[2025] JMCC Comm 07

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2023CD00055

BETWEEN	**AIC (BARBADOS) LIMITED**	**CLAIMANT/ANCILLARY DEFENDANT**
AND	**VERTICAST MEDIA GROUP LIMITED**	**DEFENDANT/ANCILLARY CLAIMANT**

IN CHAMBERS BY VIDEO-CONFERENCE

Appearances: Ms. Carlene Larmond KC and Ms. Giselle Campbell instructed by Patterson Mair Hamilton Attorneys-at-Law for the Claimant/Ancillary Defendant

Ms. Jacqueline Cummings and Dianca Watson instructed by Archer Cummings & Co. Attorneys-at-Law for the Defendant/Ancillary Claimant

Heard: 4th and 5th April 2024 and 31st January 2025

Application for Summary Judgment – Ancillary Claim – Set Off as a Defence – No Set-Off Clause– Whether there is Fraudulent Misrepresentation/Non-Disclosure

BROWN BECKFORD J

INTRODUCTION

[1] This matter was brought by AIC (Barbados) Limited against Verticast Media Group Limited, for Damages for breach of contract to purchase its majority shareholding in CVM

Television Limited, operators of the local television station CVM TV. The Claimant sought the following Orders:

1. Damages for breach of contract in the sum of US$800,000.00 (equivalent to the sum of J$124,026,320.00 at the exchange rate of J$155.0329:US$1.00 being the most recently published Bank of Jamaica selling rate as at 9 February 2023).

2. Interest on the said sum of US$800,000.00 at the rate of US 3' month Treasury Bill Rate plus 3% per month from 1 February 2023 until payment.

3. Damages for breach of contract in the sum of US$2,000,000.00 (equivalent to the sum of J$310,065,800.00 at the exchange rate of J$155.0329: US$1.00 being the most recently published Bank of Jamaica selling rate as at 9 February 2023).

4. Interest on the said sum of US$2,000,000.00 a commercial rate pursuant to the Law Reform (Miscellaneous Provisions) Act at such rate as the court may determine from the date hereof until payment.

5. Costs;

6. Such further or other relief as this Court deems fit.

[2] In response to the claim, the Defendant filed a Defence and an Ancillary Claim. In its defence of the claim, the Defendant admits to the prior dealings with the Claimant and the terms of the agreements made between them. This includes that the Defendant failed to comply with the terms of the Share Sale Agreement and also with the terms of the First Supplemental Letter Agreement, and as a result, there was a Second Supplemental Letter Agreement. The Defendant also does not deny that it failed to pay the full purchase price as agreed.

[3] In the Ancillary Claim, the Defendant, as Ancillary Claimant, has alleged negligent or fraudulent misrepresentations and non-disclosure by the Claimant, as Ancillary Defendant, in breach of the contract, for which it has claimed Damages. The Defendant/ Ancillary Claimant also claimed to be entitled to set-off its damages for the

Claimant's/Ancillary Defendant's breach against the outstanding purchase price. The Defendant/Ancillary Claimant sought the following Orders:

a. A declaration that the payment of the balance due on the aforesaid sale and the delivery of the said bank guarantee for the balance be stayed pending an Account or the determination of the Claimant's exposure with respect to Claim No. SU 2020 CV02920 - Horace Reid v John Barnes, CVM-TV and Ors.

b. Further or in the alternative a declaration that the payment of the balance due on the aforesaid sale and the delivery of the said bank guarantee for the balance be stayed pending the resolution of the Claim herein.

c. Damages in the sum of US$340,880.00 (estimated).

d. Damages for fraudulent or negligent misrepresentation.

e. Further or in the alternative damages for breach of contract.

f. A Set-Off of as against the balance due on the aforesaid sale the amount of J$15,000,000 which amount was charged to the account of CVM-TV in settlement of the Ancillary Defendant's legal fees.

g. A Set-Off of any sums awarded to the Ancillary Claimant herein against the balance due on the aforesaid sale.

h. Interest on all sums awarded to the Ancillary Claimant at a rate of US 3' month Treasury Bill Rate plus 3% per month from the date of breach until payment.

i. Alternatively, interest on all sums awarded to the Ancillary Claimant at such commercial rate or at such rate and for such period as this Honourable Court deems just in the circumstances.

j. Such further relief as this Honourable Court deems just in the circumstances.

k. Costs

[4] The Claimant filed an Application for Summary Judgment seeking the following Orders:

1. Mediation be dispensed with.

2. Summary Judgment be entered in favour of the Claimant on the claim.

3. Summary Judgment be entered in favour of the Ancillary Defendant on the Ancillary Claim.

4. Costs of the claim and Ancillary Claim to the Claimant/Ancillary Defendant to be taxed if not, if not agreed.

5. Such further or other relief as this Honourable Court deems just in the circumstances.

BACKGROUND

[5] The background, as set out in the submissions of Counsel is largely agreed. AIC (Barbados) Limited, **("AICB")** a company duly incorporated under the laws of Barbados, and Verticast Media Group Limited, **("VMG")** a company duly incorporated under the laws of St. Lucia, are parties to a Share Sale Agreement dated 14th March 2022, by which it was agreed that AICB would sell to VMG Twenty-Two Million, Nine Hundred and Thirty-Seven Thousand and Ten **(22,937,010)** shares, representing 90% of the total issued shares of the equity capital, held by the AICB in the equity capital of CVM Television Limited, a company duly incorporated in Jamaica.

[6] The agreed purchase price was Eighteen Million United States Dollars **(US$18,000,000.00)**, and pursuant to Clause 2.02 of the Share Sale Agreement, was payable as follows:

i. US$100,000.00 on execution of the Agreement ;

ii. US$15,700,00.00 on the Completion Date, being the later of 15th April 2022 or the date of receipt by the Seller og the BCJ (Broadcasting Commission of Jamaica) Authorization; (Authorzation was received on May 2, 2022)

iii. The balance Purchase Price of US$2,000,000.00, being due on or before the Final Payment Date of 31st May 2023.

VMG was also required to provide a Letter of Credit or Bank Guarantee, issued by a Financial Institution, providing for payment of the balance Purchase Price of US$2,000,000.00, on or before the Final Payment Date of 31st May 2023.

[7] VMG defaulted on all of its obligations for payment and for the Support Document, save for the first, and failed to complete the Share Sale Agreement despite a Notice being issued. As a result, AICB terminated the Share Sale Agreement.

[8] At the request of VMG, the parties then entered into a Letter Agreement, the First Supplemental Letter Agreement, dated 30th June 2022, by which it was agreed that if VMG made payments totalling US$16,070,000.00 by 29th July 2022, AICB would reinstate the terminated Share Sale Agreement, thereby restoring VMG to the position of Purchaser of the shares under the terms of the original Share Sale Agreement, as amended by the First Supplemental Letter Agreement. VMG however failed to fulfill the terms of the First Supplemental Agreement by not making the required payments by 29th July 2022, and not providing the Support Document for the remaining Purchase Price due by the revised final payment date of 23rd July 2022.

[9] Following another request made by VMG, the parties made another attempt to revive the transaction, entering into a Second Supplemental Letter Agreement dated 19th September 2022. By that time, VMG had paid a total of US$17,200,000.00 to AICB, including US$17,000,000.00 on 7th September 2022, covering both the Purchase Price and Extension Fees as outlined in the First Schedule of the Second Supplemental Letter Agreement. This agreement reinstated the Share Sale Agreement and VMG as purchaser, except as varied by the First Supplemental Letter Agreement and the Second

Supplemental Letter Agreement, called collectively the Reinstated Agreement. In accordance with the Second Supplemental Letter Agreement, it was agreed that VMG would pay the remaining Purchase Price in two installments as follows:

i. US$800,000.00 on or before 31st January 2023; and

ii. US$2,000,000.00 on or before 30th September 2023.

It was also agreed that VMG would fulfill its obligations under the Reinstated Agreement, including providing the Support Document (in the form of a Letter of Credit or Bank Guarantee).

[10] AICB subsequently transferred the purchase shares to VMG, and since then VMG has failed to pay to AICB the sum of US$800,000.00 on 31st January 2023, and has also failed to deliver the Letter of Credit or Bank Guarantee providing for payment of US$2,000,000.00.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[11] Counsel on behalf of the Claimant, Ms. Larmond KC, grounded her application for Summary Judgment under Rule **15.2 of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020)**. She submitted that in keeping with **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] 3 ALL ER 1039, a trial of the issues which arise on the claim and Ancillary Claim would be an unnecessary waste of time and expense, as the issues require no oral evidence and are a matter of the construction of the documents constituting the Agreement between the parties, and the correspondence between Counsel. Consequently, she averred that this is a matter which is suitable for disposal by Summary Judgment.

[12] Counsel contended that the language of the Share Sale Agreement and the Second Supplemental Agreement are presumed to indicate the clear and unambiguous intention of the parties to the Agreements. Reliance was placed on **Investors Compensation Scheme v West Bromich Society and Others** [1998] 1 WL 896, **Arnold**

v Britton [2015] UKSC 36, **Carib Ocho Rios Apartments v Proprietor Strata Plan No. 73** [2013] JMCA Civ 33. In light of this reasoning, Counsel Ms. Larmond submitted that the Second Supplemental Letter Agreement makes it pellucid, *"that the payment of US $800,000.00 shall be made to AICB by or on behalf of VMG on or before the close of business on 31 January 2023 and that the payment of US$2,000,000.00 shall be made to AICB on behalf of VMG on or before the close of business on 30 September 2023."*

[13] She further submitted that AICB fulfilled its completion obligations pursuant to the Share Sale Agreement by transferring the Purchase Shares to VMG, which has since enjoyed the benefit and use of the Purchase Shares. However, VMG has failed to honour its obligations under the Share Sale Agreement by failing to make payments as they fell due and failing to present a Letter of Credit /Bank Guarantee.

[14] Counsel also strenuously denied the Defendant's allegations that AICB made false representations that there were no distribution agreements with any third-party and neither was there any obligations owed to these entities. The case of **Caricom Investments Limited & Or v National Commercial Bank Jamaica Limited & Ors** [2022] JMCC Comm 3 was referenced.

[15] Counsel rejected the contention that such representation induced VMG to enter into the Share Sale Agreement, the First Supplemental Letter Agreement and the Second Supplemental Agreement. It was Counsel's submission that VMG's assertion that it did not realize how reliant CVM was on the Ready TV boxes is not a proper basis on which it can be argued that AICB made false representations, as AICB did not guarantee it could distribute across the entire island or that its signal could reach specific locations solely through the use of Ready TV boxes. All relevant warranties are confined to Clause 3.10 of the Share Sale Agreement.

[16] It was also argued that VMG was being disingenuous on the question of inducement as VMG was willing to enter the agreement regardless of other entities distributing the signal, being that its main concern was having control over that distribution.

[17] It was further submitted that, contrary to the allegations of VMG, it made no false representation or false reporting on the extent of litigation as it relates to a defamation claim brought against CVM-TV. It was asserted that AICB did not become aware of the Horace Reid Claim until a letter dated 27 January 2023 from Samuda and Johnson Attorneys-at-Law to Patterson Mair Hamilton Attorneys-at-Law. This correspondence, as Counsel argued, was received at periods following the occurrence and violation of VMG's obligations per the Share Sale Agreement. To that extent, Counsel Ms. Larmond argued that VMG's assertions are disingenuous.

[18] Counsel further argued that in any event it was not necessary for the Court to make a finding of fact as defamation claims do not fall within the ambit of claims expressly agreed by the Parties under the Share Sale Agreement. She indicated that Clause 3.01 (e), Clause 3.01 (g) and Clauses (x) and (xvii) of Part A, Third Schedule to the Share Sale Agreement, only concerned matters which impacted the property and assets, or any business that is part of CVM-TV's assets, which could lead to significant or negative changes in CVM's financial status, business assets, property or operations. Reliance was also placed on the provision in the Share Sale Agreement at Clause 3.01(g) that no representation or warranty was given by the seller as to CVM or to the business.

[19] It was Counsel Ms. Larmonds' further submission that there was no contract value leakage as the set-off of the legal fees due by CVM-TV to AICB's attorneys-at-law did not reduce the value of the Purchase Shares to the extent of $15,000,000.00. She asserted that the legal fees were set off against inter-company loans due by CVM-TV to AICB. Further, VMG, having acquired CVM-TV, would be liable to settle the debts owing from the loans the television station had from AICB.

[20] It was also submitted by Counsel that the Ancillary Claim does not significantly challenge any key facts and show that VMG has intentionally chosen not to fulfil its contractual obligations. She argued that based on the Affidavit of Oliver McIntosh, the Court is being urged to deny AICB the balance purchase price merely because Mr. Oliver McIntosh; (a) felt betrayed by the Claimant in their supposed material non-disclosures and (b) where VMG's alleged unparticularized loss as pleaded is without evidence to

support same. Further, VMG has not disputed the interest provisions or evidence as led to interest.

[21] Counsel further averred that this was not a matter suitable for mediation as VMG has consistently failed to honour its contractual obligations and has failed to act in good faith by presenting the Letter of Credit/ Bank Guarantee. Also, VMG's obligation to pay the balance purchase price is not extinguished.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[22] Counsel on behalf of the Defendant, Ms. Jacqueline Cummings, has accepted the Court's jurisdiction to grant Summary Judgment pursuant to **Rule 15.2(b), 15.6(1) & 15.6 (3) of the CPR**. In such an application, Counsel indicated that the burden of proof is on the Claimant. She further averred that in disputing such a claim, the Defendant, in accordance with **Rules 10.5(1), 10.5(4) and 10.5(5)**, is mandated to set out its case, state whether the allegations are refuted and proffer a different version of events.

[23] It was argued that the process of Summary Judgment is designed to quickly dispose of cases where a party has no realistic prospect of success. She relied on the authorities of **Swain v Hillman and another** [2001] 1 ALL ER 91, **Allan Lyle v Vernon Lyle**, Claim No. HCV 02246/2004 (unreported) (May 10, 2005), **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37, **Marvalyn Taylor-Wright v Sagicor Bank Jamaica Limited, formerly known as RBTT Bank Jamaica Limited** [2016] JMCA Civ 38 **and Commonwealth Caribbean Civil Procedure**, 3rd edition.

[24] In light of these authorities, Counsel contended that AICB's application for Summary Judgment ought not to succeed in light of the following issues addressed in the Ancillary Claim:

(a) AICB's failure to disclose the existence of Claim No SU2020CV0290 which could have been relevant in deterring the value of the Purchase Shares.

(b) The non-disclosure of the relationship between CVM Television and Ready TV affects the value of the television station and its outstanding liability or obligation to third parties.

[25] Counsel Ms. Cummings averred that the Court is barred from conducting a mini trial into the issues at this stage. She noted that the issues before the Court are issues of fact which can only be determined at trial following the evidence of witnesses being put to test. For those reasons Counsel urged the Court to dismiss the Summary Judgment application.

[26] It was also Counsel's contention that AICB's request for mediation to be dispensed with is to be dismissed, and the parties are to be sent to mediation.

RESPONSE TO AUTHORITIES PROVIDED BY THE COURT

[27] The Court having perused the Share Sale Agreement noted that it contained in Clause 2.02 a 'no set off clause' which was not disturbed by the Supplementary Letter Agreements. The Court therefore invited the parties to make submissions on the effect of this clause considering the cases of **AMC III Purple B.V. v Amethyst Radiotherapy Limited** [2019] EWHC 1503 (Comm), **Caterpillar (NI) Limited (formerly known as) FG Wilson (Engineering) Limited v John Holt & Company (Liverpool) Limited** [2013] EWCA Civ 1232 and **Dr. Faramarz Shayan Arani et al v Cordic Group Limited** [2021] EWHC 829 (Comm).

CLAIMANT'S RESPONSE

[28] Counsel Ms. Larmond submitted that the authorities were applicable to the case at bar, in so far that in interpreting the Share Sale Agreement and the Second Supplemental Agreement, it can be properly concluded that Clause 2.02 of the Share Sale Agreement precluded VMG from raising a set-off defence against AICB's claim. In light of this, it was argued that VMG's defence has no realistic prospect of success as

Clause 2.02 fully disposes of the claim, and the Court should thereby be minded to grant Summary Judgment.

DEFENDANT'S RESPONSE

[29] Counsel Ms. Cummings contended that the cases of **FG Wilson (Engineering) Limited v John Holt & Company (Liverpool) Limited** and **AMC III Purple B.V. v Amethyst Radiotherapy Limited** *(supra)* were distinguishable from the case at bar. In **FG Wilson (Engineering) Limited v John Holt & Company (Liverpool) Limited** *(supra)* the case turned on the fact that the seller could not sue for the price of the goods until it became due. Whilst in the present case AICB sued VMG before the US$2,000,000.00 payment became due and owing to them. She argued that in light of the foregoing authorities, VMG is entitled to set-off in respect to that aspect of AICB's claim, as the claim was brought prematurely.

[30] It was also submitted that AICB cannot now seek to rely on the no set-off provision in the Share Sale Agreement as no such intention was evidenced in their application for Summary Judgment, their Defence to the Ancillary Claim or any correspondence exhibited to the Affidavits of Mr. McIntosh and Ms. Khan.

[31] Additionally, it was contended that the choice of language of AICB in the Ancillary Defence which states, *"if which is denied, any set-off is permissible, the Ancillary Defendant will say: a) any such sum would be significantly below the cash balance of US$800,000.00…"* further shows that AICB was not relying on the set-off provision in the Share Sale Agreement. Counsel also indicated to the court that VMG's Ancillary Claim far exceeds US$800,000.00.

[32] Counsel then went on to also distinguish the case of **Dr. Faramarz Shayan Arani et al v Cordic Group Limited** *(supra)* from the present case. She asserted that VMG's Ancillary Claim, in accordance with the **CPR**, is specific, and complies with all the requirements for setting out its claim on the quantum being sought and states the basis of the claim. Further, there was no delay in alerting AICB of their breach of warranty and

disclosure for material disclosure, whilst the defendant in the foregoing authority seemed to have been filing an Ancillary Claim and amended it while the application for Summary Judgment was ongoing.

[33] On these premises, Counsel urged the Court not to rely on the authorities above in determining the matter, but instead review the case at bar holistically.

ISSUES

[34] The Court must determine whether the no set-off clause in the Share Sale Agreement is valid, as this would effectively dispose of the defence to the claim. The Court would then go on to consider whether there is merit in the Ancillary Claim such that it should proceed to trial.

LAW AND ANALYSIS

SUMMARY JUDGMENT

[35] **Part 15 of the CPR** empowers the court to grant summary judgment on a claim, or on a particular issue, where the court considers that the claimant, or the defendant, has no real prospect of successfully defending the claim or issue. In the oft-cited case of **Swain v Hillman and another** [2001] 1 All ER 91, Lord Woolf MR defined what is meant by *"no real prospect of succeeding*" as:[1]

> *… 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.*

[36] In proceedings for Summary Judgment, the onus of proof rests upon the respondent to establish that he does have a defence with a realistic prospect of success,

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[1] [2001] 1 All ER 91 at pg 92

once the applicant credibly asserts that there is no real prospect of successfully defending the claim. The scope of the burden was clarified in **Somerset Enterprises Limited and Anor v National Export Import Bank** [2021] JMCA Civ 12 **("Somerset")**, where Brooks P, in reviewing several authorities, posited: [2]

> *[25] The party that seeks the summary judgment must assert that the respondent's case has no real prospect of success. If that party asserts that belief, on credible grounds, a respondent seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable". In order to successfully resist the other party's assertion, the respondent must prove that its case has "a 'realistic' as opposed to a 'fanciful' prospect of success" (see paragraphs [14] and [15] of* ***ASE Metals NV v Exclusive Holiday of Elegance Limited*** *[2013] JMCA Civ 37).* ***In determining whether there is any real prospect of succeeding, the judge should not conduct a mini-trial.***
>
> *[26] The Privy Council has also offered guidance on the matter, in* ***Sagicor Bank Jamaica Limited v Marvalyn Taylor Wright*** *[2018] UKPC 12. Lord Briggs stated that summary judgment allows the court to determine whether the matter requires a trial.* ***He added that if a trial of the issues between the parties does not affect the claimant's entitlement to the relief sought then the trial is unnecessary*** *(see paragraphs 16-21).*
>
> *[27]* ***Although the judge considering a summary judgment application is not to conduct a mini-trial, he must carefully examine each party's statement of case and the supporting documents, in order to determine the merits.*** *It is against this background that this matter is to be viewed.* (Emphasis mine)

In summary, as noted by Mangatal J in **Eureka Medical Limited v Life of Jamaica**, (unreported) Supreme Court, Jamaica, Claim No. HCV 1268/2003 judgment delivered 12 October 2005, *"Summary Judgment is really designed to deal with cases that do not merit trial at all."*[3]

[37] Sinclair-Haynes J (as she was then) in **Allan Lyle v Vernon Lyle**, (unreported) Supreme Court, Jamaica, Claim No. HCV 02246/2004 judgment delivered 10 May 2005,

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[2] [2021] JMCA Civ 12, paras 25-27
[3] (2005) Supreme Court of Jamaica No HCV 1268/2003 (unreported), para 7

gave a useful matrix that the court should have in contemplation when considering whether to grant a Summary Judgment application. She stated:[4]

> *An application for summary judgement is, however, inappropriate where there are important disputes of facts. On an application for summary judgement, the applicant must satisfy the court of the following:*
>
> *1. All substantial facts relevant to the claimant's case which are reasonably capable of being before the court must be before the court.*
>
> *2. Those facts must be undisputed or there must be no reasonable prospects of successfully disputing them.*
>
> *3. Those facts must be undisputed or there must be no reasonable prospects of successfully disputing them.*
>
> *[See S v Gloucestershire County Council and L v Tower Hamlets London Borough Council (2000) The Independent 24th March (C.A.)]*

There is no dispute on the relevant law and the principles found in the cases cited.

Claimant's Claim

WHETHER THE NO SET-OFF PROVISION IS A VALID DEFENCE TO THE CLAIMANT'S CLAIM?

[38] VMG does not contest that the sum of US$800,000.00, remained unpaid after it fell due and that it failed to provide the Support Document. It also does not contest that it failed to pay the sum of US$2,000,000.00 which became due after this application was made. VMG however contended that it is entitled to set-off its claim for damages for expenses incurred, in mitigating the effects of what it says are fraudulent and/or negligent misrepresentations made by AICB, and for non-disclosure, against any amount that it owes to AICB.

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[4] (unreported) Supreme Court, Jamaica, Claim No. HCV 02246/2004 judgment delivered 10 May 2005, pg 8

[39] The Share Sale Agreement, which remained in effect subject to the variations in the Supplemental Letter Agreements includes a 'no set-off' provision at Clause 2.02 of the agreement. It reads:

> *Section 2.02 Closing. (a) Subject to the terms and conditions of this Agreement, the Purchaser shall make the following payments, in each case in USD by wire transfer of immediately available funds,* ***without set-off or counterclaim,*** *to the account for the benefit of Seller designated in Appendix 2,* ***o****bserving the instructions set out therein as under …****such that*** *the Purchase Price may be received for the benefit of the Seller all in accordance with the procedures set forth in this Agreement…"* Emphasis mine

This paragraph was not varied by the Letter Agreements.

[40] The no set-off provision was not specifically pleaded by Counsel for AICB. This was a point taken by Counsel for VMG. **Rule 8.9A of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020)** provides that the claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim which could have been set out there unless the court gives permission.

[41] This argument seems to me to be misconceived. The question of a set-off does not arise on the case for AICB. **Rule 8.9** is directed to the claimant's case, the mischief being that the Defendant is entitled to know what case it has to meet. VMG as Ancillary Claimant raised this argument. A response, denying that VMG was entitled to a set-off was contained in the Defence to the Ancillary Claim at paragraph 16. It is true however that this is in the context of a denial that it was in breach of the Share Sale Agreement. Clause 2.02 was not specifically pleaded.

[42] Morrison JA in **Capital & Credit Merchant Bank Ltd v Real Estate Board and Real Estate Board v Messado (Jennifer) & Co** [2013] JMCA Civ 29, in discussing the

formal requirements of a fixed date claim form in the scope of **Rule 8.9**, proffered the following guidance in respect to the role of pleadings. He opined:[5]

> *In my view, firstly, the pleader is required to set out a short statement of the material facts relied on in support of the remedy sought, sufficient to reveal the legal basis for the claim, but not the legal consequence which may flow from those facts. Secondly, once the claim form itself is generally in compliance with the rules, full details of the claim may be supplied by the affidavit or affidavits filed in support of it (together with any accompanying documents upon which the claimant relies), provided that the documentation, taken all together, is sufficient to enable the defendant to appreciate the nature of the case against him, and the court to identify the issues to be decided.*

[43] In the instant claim, it is clear that AICB was relying on the terms and effect of the Share Sale Agreement, as well as the First and Second Supplemental Letter Agreements dated 30th June 2022 and 19th September 2022, which were exhibited to the Affidavit of Shamena Khan dated 14th April 2023. The Court is bound to look at all the pleadings and evidence presented in support of, or in opposition to the Application. (See Dicta of Brooks P in **Somerset Enterprises Limited and Anor v National Export Import Bank** *(supra))* The Court is required to examine the agreements holistically in order to determine the merits of the claim. Upon review, the Court requested both parties to make submissions on the no set-off provision. This was not in conflict with the pleaded case of either party. This in effect ensured that both Counsel were afforded equal time and opportunity to review the relevant authorities and to present their respective arguments regarding the applicability of the provision to the matter at hand.

[44] This approach serves to further the overriding objective of the Court to deal with matters justly. To exclude from the Court's consideration, the no set-off provision, which could be argued at the trial, would be to engage judicial time and resources unnecessarily. This is especially so in these circumstances where the VMG does not dispute its failure to abide by the terms of the Reinstated Agreement. The mischief to which the Rule is

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[5] [2013] JMCA Civ 29, para 142

directed, as identified by Morrison JA, is sufficiently cured by allowing both parties to move the Court.

[45] In light of this, I now turn my attention to an examination of the no set-off provision. This commences with an examination of the cases referred to Counsel.

[46] The case of **Caterpillar (NI) Limited (formerly known as) FG Wilson (Engineering) Limited v John Holt & Company (Liverpool) Limited** [2013] EWCA Civ 1232 **("FG Wilson (Engineering)")**, concerned an appeal by the defendant challenging a Commercial Court ruling that granted Summary Judgment in favour of the claimant for outstanding sums under a distributorship agreement. The court rejected the defendant's attempt to set off these sums with a cross-claim, citing the presence of a no set-off clause in the contract. As a result, the defendant was barred from applying any set-off to the amount due for the goods covered by the agreement. Popplewell J in the first instance judgment of **FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd** [2012] EWHC 2477 (Comm), stated:[6]

> *83. A right of set-off may be excluded by agreement of the parties. If set-off is to be excluded by contract, clear and unambiguous language is required: Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd [1974] A.C. 689, 717, 722-3; Connaught Ltd v Indoor Leisure Ltd [1994| 1 W.L.R. 501; Esso Petroleum Co Ltd v Milton [1997] 1 WLR 938; BOC Group plc v Centeon LLC [1999| 1 All ER (Comm) 970. But no more than that is required. In particular such a term is not to be treated in the same way as an exclusion clause: Continental Illinois National Bank & Trust Company of Chicago v Papanicolaou (The Fedora) [1986] 2 Lloyd's Rep 441, WRM Group Ltd v Wood [1998] C.L.C. 189.*
>
> *…*
>
> *86. Sentence [3] refers expressly to set-off. It imposes a prohibition on applying a set-off to the price. Reference to the price can only sensibly mean payment of the price or a claim for payment of the price. It is addressing the circumstances in which a cross claim may be applied to withhold payment of the price. It can only be directed to that payment obligation. It immediately follows the sentence containing the main*

[6] [2012] EWHC 2477, paras 83 and 86

> *payment obligation, sentence [2]. So far as the price is concerned, it qualifies the payment obligation*

[47] The Court of Appeal had two issues before it for consideration; the presence of a no set-off clause and a retention of title clause in the distribution agreement. However, in the context of the Court's current discourse on a no set-off provision, I will limit my discussion of the case to same.

[48] In **FG Wilson (Engineering)** the no set-off clause provided:

> *Buyer shall not apply any set-off to the price of Seller's products without prior written agreement by the Seller.*

The defendant contended that on its true construction, the clause did not apply to transactional or equitable set-offs. In rejecting the defendant's submission, the Court of Appeal affirmed the decision of Popplewell J on this issue and unanimously held that the no set-off clause prevented the set-off sought in the proceedings.

[49] Longmore LJ said:[7]

> *He then submitted that any clause purporting to exclude a right otherwise legally available must be expressed in clear words. But it is difficult to think of clearer words than that a party "shall not apply any set-off". "Any" must mean what it says. Mr Cogley had some difficulty in this court, as he had below, in indicating what set-offs are catered for by the clause. The best he could do was to say that the kind of set-off comprised in the Holt 1 claim was outside the scope of this clause. But that takes one straight back to the concept of transactional or equitable set-off and would imply that only legal set-offs were within the clause. That would be a most surprising result; indeed the average businessman who was told that a clause of this kind applied to legal set-offs but not equitable set-offs would hardly be able to contain his disbelief.*

Patten, LJ in his analysis stated:[8]

> *For the reasons which Longmore LJ gives, I am unpersuaded by Mr. Cogley's argument that the no-set off clause should be construed so as to*

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[7] [2013] EWCA Civ 1232, para 38
[8] Ibid., para 59

> *exclude a transactional or equitable set-off of the kind that is at issue in these proceedings. The words used in the relevant condition are clear and it must be assumed that the condition was drafted in this way to achieve its obvious commercial purpose of ensuring that the price is paid free of any underlying disputes about the goods sold or any related matter.*

Floyd LJ expressed his agreement with Longmore LJ and Patten LJ on this issue.[9] This decision demonstrates the court's general willingness to give effect to terms agreed to between parties in a commercial contract.

[50] **FG Wilson (Engineering)** was later relied upon by the court in **AMC III Purple B.V. v Amethyst Radiotherapy Limited** [2019] EWHC 1503 (Comm) **("AMC")**. In **AMC** the court had before it for consideration Summary Judgment proceedings in respect to a breach of contract for non-repayment of sums loaned, where the defendant sought to set-off sums alleged in the counterclaim against the sums it owed. AMC Group (AMC) provided mezzanine financing to Amethyst Radiotherapy Limited, a company which was operating a radiotherapy centre. In 2014, AMC granted a £21,000,000 loan through a Mezzanine Facility Agreement, followed by an additional £4,000,000 loan in 2015 under a supplemental facility agreement to facilitate Amethyst's expansion. Amethyst defaulted on its interest payments for both agreements, as well as on the principal sum pursuant to the Supplemental Agreement. Consequently, AMC filed for Summary Judgment, seeking: (i) An order that the Defendant pay sums due to the Claimant in respect of outstanding but unpaid interest under the Mezzanine Facility Agreement; and (ii) An order that the Defendant pay the principal and interest outstanding under the Supplemental Agreement.

[51] In opposition to the claim, Amethyst claimed an equitable set-off in respect of the claims in its counterclaims. In reply, AMC cited the no set-off clauses in both the Mezzanine Agreement and the Supplemental Agreement to counter Amethyst's defence. The no set-off clause read:

> *All payments to be made by the Borrower under the Finance Documents shall be calculated and be made without (and free and clear of any*

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[9] Ibid., paras 70-71

> *deduction for) set-off or counterclaim" [This is an LMA standard form provision]*
>
> *Each payment to be made by the [Borrower] under this Agreement will be made in full, without any set-off or deduction.*

The court ultimately determined that, even if Amethyst had a legitimate counterclaim against AMC, they were not authorized to use them as a set-off against interest or principal payments, as the no set-off clauses effectively prevented both equitable and legal set-off. He opined:[10]

> *The short answer to this is that, even assuming that the Defendant has claims which it can bring of that sort against the Claimant, it is not entitled to set them off against any interest payments falling due under the MFA and not entitled to make a deduction from those payments because of such cross-claims. That is the effect of clause 27.6 of the MFA. The way in which that clause is drafted, in terms of the calculation and making of payments under the Finance Documents, does not lend itself, unlike some other clauses which have been considered in the authorities, to an argument that it is only sums which are "due" against which there can be no set off and if there can be an equitable set-off the sums are not due (see Derham on the Law of Set Off (4th ed) para. 5.99). In any event, I consider that the purpose and effect of clause 27.6 is to preclude the application of an equitable set-off as well as a legal set off. I regard this conclusion to be supported by the decision in Credit Suisse International v Ramot Plana OOD [2010] EWHC 2759 (Comm), which considered a "no-set-off" clause in identical terms to that in the MFA. I also consider that it is supported by the decision of the Court of Appeal in Caterpillar (NI) Ltd v John Holt & Co. (Liverpool) Ltd [2013] EWCA Civ 1232, and in particular Longmore LJ's analysis at paragraphs [35]-[38] including his dismissal of the argument that the clause which he was considering precluded only legal and not equitable set-offs. As Longmore LJ said: "the average businessman who was told that a clause of this kind applied to legal set-offs but not equitable set-offs would hardly be able to contain his disbelief". I consider that the clause in the MFA is a clause of the "kind" that Longmore LJ was there referring to.*

[52] The court carefully scrutinized the wording of the clauses and concluded that the term *"any"* unequivocally signified the exclusion of both equitable and legal set-offs. It was also made clear that, even in the context of a counterclaim brought against the claimant,

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[10] 2019] EWHC 1503 (Comm), para 22

the defendant would still not be entitled to a set-off where a no set-off provision is provided for.

[53] This was the similarly held view of the court in **Arani and others v Cordic Group Ltd** [2021] EWHC 829 (Comm) **("Arani")**, which also relied on the case of **FG Wilson (Engineering)**. **Arani** concerned an application for Summary Judgment on a claim and counterclaim in relation to the payment of unpaid consideration that had been held in escrow. The claimants were the previous owners of a software company that provided fleet management solutions for taxi, private hire, and courier businesses. They sold their shares to the defendant for £10,200,000 under a Sale and Purchase Agreement, which provided that £2,000,000 be held in an escrow account called the Retention Account. This amount was to be released to the vendors after 16 months if no claims were reported. After the 16 months had elapsed, without any claims being notified, the purchasers sent a letter the next day claiming a potential breach of warranties in the Sale and Purchase Agreement and refused to release the escrow funds. The vendors then filed suit to recover payment. In response to this claim, the defendant counterclaimed for breach of warranty and fraudulent misrepresentation. The purchaser contended that it had the right to withhold the funds in the Retention Account due to the claims outlined in its letters. Alternatively, the purchaser claimed a right to set-off the sums claimed in its counterclaim against the Retention Account Money. The sellers sought Summary Judgment regarding their claims as well as the purchaser's counterclaims, or in the alternative, requested an order to strike out the counterclaims.

[54] On the issue of the defendant seeking to set-off the counterclaim, the court noted that clause 6.2 of the Sale and Purchase Agreement stipulated that,

> *6.2 **Deductions and Withholdings**: All sums payable by any party under this Agreement shall be paid free and clear of all deductions or withholdings unless such deduction or withholding is required by law.*

Andrew Hochhauser QC (sitting as a deputy judge of the High Court), in carefully examining the language of clause 6.2, opined:[11]

> *The words of clause 6.2 are clear and unambiguous:*
>
> *(1) They refer to all sums payable. There is no exception whatsoever, so that it is not open to the Defendant to argue that the amounts in escrow are excluded;*
>
> *(2) They expressly state that the sums shall be paid "clear of all deductions or withholdings", being the very phrase used by the Court of Appeal in BOC as being indicative of exclusion of set off. These words can have no meaning other than to exclude set off, nor has any other meaning been suggested by the Defendant;*
>
> *(3) The only limited exceptions are those required by law, and it is not suggested that the Defendant's claim falls within such an exception. Plainly, therefore, set off is excluded.*

In light of this, the court ruled that the purchaser was not entitled to set-off the amounts in the Retention Account against its counterclaims, as clause 6.2 was a valid no set-off clause. The court concluded:[12]

> *I reach that conclusion for the following reasons:*
>
> *(1) I rely upon the clear wording of clause 6.2 and paragraph 2 of Schedule 5 to the SPA. The wording in clause 6.2 is similar (a) to the words "payment in full without deduction or withholding of any sort", which, Evans LJ said in the BOC case at p980b, although "not necessarily a magic formula" were "words which are all familiar in contexts such as this." and (b) the wording of the relevant clause in the Lotus case which was held to be a valid set off clause.*
>
> *(2) As was made clear in the WRM v Woods case, the parties to a contract can exclude the remedy of a set off in relation to allegedly fraudulent misrepresentations;*
>
> *(3) Since clause 6.2 containing the "no set off" clause is not to be construed as an exclusion clause, but one which defines the payment obligation (see: WRM v Woods, applying Coca Cola Finance Corp v Finsat International Limited, referred to paragraph 53(4) above and FG Wilson at*

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[11] [2021] EWHC 829, para 51
[12] Ibid., para 154

> *[83]). It is therefore not to be regarded as an exclusion for the purposes of clause 6.4 of the SPA. I therefore do not accept the defence as set out either in paragraph 11(6) or 12(2) of the Defence, nor do I accept that such a set-off is "required by law", by reference to the wording in clause 6.2 of the SPA. The law did not require a set off in any of the cases referred to above.*

[55] The judge was then tasked with determining whether the purchaser's counterclaims for breach of warranty and fraudulent misrepresentation could be permitted to proceed as independent counterclaims, or if they should be struck out on the grounds that they fail to disclose any reasonable prospects of success. Andrew Hochhauser QC determined that the defendant's claim for fraudulent breach of warranty ought to advance to trial, as the failure to issue notice within the prescribed timeframe did not inhibit claims predicated on fraud. Conversely, the court dismissed the claim for fraudulent misrepresentation on the basis that a contractual warranty constitutes merely a promise within the contract, rather than a representation. Furthermore, the defendant could not invoke warranties articulated in the transaction documents, as those documents constituted the agreement and could be interpreted as containing pre-contractual representation.

[56] In this application for Summary Judgment, the issue before the Court is whether VMG can set-off the sums claimed under its Ancillary Claim against the outstanding sums pursuant to the Reinstated Agreement. VMG has asserted that it is entitled to set-off the sums it claims to have incurred as a result of the AICB's alleged misrepresentations and non-disclosure. AICB, on the other hand, has maintained that the no set-off clause operates as a complete bar to the VMG's attempt to set-off the sums outstanding.

[57] I accept the cases referred to above as persuasive authority reflecting the common law. Since there is no statutory provision to the contrary, I accept as the common law applicable to this jurisdiction, that a no set-off clause, where clearly drafted, will generally be enforced by the courts. This is in keeping with the principle that parties to a contract are free to agree on the terms of that contract, and such terms will generally be enforced unless there is an overriding reason not to do so, such as an issue of public policy or statutory prohibition. The Court of Appeal recently restated this principle in **National**

Commercial Bank Ja Ltd v Chagod Tour Ja Ltd [2024] JMCA Civ 29, where Brooks P stated:[13]

> *[38] Regrettably, it must be said that, in exercising his discretion about the breach of the Merchant Agreement, the learned judge was wrong to find that there was a serious issue to be tried on the issue of breach of contract. A fair reading of clause 8.3 of the Merchant Agreement does not allow for the importation of the concept of objectivity to NCB's position, when it asserts that it "deems itself insecure". The learned judge's lament at para. [5] of his judgment that "[i]t does seem unfair, whether that unfairness is the one required at common law or by the Constitution, for no explanation to be provided to [Chagod for NCB's action]" is entirely understandable, but was not open to him to act upon. That was the bargain that the parties made, and Chagod was obliged to accept NCB's reliance on the Merchant Agreement.*

[58] The no set-off clause as contained in Clause 2.02 of the Share Sale Agreement provides for the Purchaser to make the payments without set-off or counterclaim. This in effect prohibits VMG from asserting any form of set-off, whether legal or equitable. VMG is then unable to rely on its Ancillary Claims to reduce the payments owed under the agreement. This was the position in AMC **III Purple B.V. v Amethyst Radiotherapy Limited** *(supra)*. The court enforced a no set-off clause in the face of a counterclaim, ruling that the clause operated to preclude both legal and equitable set-offs, regardless of the validity of the counterclaim. The court held that even if the defendant had valid cross claims against the claimant, they were not entitled to set them off against interest or principal payments which were outstanding. This principle was also affirmed in **Arani v Cordic Group Ltd** *(supra)* where the court held that a no set-off clause, when clearly worded, excluded the possibility of a set-off even where the defendant had an alleged counterclaim arising from a breach of contract.

[59] In the present case, the no set-off clause is drafted in clear and unambiguous terms and there is no reason to depart from its plain meaning. The clause is unequivocal in its prohibition of set-offs or counterclaims. The clause was clearly designed to ensure that payments under the agreement are made in full, without any deductions or disputes

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[13] [2024] JMCA Civ 29, para 38

regarding unrelated claims. There is no provision in the agreement which allows for exceptions to the no set-off clause, and neither has VMG advanced any argument to suggest that there is a valid exception to the no set-off clause in this case. There is no suggestion that the clause is unenforceable or should be interpreted narrowly to allow for equitable set-offs, as was argued and rejected in the cases cited above. There can be no doubt that the purpose of a no set-off clause was to ensure that the amounts due under the contract are paid in full, irrespective of any claims which may arise. For the reasons outlined above, I find that VMG's Ancillary Claim, as in **Arani and others v Cordic Group** *(supra)*, cannot be used as a basis to reduce or withhold the payments owed under the Share Sale Agreement. VMG's attempt to set-off the Ancillary Claim against the sums due to AICB under the Reinstated Agreement is precluded by the terms of the contract.

WHETHER THE PAYMENT WAS DUE AT THE TIME THE CLAIM WAS FILED?

[60] In opposition to the application for Summary Judgment, Counsel for VMG in her oral submissions contended that pursuant to the Second Supplemental Letter Agreement, the payment of the sum of US$2,000,000.00 was not due and owing to the Claimant until 30th September 2023. As a result, at the commencement of the claim on 13th February 2023, and the subsequent filing of the application for Summary Judgment on 14th April 2023, the payment obligation had not yet matured. Further, AICB had not pleaded an anticipatory breach.

[61] The response from AICB fully answers this submission. The Claimant does not rely on a repudiatory breach. In its Amended Particulars of Claim, AICB pleaded that VMG, in breach of the contract, failed to deliver the Support Document being a Letter of Credit or Bank Guarantee for the sum of $2,000,000.00 since September 2022. The sum of US$2,000,000.00 is claimed as damages for the breach of contract.

[62] Further, the correspondence between Counsel, as exhibited in the Affidavit of Shamena Khan dated 14th April 2023,[14] showed that prior to the US$800,000.00 payment being due on 30th January 2023, Counsel for AICB received a letter dated 27th January 2023 from Counsel for the VMG, indicating that the delivery of the Bank Guarantee and the payment of the balance due on the purchase price were *"being revisited with a view to determining whether the matters* [allegations of false misrepresentation and non-disclosure] *mentioned in this letter, and the matters being investigated, will result in a reduction in the balance due on the sale."* Counsel for AICB, by way of by letter dated 30th January 2023, refuted the allegations made by VMG and reiterated the terms of the Share Sale Agreement. AICB demanded that VMG pay the next instalment of US$800,000.00 by 31st January 2023, and if said payment was not made, VMG was required to present the Letter of Credit or Bank Guarantee by 3rd February 2023. Failing to do so, VMG would be in default of the agreement, thereby entitling AICB to pursue legal action. The letter in effect unequivocally placed VMG on notice that failure to adhere to the contractual obligations would result in legal proceedings.

[63] VMG has not averred that it has either satisfied the condition to provide the support document or that it was not due. There is no factual dispute because as noted before, VMG intentionally failed to adhere to this term of the contract. Paragraph 8 of the Ancillary Claim and Ancillary Particulars of Claim makes it clear that both the US$800,000.00 and the Support Document were due. VMG pleaded that it withheld the payment of the US$800,000.00 and withheld the delivery of the bank guarantee.

[64] Consequently, VMG's argument that the claim for US$2,000,000.00 payment pursuant to the Second Supplemental Letter Agreement was not due at the time of the commencement of the claim is without merit since no such claim was made by AICB.

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[14] Exhibit SK-1(5)

[65] In the circumstances, VMG has not proven to the Court that it has a realistic prospect of successfully defending the claim. AICB therefore succeeds in its application for summary judgment.

Ancillary Claim

[66] VMG's case rests on allegations of breach of contract and/or for fraudulent and/or negligent misrepresentation. In its Particulars of Claim, it alleges AICB induced it to enter into the various agreements by falsely representing that:

(a) There were no distribution agreements or arrangements, specifically with Ready TV, and that no obligations were owed to any entity in that regard.

(b) There were no other claims against CVM TV save those outlined in the disclosure letter dated 9 March 2022.

(c) Falsely reporting on the litigation exposure by not disclosing the existence of a default judgment in Claim No. SU 2020 CV 02920 (**Horace Reid v John Barnes, CVM-TV, and Ors**).

VMG, in its particulars of special damage, also averred that AICB's legal fees incurred on the transfer of the shares had been settled by CVM TV and constituted an incident of leakage.

[67] AICB disputed these allegations, contending that the representations were accurate and that no fraudulent or negligent misrepresentation occurred. With respect to the incident of leakage, Counsel for VMG indicated that that claim was not being pursued.

[68] The present operative agreement between the parties is the Reinstated Agreement, which is comprised of the Share Sale Agreement as varied by the First Supplemental Agreement, and as expressly varied by the Second Supplemental Agreement. The the Second Supplemental Agreement provided in Clause 9 vii, a representation by AICB that there were *"no distribution agreements or arrangements with*

any entity regarding the distribution of CVM-TV and that there are no obligations owed to any entity in this regard".

[69] As articulated in the seminal authority of **Derry v Peek** (1889) 14 AC 337, to establish fraudulent misrepresentation, the claimant must prove that the defendant knowingly made false statements or acted recklessly without regard for the truth and intended that it must be acted on by another, and in that third party acting on said statement, suffered damage. The standard of proof in determining whether there was fraudulent misrepresentation is the civil standard, on a balance of probability. In such cases where fraud is asserted, a higher level of cogent evidence is required. (See **Horal v Neuberger Products** [1957] 1 Q.B. 247) Therefore, in these circumstances it is for VMG to establish that AICB had the intent required for committing the tort of fraudulent misrepresentation.

[70] To establish negligent misrepresentation, VMG must show that AICB failed to take reasonable care to ensure the accuracy of the representations made during the negotiation of the agreements. (See **Cramaso LLP v Ogilvie-Grant and others [2014] UKSC 9**) Here, the claim is supported by allegations that the AICB failed to exercise due diligence in disclosing material agreements and legal exposures.

READY TV

[71] The essence of VMG's claim is that AICB falsely represented that there were no distribution agreements in place with Ready TV, and that Ready TV was being utilized for a significant part of the distribution of CVM- TV's signal. No representation or warranty is made in respect of Ready TV in the Share Sale Agreement or First Supplemental Agreement. There is no indication from any of the documentary evidence, the agreements themselves or correspondence, that there were any discussions on this issue. VMG itself does not assert this in the several affidavits of Mr. Oliver McIntosh. VMG would therefore be hard-pressed to prove that any such representation induced it to enter into the Share Sale Agreement or First Supplemental Letter Agreement.

[72] Before the Second Supplemental Letter Agreement was concluded, Counsel then representing VMG, raised that discussions with the principals of Ready TV "suggested" that a distribution Agreement was in place between CVM and Ready TV, and asked for confirmation whether this was the case, and if so, what were its terms. The consideration was that such an arrangement may have imposed obligations on VMG. This was denied by AICB. This led to the request that the abovementioned clause be inserted in the Second Supplemental Letter Agreement.

[73] There can be no issue that this was not a relevant factor when the Share Sale Agreement was made. Mr. McIntosh's benign statement, firstly in paragraph 7 of his affidavit filed July 28th 2023, that the parties were engaged in a series of continued negotiations to reach a final position with respect to the Share Sale Agreement is not accurate. The Share Sale Agreement was terminated as a result of VMG's breaches and later revived at the request of VMG. The Share Sale Agreement initially stood on its own, and after termination stood only be revived if the terms of the First Supplemental Letter Agreement were met. His reference in paragraph 8 that, *"the Defendant during the course of negotiating this share sale agreement tasked the Claimant's representative to explain the relationship between CVM Television and Ready TV"* could only refer to the Reinstated Agreement and specifically the Second Supplemental Agreement.

[74] Mr. McIntosh's statement that it was only in September 2022 that it was discovered that Ready TV had cable boxes at several transmission sites of CVM may have been technically true in the sense of confirmation, as on May 11th 2022, he stated in communication to Ms. Khan that his understanding was that Ready TV was providing the distribution of CVM channels to cable operators and had Ready TV Boxes placed throughout the CVM tower network. In fact, the stated position of Mr. Oliver was that VMG would have no issue in principle with such an arrangement, only to have the option to continue or discontinue the arrangement This led to the insistence that AICB provide the agreements, and in light of AICB's response that there was none, the inclusion of that representation in the Second Supplemental Letter Agreement.

[75] As submitted by Counsel for AICB, the issue raised by the representation given by AICB was not the existence of Ready TV boxes or even that there was an agreement in place with Ready TV. Whether there is in fact an agreement between CVM and Ready TV, which is disputed, the relevant issue is whether VMG has had to assume any obligations to Ready TV by virtue of any agreement entered into by them with CVM/AICB. This is not claimed in either the pleadings or evidence produced in this Application. VMG has not asserted that it has become bound by any obligations to Ready TV. VMG therefore has no reasonable prospect of succeeding in its claim for damages for fraudulent or negligent misrepresentation with respect to the Ready TV issue.

[76] The complaint of VMG is also disposed of by the terms of the Share Sale Agreement which remained in effect in the Reinstated Agreement, which provided that no warranty or representation was given as to CVM or as to the business of CVM.

HORACE REID CLAIM

[77] AICB relies on Clause 3.01(e) of the Share Sale Agreement, which limited its disclosure obligations to claims that could affect the legality or enforceability of the agreement or the consummation of the transaction. It contended that the Horace Reid claim fell outside the scope of these obligations. VMG argued otherwise, asserting that the claim was material and should have been disclosed. Counsel for AICB conceded that this was an issue for trial since the question whether the failure to disclose was deliberate was a live one, given the inclusion of other defamation claims.

[78] Accordingly, AICB's application for Summary Judgment on the Ancillary Claim is granted, save on the issue of the non-disclosure with respect of Claim No SU 2020 CV 02920 **Horace Reid v John Barnes, CVM-TV and Ors**.

MEDIATION

[79] In light of the amendment made to the **Civil Procedure Rules** that mediation is no longer mandated, mediation is dispensed with.

INTEREST

[80] Both parties claimed interest at the same rate and at a commercial interest rate on the sums claimed. There being no dispute, the Claimant is to have interest on the sum of US $800,000.00 as claimed, and interest on the sum of US$2,000,000.00, at a commercial interest rate per cent.

ORDERS

On the Claim

1. Summary Judgment is granted to the Claimant on the claim as follows:

(i) Damages for breach of contract in the sum of US$800,000.00 (equivalent to the sum of J$124,026,320.00 at the exchange rate of J$155.0329:US$1.00 being the most recently published Bank of Jamaica selling rate as at 9 February 2023).

(ii) Interest on the said sum of US$800,000.00 at the rate of US 3' month Treasury Bill Rate plus 3% per month from 1 February 2023 until payment.

(iii) Damages for breach of contract in the sum of US$2,000,000.00 (equivalent to the sum of J$310,065,800.00 at the exchange rate of J$155.0329: US$1.00 being the most recently published Bank of Jamaica selling rate as at 9 February 2023).

(iv) Interest on the said sum of US$2,000,000.00 at the rate of US 3' month Treasury Bill Rate plus 3% per month from 1 October 2023 until payment.

2. Cost of the Claim to be the Claimant’s.
3. Leave to Appeal refused.
4. Application for stay of execution refused.

On the Ancillary Claim

5. Summary Judgment is granted to the Ancillary Defendant on the Ancillary Claim, save that the issue of whether the Ancillary Defendant falsely reported on the extent of the litigation exposure with respect to Claim No SU 2020 CV 02920 **Horace Reid v John Barnes, CVM-TV and Ors** shall proceed to trial.
6. Mediation is dispensed with.
7. Case Management Conference is fixed for June 2, 2025 at 11:00am.
8. The Ancillary Defendant is to have 80% of its Costs incurred to date.
9. Leave to Appeal refused.

10. Claimant's Attorneys to prepare, file and serve Order.

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Judge