

The parties are licensees under the Telecommunications Act, 2000. Digicel is provider of public cellular services. Cable & Wireless is a provider of public fixed line, cellular and internet services in the island. The parties have entered into an Interconnection Agreement (ICA), which provides interconnection between their networks, in order to facilitate the making of a telephone call from one licensee network to another network. The parties are the main competitors in the cellular services market.

The parties instituted a system of net settlement of invoices, which allows a party making payment to set off invoices in certain circumstances from the party who is to receive the payments.

During the month of September 2003, Cable & Wireless deducted the sum of \$16,011,640.34 from a payment of J\$379,490,786.12 due to Digicel. Digicel demanded that the withheld sum be reimbursed. Cable & Wireless refused. On the 23rd August 2004 Digicel filed a Fixed Date Claim Form seeking declarations inter alia;

A declaration that the Claimant is entitled to be paid the full amount of its interconnection charges invoiced to the Defendants in relation to charges incurred in July 2003 and invoiced for payment in September 2003 in accordance with the Interconnection Agreement dated the 18th day of April 2001, free from set-off, deductions, or other withholding save in specific compliance with clause 9 of the Interconnection Agreement. A Particulars of Claim was filed on 11th October 2004.

On the 27th October 2004, Cable & Wireless acknowledged service of the Fixed Date Claim Form. No other step was taken by Cable & Wireless until 31st January 2005 when they filed and served their defence one hour ahead of the scheduled 11:00am hearing.

The original date fixed for first hearing of the Fixed Date Claim Form was the 19th April 2005. The attorneys-at-law for Digicel complained to the Registrar of the Supreme Court that such a fixture was not in conformity with Rule 27.2 (2) of CPR, which required that the first hearing be scheduled for a date not less than four (4) weeks or more than eight (8) weeks from the date of filing. The date of first hearing, 10th April 2005, was some eight months later than allowed by the Rules. The Civil Registry fixed a new date which, although not in conformity with the Rules, reduced the period of the breach. The Claimants were duly advised of this new first hearing date of the 31st January 2005.

The delay

The Claimant computes the delay from the deemed date of service for registered mail as per Rule 6.6, as 13th September 2004 and concludes that on the 25th October 2004 the defence should have been filed. Accordingly, on 12th January 2005, at the time of service of relisted notice of first hearing, a period of 121 days had elapsed and the Defendants were 79 days in default of delivery of defence. The Defendant computes the service as the 11th October, therefore, the

period for filing the defence would expire on the 22nd November 2004. The Defendants argue that at that time, the Fixed Date Claim Form in their possession indicated a first hearing date of 19th April 2005. They contend they filed their defence within the time limited for filing their defence to the “amended Fixed Date Claim Form.” They further allege there was no evidence before the Court in support of Digicel’s application. Ms. Justice Harris, after hearing submissions from the parties, ruled that an application to file defence out of time was required, in accordance with that ruling, an application was made by Cable & Wireless on the 5th May 2005 to extend the time to the 31st January 2005. When the matter came before Mr. Justice King the application to extend time was determined short-served.

The Re-listed Date

The action of the Registry in minimising its non-compliance with Rule 10.3.1 by issuance of an earlier hearing date than the date originally given is consistent with the exercise of the Court’s administrative function of fixing dates by the Registry, pursuant to CPR 2.5(1)(c) and Rule 2.6 (1), which provide;

“Where these Rules refer to an act being done by the registry **or require or permit the performance of an act of a formal or administrative character**, that act may be performed by a member of the court staff authorised generally or individually in writing by the Chief Justice.”

The Court's duty to actively manage cases in order to further the overriding objectives of the CPR expressly includes, the fixing of time-tables or otherwise controlling the progress of the case (see Rule 25.1) and, giving directions to ensure that the trial of the case proceeds quickly and efficiently (see Rule 25.1(l)) and, to adjourn or bring forward a hearing to a specific date (see Rule 26.1 (d)).

Ms. Phillips has submitted that the time for filing a defence should start from the date of service of the re-listed Fixed Date Claim Form. I do not agree. The new date is an administrative act by the Registry, which has not affected the pleading that the Defendant has to meet. It is not an amendment to the Claimant's pleadings. If the Defendants had been in compliance and had filed their defence, no further action on their part would be required because of the new date. To require that the fixing of an earlier date requires a "restart" of the matter to bring into effect Rule 10.3 would be to defeat the quest for expedition and the overriding objectives even where there is no detriment or prejudice to the Defendant. I find that the issuance of a new date did not constitute an amendment of the pleading. Rule 10.3(1) is therefore inapplicable.

Conduct of the Defendant

The Defendant did not file its defence until the morning of the first hearing of the Fixed Date Claim Form. The matter was adjourned; no indications were

given that the Defendants were seeking an extension of time in which to file a defence.

The Defendants argue that Rule 10.3(9) of the CPR makes provision for the Defendant to apply for an order extending time in which to file a defence. Rule 10(5) allows the parties to agree an extension of time. The Defendants further contend that the reason provided a cogent and credible explanation for the delay. The Court was referred to Finnegan v Parkside Health Authority (1997) EWCA 2774, where in the absence of cogent reasons for the delay, the Court held that a Judge must still consider all the circumstances of the case, recognizing the overriding principle that justice had to be done and the absence of a reason was only one factor which a Court ought to take into account. It was further urged that the Defendant's case demonstrated a realistic prospect of success. Price v Price (2003) EWCA 888 was cited as an example where despite a long delay in filing, the English Court of Appeal permitted an extension of some 17 months for the filing of Particulars of Claim.

The explanation of the delay

The affidavit of Rochelle Cameron, legal and regulatory advisor to Cable & Wireless provides the explanations for the delay in filing the defence. This affidavit was not in existence at the scheduled date for the first hearing of the Fixed Date Claim Form.

She alleges that on the 31st January 2005, the historical information was requested in order to address issues raised such as licensing and billing information.

The officers with the information had to be identified and contacted. The contacting was a difficulty, because the officers were oftentimes out of the jurisdiction. When they were located, their availability to assist was limited. It was Christmas time and Christmas is a busy period. This hindered communication with these officers. Timely progress was further hampered because persons were on vacation, this contributed substantially to the delay.

To my mind, these matters speak to the organization of the company and the importance that organization placed on this matter. Surely, the availability of the officers to assist represents the relative importance that the company ascribes to these matters. There was nothing pleaded in the defence that demonstrated the reason the historical information on licensing could not be obtained within hours, I have not been shown any information on the companies' history that was not available from the licence, the affiant as the regulatory officer would be expected to have ready access to the company's licences. The delay as it concerns historical information on billing is equally difficult to understand when the dispute hinges on the billing in respect of a particular month, September 2003. One would expect that Cable & Wireless, having gone on the offensive by withholding the sum

claimed, would be well armed with the information on which their decision was based. It is their action that the Claimants have queried. Is it unreasonable to expect a company that has taken such a decision to be able to justify the action taken. The Defendant's letter of the 21st August 2003 purports to do just that, where it says;

“C & W's view is that the sudden increase in traffic is not due to additional calling from within Jamaica but is in fact due to traffic originating from overseas being routed via Digicel's network”

We have been pointed to nothing in the historical billing of Cable & Wireless that warranted such prolonged delay. An examination of the defence filed, reveals that paragraph 1 admits the description of the parties. Paragraphs 2 and 3 refer to the licence under which the Defendant operates. Paragraphs 4 and 14 refer to the Interconnection Agreement access to which we were not told posed a problem. Paragraphs 9 to 11 refer to the September 2003 billing; paragraphs 12 to 13 refer to letters dated 21st August 2003 to the 10th May 2004. Paragraphs 7, 15, 17 and 20 refer to letters; paragraph 21 contains the claims for relief. There is contained in paragraphs 11 and 12 a reference to an electronic mail dated 21st August 2003. I have detailed my examination of the filed defence to demonstrate that there is not, on the face of the pleadings, any material, the obtaining of which should have delayed the Defendant. The Interconnection Agreement, the company licences, the billings for the month of September 2003, a series of recent letters

between the parties and Mr. David Hall's electronic mail of the 21st August 2003 are the important documents that support the allegations contained in the defence. The failure to timely identify, locate, and obtain the assistance of the persons (some of whom were vacationing) who possessed these current documents, resulted in a delay estimated by the Claimant at 106 days. There is nothing in Ms. Cameron's affidavit that suggests a plausible reason can be advanced for the delay. I find the period of the delay inordinate and inexcusable.

Inordinate delay and disregard for the Rules have been identified as major contributing factors to the ailment that plagues the administration of justice in this judgment. Both factors have attracted strong judicial comments in the past. The most recent of these comments that have been brought to my attention are those of Sykes J, in James Robertson vs Maxine Henry-Wilson and CVM Television (suit no. CL. 2001/R034) 11th November 2004, after referring to Wolfe JA (as he then was) comments in Wood v H.G. Liquors Ltd. and Another (1995) 48 WIR 240, 256 and Panton JA in Port Services Limited v Mobay Undersea Tours Limited and Fireman's Fund Insurance Company SCCA No 18/2001(delivered March 11, 2002), said;

11. These two passages were used in the context of applications to strike out an action for inordinate delay but they express judicial concern from the Court of Appeal in 1995 and 2002 about delay, disregard for rules and the need for special measures for Jamaica.

12 Cooke JA in **Alcan Jamaica Company v Herbert Johnson & Idel Thompson Clarke** SCCA 20 of 2003 (delivered July 30, 2004) at page 26;

These rules [speaking of the new rules] are the antidote to the epidemic of delay against which Panton JA so rightly inveighed Wood.

See also Smitty JA comments in Norma McNaughty vs. Clifton Wright et al, SCCA 20/2005. Delivered May 25, 2005, unreported at page 12.

A refusal of the Defendant's application is unlikely to achieve the sought after 'overriding object of enabling the Court to deal with cases justly.' A refusal would not be determinative of the matter.

Claimant's application for leave to enter judgement in Default of Defence

Fixed Date Claim Form is excluded from Default Judgements and Summary Judgement by Rule 12.2 (a) and Rule 15.3, respectively. It was contended this exclusion does not mean that the Court is powerless to regulate its own proceedings, because Rule 27.2 (8) provides for the Court to treat the first hearing as the trial of the claim **if it is not defended** or the Court considers that the claim can be dealt with summarily. Rule 27.2 (7) allows the Court all the powers of a case management conference. In addition, Rule 26.1 (j) allows the Court to dismiss or give judgement on a claim after a decision on a preliminary issue. Counsel for the Claimant further urged that the failure of the Defendant to give

cogent explanations is ground for the grant of leave to enter judgement, and that at the time of first hearing, no reason was given.

On this fixed date claim, the refusal to grant the Defendant's application does not by itself determine the matter. The declarations sought need the examination by the Court to ascertain whether the documentation to be presented will bear the construction sought. In examining the issues to be raised at the hearing of the declarations, the Defendant's full participation would be of assistance to the Court in having the matter dealt with expeditiously and fairly. We are therefore constrained to grant the application for extension of time in which to file defence, despite our reluctance so to do.

The Defendant's application for extension of time in which to file defence is granted and time is extended to 31st January 2005. The Defendants will pay the assessed cost of \$115,000.00 on or before the 30th October 2005. The Claimant's application for Summary judgement is refused. The parties will file written submissions within 14 days of this order. The Registry has listed the matter for hearing on the 11th November 2005 at 10:00 for one hour and a half. The parties' presentation will be restricted 40 minutes.