[2025] JMCC Comm 16

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO.SU2024CD00154

BETWEEN	**VERTICAST MEDIA GROUP LTD**	**CLAIMANT**
AND	**DIGICEL (JAMAICA) LIMITED**	**1st DEFENDANT**
AND	**COLUMBUS COMMUNICATIONS JAMAICA LIMITED**	**2nd DEFENDANT**
AND	**CABLE AND WIRELESS JAMAICA LIMITED**	**3rd DEFENDANT**

Mr Douglas Leys KC, Dr Delroy Beckford and Miss Jacqueline Cummings, instructed by Samuel Beckford for the claimant

Mr Maurice Manning KC, Ms Allyandra Thompson and Ms Dionne Samuels, instructed by Nunes Scholefield Deleon & Co for the 1st defendant

Mrs Denise Kitson KC and Mr Kevin Williams instructed by Grant Stewart Phillips for the 2nd and 3rd Defendants

Heard: September 16, 2024, and May 9, 2025

Costs - Whether costs are payable by the claimant on withdrawal of an interim application - Civil Procedure Rules 64.6(3) and (4) and 37.6(1)

CORAM: JARRETT, J

Introduction

1. This is my third judgment[1] in a highly contentious dispute between the parties. The claimant is a company conducting business in Jamaica, creating and providing cable television channels with exclusive and non-exclusive sports content, for distribution on multi subscriber cable television networks to multimedia subscriber cable television operators. Its main grouse is its allegation that the defendants have refused to enter into carriage service agreements with it, for the distribution of its exclusive and non-exclusive sports content (such as the English Premiere League games) on their multi subscriber cable television networks. The claimant alleges that the actions of the defendants are in breach of the Fair Competition Act. On April 2, 2024, simultaneously with the filing of a claim form and particulars of claim, the claimant filed an urgent notice of application for court orders, seeking injunctive relief against the defendants.

2. On September 16, 2024, in a surprising turn of events, the claimant's lead counsel, Mr Douglas Leys KC, informed the court that the claimant is withdrawing its urgent notice of application for injunctive relief. The issue now before the court is whether there ought to be an order for costs on the withdrawal, and if so, what should that order be. Predictably, the parties are at odds on the issue. The claimant argues

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[1] See **Verticast Media Group Limited v Digicel Jamaica Limited, Columbus Communications Jamaica Limited and Cable and Wireless Jamaica Limited [2024] JMCC Comm 22;** and **Verticast Media Group Limited v Digicel (Jamaica) Limited; Columbus Communications Jamaica Limited and Cable and Wireless Jamaica Limited [2024] JMCC Comm 38.**

that there should be no order as to costs, while the defendants say that costs should be awarded to them.

Procedural Background

3. It is helpful to chronicle the procedural background which preceded the claimant's withdrawal of its application. Below is a summary of that background, extracted from my earlier decision in **Verticast Media Group Limited v Digicel (Jamaica) Limited, Columbus Communications Jamaica Limited and Cable & Wireless Jamaica Limited [2024] JMCC Comm 38,** in which I refused the 1st defendant's application to stay proceedings, but granted it an extension of time to file its defence:

> "4**.** On April 2, 2024, along with the filing of its claim form and particulars of claim, the claimant also filed an urgent notice of application for injunctive relief in which the interim injunctions referred to in the claim were sought. That application came before the court on April 4, 2024, April 19, 2024, May 16, 2024, and September 16, 2024, respectively. On April 4, 2024, I ordered that the claim, the urgent application and all affidavits in support were to be served on the FTC, and its representatives were to attend the adjourned hearing on April 19, 2024. Representatives from the FTC were present for the adjourned hearing on April 19, 2024, and at that time, indicated to the court that they had begun an investigation into the issues raised in the claim.
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> **5**. On April 19, 2024, I refused the claimant's oral application for an "interim protection order"[2] pending the resumption of the hearing on May 16, 2024. That decision was appealed by the claimant. On May 9, 2024, the 1st defendant filed the current application, supported by an affidavit of Dionne Samuels, which was also filed on the same day. Arguments were heard

[2]**Verticast Media Group Limited v Digicel Jamaica Limited, Columbus Communications Jamaica Limited and Cable and Wireless Jamaica Limited [2024] JMCC Comm 22**

from counsel for the claimant in support of the urgent notice of application for injunctive relief on May 16, 2024, and that application was adjourned part heard to July 5, 2024. Due to the approach of Hurricane Beryl, the July 5, 2024, hearing date was vacated and the hearing rescheduled for September 16, 2024. On September 16, 2024, King's Counsel Mr Leys announced to the court, that the urgent application for injunctive relief was being withdrawn, as the claimant had its rights to broadcast the English Premier League (EPL) live sporting competitions terminated. On that same day, the court was also advised that the appeal of my April 19, 2024, decision had been withdrawn. In the event, I made orders for the filing of affidavits and written submissions on the question of costs on the withdrawal, and informed the parties that I will determine that issue on paper".

The urgent notice of application for court orders for injunctive relief

4. In its application filed on April 2, 2024, the claimant sought the following relief which are part of the substantive remedies it seeks in its claim form: -

    a) An interim and interlocutory injunction restraining the Defendants from breaching the Fair Competition Act, 1993, whether by themselves, their servants or their agents or employees or otherwise by directly and/or indirectly conspiring and/or colluding or engaging in a concerted practice with each other which has had and is having the effect of substantially lessening competition or an exclusionary effect in a relevant market, namely the market for ***providing cable television channels for distribution on multi-subscriber cable television networks in Jamaica to multi-subscriber cable television operators in respect of live elite sport competitions.***

b) An interim and interlocutory injunction restraining the Defendants from breaching the Fair Competition Act, 1993, whether by themselves, their servants or their agents or employees or otherwise by abusing or continuing to abuse their position of dominance or economic strength in the multi-subscriber cable television operator market by virtue of leveraging said dominance in the market for live broadcast of elite sports competitions, on multi-subscriber cable television platforms and in effect restricting the entry of the Claimant in said market, preventing or deterring the Claimant from engaging in competitive conduct in said market and/or limiting the production of goods or services to the prejudice of cable subscriber television consumers of significant live elite sports competition cable television channels.

c) Additionally, and/or alternatively, an interlocutory injunction mandating the Defendants whether by themselves, their servants or their agents or otherwise to grant access of their multi-subscriber cable television operator network to the Claimant to enable Claimant to provide live broadcasts of elite sporting competitions through the television channels it has created for that purpose.

d) Such other and/or further relief as this Honourable Court deems fit.

The affidavits filed on the question of costs

5. In its submissions on cost, the claimant relies on the affidavit of Jacqueline Cummings (Ms Cummings), filed on September 27, 2024. Ms Cummings is an attorney-at-law, and part of the legal team representing the claimant. She recounts the procedural history of this matter, to the best of her knowledge information and

belief. Among the things she outlines is that on April 19, 2024, the court was advised that all the defendants had not filed their affidavits within the time the court had specified, and consequently, the claimant requested time to respond. She says that although she was not in court on the adjourned date of May 16, 2024, she was alarmed to hear that on that date, the matter was adjourned to July 5, 2024. However, according to her, she understands the difficulty with scheduling and: "the dilatory nature of the court". Ms Cummings exhibits copies of the correspondences among counsel and the court's registry, which reflect her attempts to secure an earlier date, other than September 16, 2024, for the adjournment of the July 5, 2024 hearing, which was not held due to the passage of Hurricane Beryl. She agreed to the date of August 8, 2024, which the judge's clerk advised was the only date available for the judge during the long vacation; however, King's Counsel Mrs Kitson, who represents the 2nd and 3rd defendants, indicated that she was unavailable during the month of August. She says it ought to have been understood that the application was urgent and in support of this view, she quotes the following paragraphs from the affidavit of urgency of Oliver McIntosh which he filed in support of the application on April 2, 2024: -

> "3. The matter herein has become of extreme urgency as the Claimant has been severely prejudiced by the Defendants(sic) continued refusal to deal with it and the costs and damage being suffered by the Claimant has become almost immeasurable.
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> 4. The urgency is also due to the fact that the holder of the rights for the English Premier League (EPL) may terminate our current arrangement with them and offer the rights to broadcast the live games to the Defendants for the remainder of the 2023-24 EPL season and potentially for the next 3 seasons 2024/25, 2025/26,2026/27.

5. We have been credibly advised by representative of the EPL and do verily believe that the Defendants and/or their representative or related companies are actively in discussions using their joint venture to obtain the current EPL rights to exclude us from the relevant market to our detriment.

8. The Claimant's exit from the market is imminent due to the Defendants' conduct and their interconnected company to act together and share content acquired both as part of the joint venture as well as by their respective sports channels to be dominant in both markets.

9. Both Defendants acting jointly had previously acquired the live broadcasting rights for the English Premier League, have jointly and independently settled for acquiring English Premier League Club Channel broadcast rights, which allows for delayed broadcast of English Premier League matches as a secondary non-preferred option, but it is our belief that the Defendants intend to actively negotiate with the English Premier League for the live broadcasting rights. They have the club television rights for Manchester City Football Club, Arsenal Football Club and Liverpool Football Club. Hence they can show delayed games for these clubs within X hours of the live games being completed.

10. The Defendants' joint consistent conduct amounts to a conspiracy and collusive attempt to force the Claimant out of the market for their own benefit and they may succeed if not precluded from doing so by the court herein."

6. According to Ms Cummings, she has been credibly advised by Oliver McIntosh and believes, that the claimant's right to broadcast the English Premier League in

the Caribbean was terminated before the start of the new season in August 2024, and those rights have been acquired by a new entity. She says that the defendants have started to broadcast the English Premier League on their cable networks. In urging the court not to make an order for costs, on the withdrawal of the urgent notice of application for injunctive relief, Ms Cummings concludes by saying in paragraph 17 that:

> "17. The Claimant acted reasonably in its withdrawal of the Urgent Notice of Application, having regard to the prevailing circumstances, and the time and duly advised all of the opposing counsel prior to the court hearing. Once that was done the main purpose for which this injunction was sought by the Claimant was no longer relevant as outside and intervening acts beyond their control have changed the course of this matter and hence continuation of the Urgent Notice of Application for the injunction would be only of academic value or nugatory".

7. The 1st defendant filed an affidavit of Dionne Samuels on October 3, 2024, in response to Ms Cummings' affidavit. Ms Samuels is herself an attorney-at-law and part of the firm of Nunes Scholefield Deleon & Co., attorneys-at-law for the 1st defendant. In responding to Ms Cummings' chronology of the proceedings, she says that service of the urgent notice of application for injunctive relief was only on April 3, 2024, at 2:15 pm, the day before the hearing on April 4, 2024, and that the court adjourned the matter to allow the defendants time to file affidavits in response as well as to hear from the Fair Trading Commission. She says further that the adjournment on April 19, 2024, was to regularise all the late filings and/or service of affidavits, including one filed and served that morning on behalf of the claimant. At the hearing on May 16, 2024, she says the three hours allotted by the court was used up by the claimant, despite reminders from the court that the claimant's counsel was over the time limit given to him. Ms Samuels says that the adjourned date of July 5, 2024, was agreed by all the parties as the earliest convenient date, and no alarm was raised about it. She says the court had advised that only Fridays were available until the end of the term, or September 18, 2024.

8. According to Ms Samuels, Kings Counsel Mr Manning, counsel for the 1st defendant, did not object to the hearing date canvassed of August 8, 2024, and it was understood from the email correspondences, that that was the only date in the long vacation available to the court. She says further that on August 13, 2024, the 1st defendant became aware by way of a social media post by the Jamaica Observer newspaper, that the claimant no longer held the broadcast rights for the English Premier League. She refers to an affidavit of Rachel Kitson filed on behalf of the 2nd and 3rd defendants, which exhibits a notice posted on the claimant's CSport app about the same time as the Jamaica Observer social media post. She says the imminent urgency in Oliver McIntosh's affidavit of urgency, to which Ms Cummings referred, seemed to have resulted from notices of termination the claimant received from the National Basketball Association and the National Football League. It was his affidavit filed on April 2, 2024, in which Oliver McIntosh outlined the issues the claimant has with respect to the broadcast of the English Premier League and made allegations of anticompetitive conduct on the part of the defendants. She says the 1st defendant has advised her that ESPN procured the live broadcast rights for the EPL, and that as Digicel+ already aired ESPN on one of its channels, no arrangement similar to a carriage agreement being proposed by the claimant was necessary.

9. Ms Samuels says the claimant did not act reasonably in its withdrawal, as it did not immediately advise the court or the defendants that it had lost the broadcast right to the EPL. She exhibits her letter dated September 5, 2024, to Archer Cummings & Co., inviting an indication of the claimant's posture, considering the new development, and Ms Cummings response of September 10, 2024. When the matter came before the court on September 16, 2024, that was when counsel for the claimant Douglas Leys KC, orally informed the court that: "The EPL is the owner of the rights and for whatever reason they have determined to end those rights. It has nothing to do with the Claimant or the Defendants". According to Ms Samuels, the claimant's urgent application for injunctive relief was not restricted to

the EPL games. She says that the 1st defendant has incurred significant costs in its preparation and response to the application and should not have to bear costs of a flawed and now abandoned application.

Analysis and findings

10. The general rule is that if the court decides to order costs, it must order the unsuccessful party to pay the successful party's costs. (CPR 64.6(1)). Success however must be real rather than pyrrhic. Lightman J in **Bank of Credit and Commerce International SA (in liquidation) v Ali (No. 4) [1999] 149 NLJ** put it this way in discussing the English rule, equivalent to our CPR 64.6(1): -

> "For the purposes of the CPR success [is not] a technical term but a result in real life, and the question as to who succeeded is a matter for the exercise of common sense."

11. CPR 37.6(1) provides that unless the parties agree or the court otherwise orders, a claimant who discontinues a claim is liable for the costs of the defendant against whom it has discontinued, incurred on or before the date a notice of discontinuance is served. The default position on a discontinuance, therefore, is that the discontinuer is liable to pay costs on the discontinuance of a claim. There is however no similar provision in the CPR which deals with the payment of costs on the withdrawal of an interlocutory application by an applicant.

12. CPR 64.6(3) provides that in deciding who should pay costs, the court must have regard to all the circumstances and, CPR 64.6(4) outlines some of the factors that it should consider. These factors are: -

    a) the conduct of the parties both before and during the proceedings;
    b) whether a party succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);

d) whether it was reasonable for a party –

   (i) to pursue a particular allegation; and/or

   (ii) to raise a particular issue;

e) the manner in which a party has pursued

   (i) that party's case;

   (ii) the particular allegation; or

   (iii) a particular issue;

f) whether a claimant who has succeeded in his claim, in whole or in part exaggerated his or her claim and;

g) whether the claimant gave reasonable notice of intention to issue a claim**.**

13. This is not case of the discontinuance of a claim, and therefore the default position under CPR 37.6(1) does not apply. Counsel for the 2nd and 3rd defendants argue in their written submissions that on the withdrawal of the urgent notice of application for injunctive relief, the defendants are the successful party. I cannot agree. There has been no determination by the court on the application which was part heard at the point of the withdrawal. It therefore cannot be said that any party has succeeded on the withdrawal. To describe it as such, would in my view, make success a mere technical term, which is not contemplated by CPR 64.6(1).

14. The 1st defendant in its written submissions, argue that the approach to the discontinuance of a claim ought to be adopted. The rationale for the default position on a discontinuance may well be that a defendant having incurred costs in defending the claim brought against it, ought to be indemnified for those costs where a claimant decides not to proceed with its claim and in doing so deprives him of the chance to vindicate himself. (See **Maini v Maini [2009] EWHC 3036(Ch**)). With costs to the defendant being the default position on the discontinuance of a claim by virtue of CPR 37.6(1), there is a presumption that the

defendant will get his costs. As attractive as the 1st defendant's submission is, I believe that if our Rules Committee had intended the same presumption to apply in cases of a withdrawal of an interim application, it would have made provision for this in the CPR. It did not. The provisions of CPR 64.6 provide sufficient basis, in my view, to resolve the issue of costs where, as in the current case, an interim application is withdrawn. CPR 64.6(3) requires that if the court decides to make and order in relation to costs, it must have regard to all the circumstances. For the reasons that follow, this is an appropriate case, in my view, for an order in relation to costs.

15. The affidavit evidence and the written submissions on all sides are voluminous. Technical competition law issues including dominance and its determination in a relevant market; the definition of the relevant market or markets and the applicability of the Herfindahl-Hirshman Index, required scrutiny and analysis. The preparation of affidavit evidence in support of and in response to the urgent application, the preparation of written skeleton submissions and the preparation for the hearing, would have undoubtedly taken significant time, skill and expertise of counsel. Moreover, at the time of the withdrawal, the application was part heard, the claimant's counsel having made oral submissions lasting over three hours on May 16, 2024.

16. What is demonstrably obvious about the evidence of Ms Cummings, is that she does not say precisely why the claimant's EPL broadcast rights were terminated or that any other broadcast rights were terminated. She does not say that the termination was caused by the defendants' conduct, or by the claimant's inability to acquire access to the defendants' cable networks. Indeed, Ms. Samuels is correct when she says that King's Counsel Mr Leys, informed the court at the adjourned hearing on September 16, 2024, that the termination of the EPL rights was not due to the fault of any of the parties. Ms Cummings seems to attribute the termination, to: "outside and intervening acts beyond [the claimant's] control, which

have: “changed the course of this matter”, such that the continuation of the urgent application: “would only be of academic value or nugatory”.

17. What is unclear, and the claimant’s evidence falls far short of explaining, is why did the termination of the claimant’s EPL rights, make the further conduct of the urgent application, academic or nugatory? The application and the claim on which it was premised, were concerned not only with the EPL games but with other live elite games which the claimant contends is part of its cable channel content and which it is desirous of providing to the defendants for broadcast on their subscriber cable networks. Oliver McIntosh in his urgent application filed on April 2, 2024, referred at paragraph 6, to live elite games other than the EPL, for which there was a fear of the termination of broadcast rights. Following on, in paragraph 7, he speaks to the effect on the claimant’s business and reputation of the defendants’ refusal to deal with the claimant. Although Ms Cummings quoted extensively from that affidavit, she omitted these two paragraphs, which read as follows:

> “6. We have received notice of termination from the National Basketball Association and the National Football League in the United States of America for live broadcast on our channels as a consequence of the Defendants (sic) actions to exclude us from the market. These notices take effect on April 3, 2024 (NBA) and April 20, 2024 (NFL). The Defendants with their interconnected company, Caribbean Premier Sports Limited, acquired broadcast rights for some of the NFL games in November 2023 and are competing with NFL games held by the Claimant company. They have the potential to acquire the NFL games held by the Claimant if or when terminated.
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> 7. The continued refusal by the defendants to deal with the Claimant has had significant and ongoing detrimental effects on the Claimant’s business and reputation. Granting injunctive relief would be a necessary and

proportionate measure to address these issues and ensure fair competition in the market."

Ms Cummings has not said in her affidavit, that the claimant's NFL and NBA broadcast rights have also been terminated.

18. Coupled with the foregoing, is the fact, highlighted in the submissions of the 1st defendant, that Ms Cummings says in her affidavit, that the EPL broadcast rights were terminated before the August 2024 season. Yet, the claimant did not inform the court or the defendants of its intention to withdraw the urgent application until the adjourned hearing on the morning of September 16, 2024. It is also apparent from Ms Samuels' affidavit, the correspondence between counsel to which she refers, and the affidavit of Rachel Kitson filed by the 2nd and 3rd defendants on the morning of September 16, 2024, that the claimant would have been aware that its EPL broadcast rights were terminated from at least as early as August 13, 2024. The claimant ought to have advised the defendants of its definitive posture in relation to the conduct of its urgent application, before the hearing on September 16, 2024. Ms Samuels' in her correspondence to Ms Cummings, which she exhibits before the court, urged this approach on the claimant, as it was expressly stated that without such an indication, counsel would be obliged to put themselves in a state of readiness for the continuation of the hearing of the application, scheduled for September 16, 2024, with obvious implications for costs. I cannot agree with Ms Cummings, that the claimant acted reasonably in its withdrawal of the urgent notice of application.

19. The claimant places considerable emphasis on the failure of the defendants to make themselves available for the adjourned hearing of the urgent notice of application during the long vacation. It has also expressed, what appears to be a veiled reproach to the court, for not facilitating a hearing prior to September 16, 2024. The reality is that the claimant's approach to its oral submissions before the court on May 16, 2024, belied any urgency. When I made case management orders in this matter, I indicated that the hearing of the urgent application would

last for 3 hours. The defendants are correct to say, that despite my continuous indications to the claimant's counsel during their oral submissions, that I had read all the affidavits and the written submissions, they therefore need not go through them in minute detail, and that they were well over their allotted time, the claimant's counsel did not take kindly to my urgings. In fact, they suggested that the claimant needed more than three hours to submit both on the law and the evidence. This would naturally mean that May 16, 2024, would be insufficient time for their oral submissions, let alone, the oral submissions of the defendants.

20. Counsel did not express any concern, when seeking more time to make submissions on May 16, 2024, that time was of the essence in relation to their EPL broadcast rights or any other broadcast rights. The adjourned date of July 5, 2024, was agreed by all the parties. Hurricane Beryl however intervened and prevented that hearing being held. There was only one date during the long vacation that I was available to hear this matter, and that was August 8, 2024. As it turns out, King's Counsel, Mrs Kitson for the 2nd and 3rd defendants was unavailable throughout the entire month of August. This is not unusual. Scheduling difficulties during the court's long vacation are recognised. I will therefore not place any blame at the feet of the defendants for the adjourned hearing being scheduled for September 16, 2024, which was the first day of the Michaelmas Term 2024.

21. Having regard to all the circumstances of this case; the lack of sufficient evidence from the claimant to justify the withdrawal; its failure to heed counsel's urgings to definitively indicate before September 16, 2024, whether it intended to continue with the urgent application after having its EPL broadcast rights terminated; it is, in my view, only fair and just, that costs on the withdrawal be awarded to the defendants.

Conclusion

22. In the circumstances, I make the following order: -

a) Costs to the defendants on the withdrawal of the claimant's urgent notice of application for injunctive relief, to be agreed or taxed.

A Jarrett
Puisne Judge