



[2019] JMCC Comm 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2005 CD 00001

BETWEEN	L-3 COMMUNICATIONS CORPORATION (trading as PRIME WAVE COMMUNICATIONS)	CLAIMANT
AND	GO TEL COMMUNICATIONS LIMITED	1 st DEFENDANT
AND	ENOS GEORGE NEIL	2 nd DEFENDANT

CONSOLIDATED WITH

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2005 HCV 01070

BETWEEN	L-3 COMMUNICATIONS CORPORATION (trading as PRIME WAVE COMMUNICATIONS)	CLAIMANT
AND	GO TEL COMMUNICATIONS LIMITED	1 st DEFENDANT
AND	ENOS GEORGE NEIL	2 nd DEFENDANT

IN CHAMBERS

Mr. Dave Garcia and Ms. Ky-Ann Lee instructed by Myers, Fletcher & Gordon for the Claimant

Mrs. Pamela Benka-Coker QC and Ms. Gillian Mullings instructed by Patrick Bailey & Company for the Defendants

Heard: 23rd & 30th November, 2006 & May 16, 2019.

Civil Practice and Procedure - Notice of Application for Summary Judgment - Rule 15.2 (b) of the Civil Procedure Rules - Whether Defence has a realistic prospect of success - Whether the Claimant should be permitted to rectify documents to insert its name as the contracting party.

Cor: Rattray, J.

THE BACKGROUND

1. The Claimant by way of Claim No. 2005 CD 00001 filed on the 28th January, 2005, sought to recover from the Defendants, the sum of Four Million Ninety-Five Thousand Nine Hundred United States Dollars (US\$4,095,900.00), inclusive of interest. The Claimant contended that this sum represented the sale price of telecommunication equipment it supplied to the 1st Defendant on credit, which amount is still outstanding.
2. The Defendants filed their Defence and Counterclaim of the First Defendant on the 13th April, 2005. In their Defence, they denied owing the sum claimed by the Claimant. They also stated *inter alia*, that the telecommunication equipment supplied by the Claimant was defective, unreliable and failed repeatedly and was unfit for use for the purpose of the 1st Defendant. As a consequence, the Defendants rejected the said equipment.
3. In its Counterclaim, the 1st Defendant sought to recover from the Claimant, damages for breach of warranty and/or misrepresentation. The 1st Defendant contended that the equipment supplied was not fit for the purpose of the

Defendants' telecommunications business, and that the Claimant knew this but did not disclose that the said equipment was defective.

4. Subsequently, on the 19th April, 2005, the Claimant filed an Application for Summary Judgment against the Defendants, which came on for hearing on the 21st November, 2005, before this Court. On that date, the Application was adjourned part-heard for a date to be fixed by the Registrar.
5. In respect of Claim No. 2005 HCV 01070, which was filed on the 15th April, 2005, the Claimant sought to rectify the Debenture, Mortgage, Guarantee and Supply Agreement, signed between Prime Wave Communications (hereinafter referred to as "PWC") and the Defendants, by deleting the reference to PWC, and substituting therefor the Claimant's name, L-3 Communications Corporation (trading as Prime Wave Communications).
6. In addition, the Claimant also filed an Application for Summary Judgment against the Defendants on the 12th September, 2006, which was scheduled to be heard on the 2nd October, 2006. However, on that date the Application was adjourned to the 23rd November, 2006, due to conflicts in the schedule of Counsel for the Defendants.
7. The part-heard Summary Judgment Application in respect of Claim No. 2005 CD 00001, was scheduled to be heard with the Summary Judgment Application in Claim No. 2005 HCV 01070, on the 23rd November, 2006. However, on that date Counsel for the Claimant, Mr. Garcia, indicated to the Court that his client no longer wished to pursue the Summary Judgment Application in respect of Claim No. 2005 CD 00001. Furthermore, it was also agreed with the consent of the parties, that both claims should be consolidated. Accordingly, the Summary Judgment Application before the Court in this consolidated claim is solely with respect to the issue of rectification.

THE NOTICE OF APPLICATION

8. On the 12th September, 2006, the Claimant filed a Notice of Application for Court Orders seeking the following reliefs: -
 1. That there be judgment for the Claimant against the Defendants pursuant to Part 15 of the **Civil Procedure Rules (CPR)**, and that the Court make the following Orders:
 - a) That the Debenture, Mortgage, Guarantee and Supply Agreement, be rectified by deleting the references to PWC of 7670 Woodway Drive, Ste 300 Houston Texas, 77063 in the United States of America and substituting therefor L-3 Communications Corporation of 19810 North 7th Avenue, Phoenix, Arizona, 85027-4400 in the United States of America;
 - b) That the endorsement of the Mortgage on the Certificate of Title registered at Volume 1227 Folio 491 of the Register Book of Titles be rectified by deleting the references to PWC of 7670 Woodway Drive, Ste 300 Houston Texas, 77063 in the United States of America and substituting therefor L-3 Communications Corporation of 19810 North 7th Avenue, Phoenix, Arizona, 85027-4400 in the United States of America;
 - c) That the Registrar of Titles be directed to take such steps as are necessary to give effect to paragraphs (a) and (b) above;
 - d) Costs to the Claimant to be agreed or taxed.
 2. Alternatively, that this claim be consolidated (or alternatively tried together) with Claim No. 2005 CD 00001 and that costs of the Application be costs in the claim;

3. In the further alternative, that this claim be transferred to the Commercial Division of the Supreme Court, and that costs of the Application be costs in the claim.
9. The grounds relied on by the Claimant were as follows: -
1. In respect of the Application for Summary Judgment, the issue to be determined is whether the Defendants have any real prospect of successfully defending the claim for rectification of the documents as set out in the Claimant's Statement of Case. The Defendants have no real prospect of successfully defending the claim as the documents mistakenly named PWC instead of the Claimant as party thereto, and it was the common intention of the parties that the documents be valid and enforceable by and against the Claimant. The Claimant relies on Part 15 of the Civil Procedure Rules.
 2. In respect of the Application for consolidation, this claim together with Claim No. 2005 CD 0001 arise out of the same transaction, will involve consideration of similar documents and are likely to involve similar evidence and witnesses, with the consequence that time and costs would be saved and it would be just and convenient to have the claims tried together. The Claimant relies on Parts 1 and 26 (in particular 26.1(2) (b)) of the Civil Procedure Rules.
 3. In respect of the Application for transfer of this claim to the Commercial Division of the Supreme Court, the claim concerns the construction and performance of business documents (in particular the contracts between the parties and the security provided by the Defendants) and is particularly suitable for decision by a judge of the Commercial Division. The Claimant relies on Part 71 (in particular 71.3(k) and (n)) of the Civil Procedure Rules.
10. As indicated earlier, the matter was consolidated on the 23rd November, 2006, and so there is no need to consider that relief, as set out in the above mentioned Notice of Application for Court Orders.

THE CLAIM FORM AND PARTICULARS OF CLAIM (filed in respect of Claim No. 2005 HCV 01070)

11. By way of Amended Claim Form filed on the 19th September, 2006, the Claimant sought to have the Debenture, Mortgage, Guarantee and Supply Agreement rectified, by deleting the references to PWC, and substituting therefor L-3 Communications Corporation. It also sought to have the endorsement of the Mortgage on the Certificate of Title registered at Volume 1227 Folio 491 of the Register Book of Titles, rectified by deleting the references to PWC, and substituting therefor L-3 Communications Corporation.
12. In its Amended Particulars of Claim also filed on the 19th September, 2006, the Claimant contended that by way of Supply Agreement dated the 22nd April, 2002, it supplied to and installed and commissioned, specific equipment to the 1st Defendant. The 1st Defendant it asserted, has failed and/or refused to pay the amount due under the Supply Agreement.
13. The Supply Agreement was executed in the names of PWC and the 1st Defendant. It was also contended that at all material times PWC was one of the trading names used by the Claimant. Further, it was alleged that PWC was a division of the Claimant, and not a separate legal entity, and the Defendants were aware of the true legal nature of PWC.
14. Under the Supply Agreement, the Claimant has an executed Debenture from the 1st Defendant, intended to secure the debt of the 1st Defendant. The Claimant also has a Guarantee from the 2nd Defendant for the debt of the 1st Defendant, which was secured in part, by a mortgage issued by the 2nd Defendant over property situated at 5 Norbury Villas, Kingston 8, registered at Volume 1227 Folio 491 in the parish of St. Andrew. All these documents the Claimant insisted, were wrongly executed in the name of PWC, and not in the name of the Claimant.
15. Furthermore, the Claimant alleged that it was the intention of the parties, up to and after the execution of all the documents mentioned above, that it was to be a party

to each of the said documents, so that they would be valid and enforceable at the instance of and against the Claimant. In light of that position, the Claimant has asserted that the documents ought properly to be rectified to substitute, in place of PWC, the Claimant's name, L-3 Communications Corporation (trading as Prime Wave Communications), a duly incorporated corporation of legal existence.

THE DEFENCE (filed in respect of Claim No. 2005 HCV 01070)

16. The Defendants in their Defence filed on the 22nd November, 2006 contended that in about 2002, they contacted PWC to purchase telecommunication equipment, and at that time they knew that PWC was associated with the Claimant. Furthermore, they contended that at no time during negotiations with PWC were they advised that PWC was not a legal entity. The Defendants maintained that at all material times they were led to believe, that PWC was a legal subsidiary entitled to enter into legal contracts with third parties in its own right. The Defendants asserted that it was against this background that they entered into agreement with PWC, and that they intended to establish a legal relationship with PWC and not with the Claimant.
17. Further, the Defendants insisted that at no time was it disclosed to them, that PWC was a trading name of the Claimant. It was after the relationship broke down between the parties that they received documents herein from the Claimant, which claimed that it was trading as PWC. Prior to the claim, the Defendants maintained that they had no information that would have led them to believe that PWC was not a registered legal entity.

THE SUBMISSIONS ON BEHALF OF THE CLAIMANT

18. Mr. Garcia in advancing the Application for Summary Judgment on behalf of the Claimants, submitted that the Defendants have no real prospect of contesting the claim for rectification, and that the appropriate course in the circumstances would

be to grant Summary Judgment to rectify the documents. In support of his submissions, he relied on Rule 15.2 of the **CPR**, which reads: -

"The court may give summary judgment on the claim or on a particular issue if it considers that -

(a) the claimant has no real prospect of succeeding on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue."

19. He also relied on the House of Lords decision of **Three Rivers District Council v Bank of England (No.3)** [2001] 2 All ER 513, which cited with approval the decision of **Swain v Hillman and another** [2001] 1 All ER 91, in which Lord Woolf MR at page 92 stated: -

"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success... they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

20. Counsel submitted that in assessing the evidence on the Application, the Court may be guided by the statement of Potter LJ, in the decision of **ED&F Man Liquid Products Ltd v Patel and another** [2003] EWCA Civ. 472, where at paragraph 10 he opined: -

"In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable...where there is a claim or judgment for monies due and issues of fact are raised by a Defendant for the first time which, standing alone would demonstrate a triable issue, if it is apparent that, with full knowledge of the facts raised, the Defendant has previously admitted the debt and/or made payments on account of it, a judge will be justified in taking such acknowledgement into account as an indication of the likely substance of the issues raised and the ultimate success of the Defence belatedly advanced."

21. On the issue of rectification, Mr. Garcia in reliance on **Blackstone's Civil Practice 2001** (paragraph 5.14), stated that the remedy of rectification is a discretionary equitable remedy, that allows a written document to be rectified to represent the parties' true intention; the bargain itself is not rectified. He submitted that where applying the ordinary rules of construction to a document it shows that it does not reflect the agreement of the parties, then the document may be rectified. Moreover, he contended that an order for rectification has retrospective force, so that the document would be treated as rectified from the date it was signed or created.
22. Counsel also relied on the decision of **F Goldsmith (Sicklesmere) Ltd v Baxter** [1969] 2 All ER 733, which he found to be instructive. In that case Stamp J stated the following at page 736: -

"A limited company has in my judgment characteristics other than its name by reference to which it can be identified: for example, a particular business, particular shareholders and particular directors. If you find two limited companies having the same characteristics, then it is hardly to be that each of them was incorporated on the same day and owns the same property."

23. Mr. Garcia insisted that although the parties intended that the contracting parties were to be his client, L-3 Communications Corporation (trading as Prime Waves Communications), and the 1st Defendant, it was through a mutual mistake, and some inadvertence on the part of the litigants, which ultimately led to the name PWC being inserted, in all the relevant documents rather than his client's name.
24. He argued that PWC was not and has never been a separate legal entity or a subsidiary of his client. Although PWC was referred to as a subsidiary in the Supply Agreement, this was clearly a mistake, and the reference which was to have been made was that of his client, L-3 Communications Corporation (trading as Prime Waves Communications). Further, he contended that the contracting parties knew that PWC was only a division of his client, and the intention was that his client would be the legal contracting party holding the securities rather than PWC, which it would have been unable to do because it lacked the legal capacity.

25. Counsel submitted that there was evidence that illustrated that the 1st Defendant Go Tel, by its principal the 2nd Defendant, Enos George Neil, knew that the Agreement was to be entered into between the 1st Defendant and his client. He referred the Court to an Affidavit of George Neil in Opposition to Petition pursuant to s.222 of the Companies Act (an unrelated claim), Claim No. 2004 HCV 00244. At paragraph 5 of that Affidavit, Mr. Neil referred to the purchase of the telecommunication equipment, and goes on to describe the party with whom Go Tel Communications Ltd, had entered into agreement as L-3 Communications Corporation (trading as Prime Wave Communications). In reliance on the assertions made by Mr. Neil, Counsel Mr. Garcia argued that the true intention of the Defendants was obviously to contract with his client, as they were well aware that PWC was only a division of his client and not a separate legal entity.
26. In addition, he maintained that there was further acknowledgement by the 1st Defendant that it was in fact dealing with his client, as evidenced by letter dated the 14th July, 2002, from Mr. Enos George Neil and delivered to his client, which confirmed a willingness to purchase the equipment. The letter was addressed to PWC (L-3 Communications). Counsel therefore submitted that if the Defendants truly believed their relationship was with PWC, a separate legal entity, why then refer to L-3 Communications at all in the said letter.
27. Furthermore, Mr. Garcia urged the Court to find that in the claim for debt (Claim No. 2005 CD 00001), the Defendants essentially admitted that their contractual relationship was with L-3 Communications Corporation (trading as Prime Wave Communications). He further argued that the 1st Defendant, Go Tel Communications Limited, also sought to advance a Counterclaim against his client, and this would be entirely misconceived if there was no contract with his client, as contended by the Defendants.
28. In concluding his submissions Mr. Garcia submitted that as rectification is a discretionary remedy, it may be important for the Court to consider what would be the effect of refusing rectification. He argued that because PWC was not a legal

entity that can sue or be sued, the consequence would be that the parties who thought they had a contractual arrangement, and who clearly intended to have one, would find themselves without a contract. Furthermore, he submitted that the securities would be unenforceable, the mortgage could not be discharged, no one would be able to deal with the property the subject of the Mortgage, and the Counterclaim of the 1st Defendant in Claim No. 2005 CD 00001, could not be advanced.

THE SUBMISSIONS ON BEHALF OF THE DEFENDANTS

29. Learned Queen's Counsel Mrs. Benka-Coker in her response, argued that there was no common mistake made by the contracting parties, and insisted that at all material times, her clients intended to contract with PWC and not with the Claimant. Further, she argued that at all material times it was represented to her clients, by the principals of PWC, that PWC was a company duly incorporated under the laws of Texas in the United States of America. This representation she submitted, was reflected in the Debenture entered into between PWC and the 1st Defendant.
30. She also maintained that the first time her clients knew of the allegations being made by the Claimant, was when the claim was initiated against her clients. She further maintained that her clients did not know, either during the negotiations or after the execution of the agreements and security documents, that the Claimant was claiming to be the principal with which her clients had contracted.
31. Mrs. Benka-Coker QC submitted that in all cases in which a party seeks rectification of an instrument, convincing proof that the equitable remedy of rectification should be granted must be placed before the Court. In other words, a strong burden of proof lies on the shoulders of the party seeking rectification. She contended that it was also important to note that the common or mutual mistake must have existed at the time the instrument was executed by the parties. She submitted that it was necessary for the party who claimed rectification to not only

prove what the mutual mistake was to the required standard, but also what was mutually intended by the parties. She therefore contended that the remedy of rectification ought not to be determined on Affidavit evidence only, which has not been subject to cross examination. She submitted that the instant Application was premature and the issues should properly be dealt with at trial.

32. In addition, learned Queen's Counsel argued that the Claimant's evidence before the Court failed to satisfy the requirements for the grant of Summary Judgment, as set out in Rule 15.2 of the **CPR**, that the Defendant has no real prospect of successfully defending the claim. She submitted that the sole deponent of the Claimant, Mr. John Leshinski, was not involved in the negotiations between PWC and the 1st Defendant, and therefore cannot speak to the intention of the parties at the time the documents were executed. Moreover, she argued that the Claimant has not given an explanation as to why the alleged mistake was made, nor has it even disclosed the names of the persons who negotiated the contracts with the 1st Defendant, who may have first-hand knowledge of the alleged mistake. Further, the Claimant has given no indication as to when this alleged mistake was made, and/or why it was permitted to continue from the 22nd March, 2002 to 2005, a period of almost three years.
33. The documents themselves she insisted, have given diverse names to the party with whom the 1st Defendant had contracted. This she submitted, was illustrated in the Memorandum of Understanding where the contracting party was referred to as L-3 Prime Wave Communications, and in the Agreement for Supply, PWC was identified as the contracting party, a wholly owned subsidiary of L-3 Communications Corporation (PWC).
34. Mrs. Benka-Coker QC contended, that in relation to the letter dated the 14th July, 2002 from the 2nd Defendant to PWC, the contention made by the Claimant that this letter fortified the fact that the Defendants knew they were contracting with the Claimant was untenable. She submitted that the said letter was directed to PWC in Texas, and not to the Claimant, which was located in Arizona. Further, she

submitted that the contention by the Claimant that her clients in their Defence in Claim No. 2005 CD 00001, did not contest that the Claimant was not a contracting party lacked substance, as her clients were simply responding to the claim put forward by the Claimant.

35. In concluding, learned Queen's Counsel urged the Court that the issues raised in the claim cannot be properly disposed of by way of Summary Judgment, and a trial would be most appropriate, where additional evidence may be available to deal with the issues raised.

ANALYSIS AND DISCUSSION

36. The principles governing an Application for Summary Judgment are those set out in Part 15 of the **CPR** and in particular, Rule 15.2 (b) of the **CPR**, which reads: -

"The court may give summary judgment on the claim or on a particular issue if it considers that-

(b) the defendant has no real prospect of successfully defending the claim or the issue."

[Emphasis supplied]

37. The principles to guide the Court, in determining whether a party has a realistic prospect of success, are those enunciated in the often cited and well known case of **Swain v Hillman**. In that case Lord Woolf MR, in defining the terms 'no real prospect of succeeding on the claim', opined at page 92 that: -

"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success... they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

38. Phillips JA in the case of **Marvalyn Taylor-Wright v Sagicor Bank Jamaica Limited (formerly known as RBC Royal Bank (Jamaica) Limited, formerly**

known as **RBTT Bank Jamaica Limited**) [2016] JMCA Civ. 38, cited with approval the following passage of Lord Woolf MR in **Swain v Hillman**: -

"[40] It [summary judgment] saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."

39. The learned Judge of Appeal also stated that: -

*"[43]...it is evident that to succeed on an application for summary judgment, the prospects of success must be 'realistic' as opposed to 'fanciful' and in making an order on this assessment, regard must be had to the overriding objective, and the interests of justice. **However, if there are serious issues which require investigation, these ought to be determined in a trial and not on a summary judgment application.**"*

[Emphasis supplied]

40. To determine whether a case has a real prospect of success, the Court must embark on an enquiry. The nature of such an enquiry was considered by Lord Hope in the above cited case of **Three Rivers District Council**, where at page 542 he expressed the following: -

"But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is-what is the scope of the enquiry? I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well recognized exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to all the remedy he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as

possible. In other cases, it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based."

41. On the issue of rectification, the editors of **Blackstone's Civil Practice 2012** at paragraph 4.16 stated: -

"Rectification (alteration of a document to reflect the parties' true intentions) is a discretionary equitable remedy. It is not the bargain which is rectified, but the written record of the transaction..."

42. Similarly, the authors of the text **Commonwealth Caribbean Contract Law**, Gilbert Kodilinye and Maria Kodilinye, posited at page 134: -

"Since the basis of the remedy of rectification is the failure of the written contract to express the common intention of the parties, it is not available where only one of the parties objects and where the other satisfies the court that he understood the agreement in the sense stated in the contract. In other words, rectification is available in cases of common mistake but generally not for unilateral mistake..."

43. The case of **Craddock Brothers v Hunt** [1923] 2 Ch 136, outlines the requirements to be satisfied in order for rectification to be considered by the Court, as follows: -

- a) There must be a prior completed agreement;
- b) The intention of the parties must have continued unaltered until the time of the execution of the written agreement;
- c) There must be clear evidence that, owing to a mistake common to both parties, the instrument as executed does not accurately represent the true agreement of the parties at the time of the execution; and
- d) It must be shown that the instrument, if rectified, would accurately represent the true agreement of the parties.

44. The above mentioned case of **Craddock Brothers v Hunt** was approved in the Privy Council case of **United States of America and Another v Motor Trucks Limited** [1924] A.C. 196. In that case it was held that where there is a mistake common to both parties to a contract in writing, which does not express the true bargain between the parties, the Court has the jurisdiction to rectify the contract, and to order specific performance of it, as rectified. Lord Birkenhead, who delivered the judgment of the Board, had this to say at page 200: -

"...And indeed the power of the Court to rectify mutual mistake implies that this power may be exercised notwithstanding that the true agreement of the parties has not been expressed in writing. Nor does the rule make any inroad upon another principle, that the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified; and secondly, that such agreement has been inaccurately represented in the instrument. When this is proved either party may claim, in spite of the Statute of Frauds, that the instrument on which the other insists does not represent the real agreement. The statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on; but when the written instrument is rectified there is a writing which satisfies the statute, the jurisdiction of the Court to rectify being outside the prohibition of the statute."

45. The learned authors of the text, **Cheshire, Fifoot and Furmston's Law of Contract**, 15th edn, at page 303 noted that: -

"The burden of proving this common and continuing intention lies upon the party who claims that the written contract should be rectified. As regards the standard of proof required, all that can be said is that the claim will fail unless the common intention upon which it is based is proved by convincing evidence. It is not necessary that the evidence should be 'irrefragable' as Lord Thurlow once suggested, or that it should settle the question 'beyond all reasonable doubt' as is demanded by the criminal law...If the defendant can satisfy the court that he understood the agreement to be exactly what was stated in the written instrument, rectification will be excluded... A mistake by one party, which is known to the other party, will suffice to justify rectification however, at least where the knowledge of the other party is tantamount to sharp practice."

46. In outlining the legal principles to consider and guide the Court in dealing with the instant Application, it is important to highlight the documents that the Claimant would have this Court rectify: -

- a) Agreement for Supply, Installation and Commissioning dated 22nd March, 2002 between PWC and the 1st Defendant;
- b) Guarantee granted by the 2nd Defendant, Enos George Neil, to secure the debt of the 1st Defendant;
- c) Instrument of Mortgage under the Registration of Titles Act between Enos George Neil (mortgagor) and Prime Wave Communications (mortgagee);
- d) Debenture granted by the 1st Defendant to PWC;
- e) Endorsement of the mortgage in favour of PWC on the Certificate of Title registered at Volume 1227 Folio 491 of the Register Book of Titles.

47. In support of its Application for Summary Judgment, the Claimant relied *inter alia*, on the Affidavit of John Leshinski filed on the 19th September, 2006 and sworn to on the 15th September, 2006. In his Affidavit he deponed, in so far as is relevant that: -

"1. I reside and have my true place of abode at 8031 Eastwood Drive, Scottsdale, Arizona in the United States of America, and I am an Attorney-at-Law and Vice President and General Counsel of L-3 Communications Corporation, the Claimant herein, trading as Prime Wave Communications (a division of L-3 Communications Corporation). I am duly authorized to swear to this Affidavit on behalf of the Claimant.

...

3. I verify that the facts stated in the Amended Particulars of Claim signed by me and filed in this claim are true to the best of my knowledge, information and belief.

4. In 2002, Prime Wave Communications ("PWC") was a division of the Claimant. PWC is still, today, a division of the Claimant. It is not a separate entity and cannot, therefore, be sued or bring any claim in its own name.

5. It was always the intention of the Claimant that the Supply Agreement, Debenture, Mortgage and Guarantee referred to in my first Affidavit and in the Amended Particulars of Claim be valid and legally enforceable by and against the Claimant, L-3. It was our understanding that this was the common intention of the parties: L-3, Go Tel Communications Limited and Enos George Neil.

6. As far as I am aware, the Defendants were always aware that PWC was a division of L-3 and, in doing business with that division, intended that they have a legally binding relationship which was to be with L-3.

7. Many of the documents signed by or on behalf of the Defendants contained indications as to the relationship between L-3 and PWC. Several of these are exhibited to the first affidavit sworn by me and filed in this claim. I also wish to refer to letter dated July 14, 2002 signed by the 2nd Defendant on behalf of the 1st Defendant concerning the intended purchase by the 1st Defendant of equipment totalling US\$60,000,000. The letter is addressed to "Prime Wave Communications (L-3 Communications)." I exhibit hereto marked "JL10" a copy of the letter dated July 14, 2002 from the 1st Defendant to Prime Wave Communications (L-3 Communications).

8. Also consistent with paragraphs 4, 5 and 6 above and the allegations in the Amended Particulars of Claim is the affidavit evidence given by the 2nd Defendant, on behalf of the 1st Defendant, in claim no. 2004HCV00244 (a petition by Cable & Wireless Jamaica Limited to wind up the 2nd Defendant, Go Tel Communications Limited). In paragraph 4 of his affidavit in that claim, filed on June 16, 2005, the 2nd Defendant refers to a purchase of telecommunications equipment by the 1st Defendant and describes the person with whom the 1st Defendant entered into the agreement as being "L-3 Communications Corporations trading as Prime Wave Communications." I exhibit hereto marked "JL 11" a copy of said affidavit of Enos George Neil.

9. In 2005, the Claimant brought another claim (2005/CD 0001) against the same Defendants, Go Tel Communications Limited and Enos George Neil. The two claims arose out of the same transaction. The only significant difference between

the two claims is in the relief sought: in claim 2005/CD 0001, the Claimant seeks to recover the money outstanding from the 1st Defendant under the Supply Agreement and from the 2nd Defendant pursuant to the Guarantee; whereas in this claim, the Claimant seeks to have rectified the contract and security documents executed by the two defendants. Many of the factual allegations are common to both claims..."

48. The Court, having considered the evidence put forward by the Claimant, agrees with the submissions made by Mrs. Benka-Coker QC, that the sole deponent on behalf of the Claimant, Mr. John Leshinski, cannot speak to the intention of the parties at the time of the execution of each of the documents. Mr. Leshinski, has not indicated in his evidence, whether he was involved in the negotiations when they were conducted, nor has he identified anyone who was a part of the negotiations, from whom he could have received any information about the intentions of the contracting parties at the time the documents were signed.
49. Further, Mr. Leshinski indicated in his evidence, that he is the Vice President and General Counsel of the Claimant. He has not however, in his Affidavit filed on the 19th September, 2006, indicated whether the information he has provided was from his personal knowledge. Moreover, I am satisfied that in order to speak about the intentions of the parties from his personal knowledge, he would have to indicate when he assumed the position of Vice President and General Counsel of the Claimant, and whether in the performance of his functions, he was involved in the negotiation process, so as to speak to the intentions of the respective parties at the time the documents were signed.
50. In order to ascertain the true intentions of the contracting parties, the Court must examine the actions of the parties then and subsequently. In my view, it was not unreasonable in the circumstances for the Defendants to assume, based on the actions of the Claimant, that they intended to contract with PWC, and not with the Claimant. I am of this view because the Agreement for Supply, Installation and Commissioning, stated that the Agreement was entered into between PWC, a wholly owned subsidiary of L-3 Communications (Prime Wave Communications).

Furthermore, in the Debenture and Instrument of Mortgage, PWC is described by the parties, as a duly incorporated company in the United States of America. These references to PWC, could explain why the Defendants thought that PWC was a separate legal company from the Claimant, and that it was with PWC that they had contracted.

51. Further, the letter dated the 14th July, 2002 from the 1st Defendant, and addressed to PWC (L3 Communications), in my view, is not in and of itself, cogent evidence that the Defendants knew they were contracting with the Claimant and not with PWC. The Defendants contended in their evidence before this Court, that they knew that PWC was a subsidiary of the Claimant, and this in my view, could explain why the letter was headed PWC (L3 Communications). It is also noted that the letter was addressed to PWC, at its address in Texas, and not to the Claimant's address in Arizona, both of which are located in the United States of America. If the Defendants knew that PWC was only a division of the Claimant, and not a separate legal entity as the Claimant has contended, why then would it be writing to PWC to enter into a contractual relationship, instead of the Claimant.
52. In relation to the Affidavit of George Neil in Opposition to Petition, pursuant to Section 222 of the Companies Act, filed in Claim No. 2004 HCV 00244 (an unrelated claim) on the 16th June, 2005, Mr. Neil at paragraph 4 described the party with whom Go Tel Communications Ltd, had entered into agreement with as L-3 Communications Corporation (trading as Prime Waves Communications). However, it is interesting to note that he goes on to indicate, that the equipment was purchased from PWC. It is therefore important to highlight, in so far as is relevant, portions of Mr. Neil's Affidavit: -

"4. In order to provide telecommunications services to our customers, we purchased certain equipment from L-3 Communications Corporation (Trading as PRIME WAVE COMMUNICATIONS).

5. The equipment purchased from Prime Wave proved to be defective and had high failure rate and this had a deleterious effect on the capacity to deliver the

telecommunication services and accordingly, it resulted in substantial customer dissatisfaction with numerous complaints and a significant migration from our company of customers who were forced to go to other telecommunication service providers who could provide more efficient service.

*6. In consequence, The companies' income stream dwindled and despite numerous promises by **PRIME WAVE** to correct the problems/defects these persisted and were never corrected, or were never properly corrected.*

*11. We believe we have a strong Counterclaim and are likely to be awarded a substantial judgment for breach of warranty and/or misrepresentation in that the said **PRIME WAVE** sold us the equipment well knowing that same was not fit for the purposes of telecommunication business in that the said equipment was defective or obsolete and unfit for telecommunication business..."*

[Emphasis supplied]

53. In considering the Affidavit as a whole, the Defendants have admitted that the equipment was purchased from L-3 Communications Corporation (trading as Prime Wave Communications). It is noted however, that references to L-3 Communications Corporation (trading as Prime Wave Communications), and PWC are used interchangeably by Mr. Neil, as the company from whom the equipment was purchased. This could suggest that the Defendants knew and recognised that L-3 Communications Corporation (trading as Prime Wave Communications), and PWC were one and the same, and that PWC was apparently L-3 Communications Corporation's trade name.
54. Furthermore, the Defendants' in their Defence filed in respect of Claim No. 2005 CD 00001, did not dispute the claim on the basis that they had not contracted with L-3 Communications Corporation (trading as Prime Wave Communications), but that they had in fact contracted with PWC, a separate legal entity from the Claimant. In their Defence, they agreed that the Claimant had supplied telecommunication equipment to the 1st Defendant, Go Tel Communications Ltd. However, they contended that the equipment was defective in critical aspects, unreliable and failed repeatedly. Furthermore, the Defendants denied owing the

debt as alleged by the Claimant. It is also to be noted that in that claim, the 1st Defendant also filed a Counterclaim against the Claimant for damages for breach of warranty and/or misrepresentation. That approach taken by the 1st Defendant, is unusual, because if there was no contract between the 1st Defendant and the Claimant, then it could not sue the Claimant for a breach of warranty and/or misrepresentation, unless that claim had been filed as an alternative claim.

- 55.** I disagree with the contention of Mrs. Benka-Coker QC, that in respect of Claim No. 2005 CD 00001, the sale price of telecommunications equipment supplied by the Claimant to the 1st Defendant before the claims were consolidated, her clients did not contest that the Claimant was not a contracting party, because they were simply responding to the claim put forward by the Claimant. I would think that in responding to the claim, it would have been relevant for the Defendants to raise at the outset, that they had not contracted with the Claimant for the said equipment, but that it was in fact with PWC that they had contracted.
- 56.** It is noted that the Defendants have not put forward any evidence to suggest that they conducted any investigations to ascertain whether PWC was a duly incorporated company, as they have alleged, before they entered into contract with that entity. Moreover, there is no evidence before the Court to indicate the status of PWC, that is, whether PWC is a separate legal entity from the Claimant, or whether it is in fact a division of the Claimant.
- 57.** In the final analysis, I am of the view that the Claimant has not presented sufficient evidence to satisfy this Court, on a balance of probabilities, that the Defendants, at the time of executing the documents, knew that they were contracting with the Claimant, L-3 Communications Corporation (trading as Prime Wave Communications), and not with PWC. Moreover, the evidence presented does not to my mind, prove that the Defendants knew that PWC was not a separate legal entity, but instead a division of the Claimant.

58. The conduct of the parties at times seem to run counter to their respective positions. In order to ascertain the parties' intentions at the time the documents were executed, a trial would be required so that further evidence can be marshalled and the parties made subject to cross examination. This in my view, cannot be dealt with on a Summary Judgment Application. The Court in considering such an Application, insofar as factual issues are concerned, ought not to be conducting a 'mini trial'. It should be remembered, as Lord Woolf MR so aptly stated at page 95 in the case of **Swain v Hillman**, that: -

"...the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

59. Judge LJ also stated in **Swain v Hillman** at page 96 that: -

"To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step."

60. The factual issues to be determined in the instant case, rest heavily on the credibility of the parties, and in my view, cross-examination would be required to test their veracity. In the case of **Fletcher & Company Limited v Billy Craig Investments Limited and Anor** [2012] JMSC Civ. 128, McDonald-Bishop J (as she then was), expressed the view that: -

*"[23] In assessing whether the claim has a real prospect of success, it is, therefore, legitimate for me to form a provisional view of the outcome of the claim. **However, I am not required, nor am I expected, to conduct a mini-trial on disputed facts which have not been tested and investigated on the merits.** I am mindful that the object of the rule is not to permit a mini-trial of the issues but to enable cases which have no real prospect of success to be disposed of summarily..."*

[Emphasis supplied]

I wholeheartedly agree.

THE CONCLUSION

61. In light of the foregoing, it is hereby ordered that: -

- a) The Claimant's Application for Summary Judgment is refused;
- b) The matter is transferred to the Commercial Division of the Supreme Court;
- c) Costs are awarded to the Defendants, such costs to be taxed if not agreed.

Alvay
May 16th 2019