere, that there is back-tracking on allegations of fact, and dishonesty.

[50] At paragraph 17.3.6 of the **Civil Procedure,** Volume 1, it is stated:

*In considering whether to permit amendments withdrawing an admission previously made in a statement of case the court must have regard to r.14.1….**Lenton v. Abrahams** [2003] EWHC 1104, QB, concerned a Fatal Accidents Claim brought by the second Claimant arising out of an accident in which both drivers were killed; D admitted duty and breach of duty but did not admit that the second claimant had been a dependent of the other deceased driver "G". After the claimants had disposed of the car in which G was travelling, D applied to amend the defence to allege that G had negligently contributed to her own death by failing to wear a seatbelt; the Master's decision refusing permission to amend was upheld on appeal. **Cluly v. R.L.Heating (A Firm)** [2003] EWCA Civ 1595 concerned a contractual claim in respect of plumbing works carried out at a dwelling house built for the*

claimants; in their defence the defendants admitted the existence of a contract between them and the claimants; later they obtained permission to amend to deny any such contract; by that stage it was too late for the claimants to take proceedings against the main contractor or architect; the Court of Appeal struck out the amendment..

[51] In these cases cited at paragraph 17.3.6 it may have been a relevant consideration that no recourse could now be had by the party whom the admission favoured in order to deal with the new situation created by the proposed amendment. That may not necessarily be on all fours with the facts in this case. Nevertheless, the passage demonstrates that there is sound basis for refusing amendments withdrawing admissions.

DO THE AMENDMENTS BEING SOUGHT IN THIS CASE HAVE REAL PROSPECTS OF SUCCESS

[52] I think it is necessary to start at the very beginning and to examine the chronology and contextual developments in this case. In that regard, I am grateful to Mr. Dunkley, who appeared for Capsol during some of the freezing order hearings, and who was involved before some of the other parties and Counsel, for pointing the way. The original Particulars of Claim filed on February 25 2011, at paragraphs 7, 9 and 15 pleaded Index's case as follows:

7. In August 2007, the Claimant satisfied its obligations under the said debenture and same was duly released by letter and Memorandum of Complete Satisfaction from the 1st Defendant dated September 11, 2007 to the Office of the Registrar of Companies. This letter was duly signed by the Managing Director of the 1st Defendant, Mr. William Massias, at the material time.

(My emphasis) …..

9. Unknown to the Claimant, in late September 2010 the First Defendant purported to ignore the said Memorandum of Complete Satisfaction and to appoint the 2nd Defendant as Receiver and Manager of the Claimant's company (despite the fact that the 2nd

Defendant was at one time appointed Receiver/Manager for the holder of the second debenture which was recorded and was in favour of a Company known as Novacell Limited).

….

15. The actions of the 1st and 2nd Defendant are misrepresentations of a fraudulent/negligent nature which jeopardize the Claimant's business and purports to proceed on the basis of a Debenture which was no longer in existence, same having been duly released from as far back as September 2007.

PARTICULARS OF FRAUD OF THE 1ST DEFENDANT

i) Appointing a receiver on the debenture at a time when they were fully aware that the debenture previously held over the Claimant's assets was now discharged.

ii) Engaging in the sale of the Claimant's assets when they had no authority to do so.

[53] I cannot help but notice that there was nothing in the original pleaded case indicating that Index had outstanding indebtedness to Capsol and absolutely no mention was made of a letter of undertaking dated September 11, 2007 given to Capsol by Index; indeed, an irrevocable undertaking.

[54] On the 14th February 2011 Index applied for and obtained ex parte a freezing order, dealing in particular with the Licence. This ex parte injunction was granted until the 25th of February 2011, and it was further extended on the 25th February 2011 until the 24th March 2011, with the inter partes hearing of the application for freezing order being fixed for hearing. Capsol's Attorney-at-Law, Mr. Christopher Dunkley, indicates that on March 24 2011, B. Morrison J. refused the inter partes application for a freezing order. The Claimant Index, on the other hand, notably in the Affidavit of Mr. George Neil, Index's Managing Director, sworn to on the 20th of April 2011, seems to be contending and/or admitting that what took place was that the ex parte injunction was set aside for material non-disclosure.

[55] Affidavits of Mr. Neil were filed on the 25th of February, and 23 of March 2011. These Affidavits were filed after the Affidavits of Mr. William Massias, the former Chief Executive Officer of Capsol, and that of Vanceta Ramsay, Acting Chief Executive Officer of Capsol, both sworn to on February 21 2011. These Affidavits filed on behalf of Capsol averred, amongst other matters, that the Memorandum of Satisfaction remained without consideration, and that the Claimant had substantial debts and obligations outstanding to Capsol. Mrs. Ramsay also referred to undertakings given by the Claimant and its then Attorneys to settle the indebtedness that was secured by the debenture, none of which were discharged. It was also pointed out that Capsol had prior to the filing of this Suit by Index, filed Claim No. 2010 HCV01560 against Index , Mr. Neil and others, in respect of the debts and obligations remaining outstanding.

[56] Mr. Neil, at paragraph 4 of his Affidavit of February 25 2011 claimed that Index was not indebted to Capsol at all and has no obligations whatsoever to Capsol. (My emphasis)

[57] Mr. Neil states at paragraph 8 of the Affidavit filed March 23 2011:

> *8. A separate arrangement was made with the 1st Defendant for payments under letter dated September 11, 2007. This arrangement was not related to the release of the debenture and at no time was expressed to be a condition of the release. The said debenture against the Claimant in favour of Novacell (St. Lucia) Limited was registered at the Registrar of Companies office on or before the 13th November 2007. The said debenture was released as satisfactory arrangements, acceptable to the 1st defendant were made for the settlement of any indebtedness.* (My emphasis)

[58] In his Affidavit filed on April 20 2011, Mr. Neil now states an entirely different case, including acknowledgement of indebtedness to Capsol, and claiming that his non-disclosure of the letters of undertaking was unintentional. Paragraphs 18, 19,

20, 42 and 43 are worth quoting in full, along with the letter of undertaking which remarkably is dated the same date as the letter from Mr. Massias, upon which Index relies, (but which Index previously failed to mention). They all make for interesting reading:

> *18. That in September 2007, Index pursued investment from an overseas company, Quantek Asset Management from the USA. To secure financing for Index, Quantek used a company by the name of Novacell (St. Lucia) Limited (hereinafter referred to as Novacell) who requested security for the financing. Novacell was to provide a loan to Index. In order to provide the said loan Novacell required Index to be free and clear of any charges against it as a corporate entity. I, on behalf of Index approached William Massias, President and CEO of the First Defendant, to negotiate a release of the debenture. It was agreed that the debenture in favour of the First Defendant would be released and Mr. Massias agreed to take a Letter of Undertaking from Index to pay the debt once we secured investment from Novacell. At the time, there was no reconciliation between both parties on the matter of the accounting, it was agreed on the spot that the undertaking would be for approximately $66,333,477.00 Jamaican Dollars. A reconciliation of the account was to follow.*
>
> *19. On September 11, 2007, a letter releasing the 2004 debenture was given to me by the First Defendant and I signed the letter of undertaking on behalf of Index on the same date. Now produced to me and marked "GN3" is a copy of my letter of undertaking of the same date.*
>
> *20. It was our understanding, both Mr. Massias and I, that as at September 11,2007, Index was now free and clear to pursue the investment from Novacell and the First Defendant moved from being secured under a debenture to an unsecured position in relation to any money owing by Gotel.*
>
> ……

42. That the said application for ex parte interim injunction was granted by the Honourable Justice Sinclair-Haynes on February 14th 2011. This was extended by the Honourable Mrs. Justice Cole-Smith on the 25th of February 2011. ….Same was set aside by the Honourable Mr. Justice Bertram Morrison on March 24th 2011 on the basis of the non-disclosure of the letters of undertaking from Patrick Bailey and from myself. This non-disclosure was unintentional as my former Attorney-at law, Patrick Bailey, was not available, and despite my efforts to brief new Counsel, Miss Gillian Mullings, the information as to the undertakings was not included in my Affidavit. We required the ex parte injunction as a matter of extreme urgency and as a result of this I failed all relevant information required prior to the hearing.

43. That the alleged non-disclosure was unintentional, was not dishonest and was not intended to deceive the Court or to colour its decision.

(My emphasis)

[59] It is to be noted that although in paragraph 18 of the Affidavit of Mr. Neil he stated that he "agreed on the spot" that the undertaking would be for approximately $66,333,477.00, and that a reconciliation of the account was to follow, the letter from Patrick Bailey & Co. dated September 5, 2007, written on behalf of Index, and which is one of the letters of undertaking which Mr. Neil admitted was not disclosed, in its first paragraph states:

We have now been instructed by Mr. George Neil that the indebtedness in respect of the captioned has been agreed at J$66,333,477.00(to include the guarantee sum) (My emphasis).

[60] GN3, Index's letter of undertaking reads as follows:

September 11, 2007

Capital Solutions Limited

…….

…..

Attention : Mr. William Massias

Dear Sirs,

Re : Gotel Communication Limited/Index Communication Network Limited

We refer to letter dated September 5, 2007 on our behalf from Patrick Bailey & Co, Attorneys-at-Law.

Pursuant to your request we hereby give you our irrevocable undertaking to pay you the sum of ……J$66,333,477.00.upon receipt of the proceeds of the Capital injection shortly to be made as part of the restructuring of Gotel Communications Limited/Index Network Communication Limited.

Accordingly, this letter supercedes the letter from Patrick Bailey & Co….

(Sgd)

Index Communication Network Limited

George Neil

[61] I move on to consider another stage in this matter. Paragraph 12 of the Further Amended Particulars of Claim filed May 5 2011, contains one of the issues of significance in this matter. This paragraph is referred to earlier in this Judgment (paragraph 24). As Mr. Robinson comments in his written submissions, the Claimant has asserted in its pleading for a long time, despite prior amendments, that there is a Receiver in place, (the Novacell appointed) Receiver, and now wants to amend to allege the reverse. There are two other law suits that have been filed, one being Claim No. 2010 HCV 01560, in which Capsol has sued Gotex Communications,

Index, and George Neil. There is also a Suit filed by Novacell against a number of parties, including Index and Mr. Neil, in which Novacell allege that subsequent to the appointment of the Receiver/Manager Mr. Tomlinson it was brought to his attention that a document purporting to discharge the debenture on the basis that it was repaid had been lodged with the Companies office of Jamaica. Novacell allege that a document called a "Memorandum of Satisfaction" which it did not authorize or sign, and which was not signed by the director of Novacell under whose signature it was purportedly written, was on November 26, 2008 entered on the Register of Charges as wholly satisfying the debt created by the debenture. Novacell aver that Index has not repaid the money lent by Novacell and secured by the debenture. In his Affidavit of February 25 2011, Mr. Neil at paragraph 10 claimed that the debenture from Novacell has been discharged. However, it is only now, after multiple amendments, that Index seeks to aver in its pleadings that the Novacell debenture has also been discharged and satisfied. Index have for the first time, in the proposed Second Further Amended Statement of Claim, referred to the Novacell Suit and wish to now claim to challenge the validity of the Novacell debenture and to contend that the validity of Novacell's debenture and its discharge and satisfaction is allegedly being challenged by Index in the Novacell Suit.

[62] The significance of the present paragraph 12 is that it acknowledges that Mr. Tomlinson was also appointed Receiver/Manager of Index pursuant to Novacell's later debenture. The 5th and 2nd Defendant's Preliminary objection on the basis of the existence of Mr. Tomlinson as Receiver and his lack of consent to the bringing of the instant law suit would have considerable strength if that remains the position. In other words, if the amendment is disallowed, on the case as it presently stands pleaded by Index, there is a valid Receiver in place; being Mr. Tomlinson under the Novacell debenture. This is because the argument could be made, indeed, has already been made during the striking out application, before the application to amend, that it is therefore of no moment whether the Capsol debenture had been satisfied as alleged by Index.

THE ANALYSIS OF THE PROSPECTS OF SUCCESS AND SINCERITY

[63] This application for amendment is truly a remarkable one. I must say that I have never seen anything quite like it. In my judgment, the Claimant has not produced evidence that could lead me to a finding that the amendments have a real prospect of succeeding at trial. Index needed to explain why it wishes to make a complete about turn in its pleadings, to now challenge the validity of the Novacell debenture and to claim that it, (like the Capsol debenture) has also been satisfied. Index have a duty to explain thoroughly, carefully and sincerely the reasons why they should be allowed to do so, and why they did not make these averrments earlier, even after making multiple amendments. They have to show evidence as to why the about-face has any real prospect of success. This is particularly so in light of the many inconsistencies, contradictions, late admissions of indebtedness, and indeed, admission of non-disclosure, which exist on Index's various previous pleadings, and on Index's own evidence that it has already placed before the Court.

[64] Completely different and inconsistent positions have been taken by Index in relation to whether it has any indebtedness to Capsol, including the finding allegedly made against it (on its own admission) of non-disclosure. One would have thought that given that background, Index would have put evidence before the Court which would lead to the view that Index would have a real prospect of successfully arguing that the Novacell debenture has not only been discharged by a Memorandum of Satisfaction, but of proving satisfaction of, or payment off of the indebtedness secured under the debenture. There has been no such evidence. In responding to the Defendants' attack on the several alleged inconsistencies, Mrs. Benka-Coker urged me not to attempt to reconcile or resolve any conflicts on the Affidavit evidence. However, I have not tried to do so. Instead, I have been struck by the paucity, and demonstrable inconsistencies of Index's own evidence and the back-tracking on allegations of fact that it proposes to make in the Second Further Amended Statement of Claim.

CLAIM DISINGENUOUS AND INSINCERE

[65] It is with some reluctance that I have come to the view that the matters proposed to be raised before the Court in this latest amendment are really quite disingenuous, insincere, and have no real prospect of success. This is particularly so in relation to the attempt to now attack the Novacell debenture and receivership. I am of the view that the amendments have no real prospect of succeeding at trial, and they are not necessary in order to decide the real issues in controversy between the parties. Index has by its contradictions and disingenuous approach managed to muddy its own waters as to the real issues in controversy between the parties.

[66] In addition, I agree with Counsel for the Defendants that some of the amendments do purport to raise wholly new causes of action. These new causes of action and claims did not exist on Index's pleadings when the applications to strike out commenced. I agree with Mr. Beswick that these amendments would create an adverse effect on the Defendants, or some of them, coming as they did after the Defendants have arguably exposed flaws and weaknesses in Index's pleadings.

[67] As regards Claro, the question of whether there is reasonable ground for bringing a claim is to be determined on what took place before the action was brought. The amendment if it is to be allowed, must serve some useful purpose. I therefore reject the submission that those aspects of the amendment sought by Index to deal with matters raised in Claro's Defence, (which Mr. Neil claims that he did not know about until after the service of Claro's Defence and its attachments), are necessary in order to determine the real issues in controversy between the parties. I agree with Mr. Robinson that a Claimant cannot be allowed to cast out a fishing line, and having hooked something on the line, suddenly use it to say that it created a cause of action. In this context, it is appropriate to note that Index has in the present Further Amended Particulars made all sorts of allegations of, and particularized fraud against Capsol and Mr. Tomlinson. However, that's not all; they have even alleged fraud/negligence against Spectrum and the Registrar of

Companies. This is why it is so striking that whereas in the Further Amended Particulars of Claim, no allegation of fraud/negligence was made against Claro, in the proposed Second Further Amendment, at paragraph 23, Index now wishes to mount a claim against Claro for fraud/negligence. The claim against Claro for fraud has no real prospect of succeeding at trial. For example, in the proposed paragraph 23(1) Index particularizes Claro's fraud as being that they engaged themselves in the assignment of the Licence, fully knowing that Mr. Tomlinson's status as the Claimant's Receiver was in dispute. Someone knowing that there is a dispute is not fraud. At paragraph 23(3) Index proposes to allege that Claro was guilty of fraud because it failed to recognize that the Licence could not be considered an asset of the Company which fell under the debenture. Yet, in the proposed paragraph 20, Index itself appears to refer to the Licence as part of the company's assets. It cannot be over emphasized that allegations of fraud and the pleading of fraud is not something that should be lightly done. Index's case is essentially based upon contract. Thus, the legal duties owed, it would follow, must be based in contract. As regards the allegations of negligence, Index has not pleaded, as it would have to, any duty of care that it could be said has been breached and gives rise to negligence, whether misstatements or what Index has termed Claro's "misrepresentations of a fraudulent/negligent nature". The amendments sought under these heads in relation to negligence are not properly pleaded or based upon any factual evidential foundation and therefore have no real prospect of succeeding at trial.

[68] This leads me to address the fact that I had on the 20th of July 2011 adjourned the application for the amendment because some of the amendments which were being sought were not contained in the exhibit GN2 to Mr. Neil's Affidavit, sworn to on June 23 2011, filed June 24 2011, and which had been served on the Defendants. Other amendments that were being sought, including in particular what is now paragraph 27 of the proposed Second Further Amended Particulars of Claim, being allegations against Claro, amongst others, that Claro purportedly acquired the Licence by unlawful means, were merely written in Counsel

for Index's written submissions. The other parties had no notice of these additional amendments. I ordered a Supplemental Affidavit to be filed in support of the entire amendment proposed and exhibiting the entire proposed amendment. Index chose to file in response to this order, an "Affidavit of Gillian Mullings", one of the Counsel appearing for Index in the matter, and not a Supplemental Affidavit of George Neil. This was the course adopted in the face of all of the various issues being raised in this matter, and the different opposing arguments, including the allegation that there was no proper evidence before the court upon which the amendments could be granted.

[69] One of the last submissions made by Mr. Robinson was that it was accepted on all sides that there must be a factual evidential basis for the amendment. I agree that the Affidavit of Ms. Mullings, Index's Attorney-at-law, could not provide the basis for this latest Amendment. This is because Ms. Mullings was not involved in any of the transactions nor did she profess to be. This point is important, and cannot be brushed over simply by stating at paragraph 3 of Ms. Mullings' Affidavit, that she is "authorized to make the Affidavit in the absence of either of the principals of the Claimant who are unavailable at this time". This is particularly so where, as in this case, allegations are being made of insincerity and dishonesty and where paragraphs of the latest amendment did not appear in the exhibits to Mr. Neil's Affidavit sworn to on June 23 2011, and filed June 24 2011. Nor was the factual substratum addressed by Mr. Neil in that Affidavit. I refer in particular to paragraph 27 of the latest proposed amendment.

[70] It is for all of the foregoing reasons that the application to amend filed on behalf of the Claimant Index Communication Network Ltd. on the 28th July 2011 is dismissed. I will now hear from the parties as to the issues regarding costs, as well as other outstanding aspects of the matter.