

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CIVIL DIVISION**
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5 Cause No: G0276/2014
6

7 **BETWEEN:**

8 **GRANT THORNTON (a firm)**
9

10 **PLAINTIFF**

11 **AND:**

12 **TELECAYMAN LIMITED**
13
14

15 **DEFENDANT**
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18 **Appearances:**

19 **Mr. Pramod K. Joshi of Stenning & Associates**
20 **for the Plaintiff**

21 **Ms. Yvonne Mullen of Broadhurst LLC for the**
22 **Defendant**
23

24 **Before:**

Mr. Justice Robin McMillan (Actg.)

25 **Heard:**

10th August 2015
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27 **JUDGMENT**
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30 1. In this hearing the Court has been asked to consider and decide upon two Summonses
31 on behalf of the Plaintiff and the Defendant respectively.
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33 2. The first in time was issued by the Plaintiff on the 6th May 2015 and seeks judgment
34 for the Plaintiff and consequential costs by virtue of:
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- 1 i. GCR O.14 r.1 (summary judgment) on the ground that the Defendant has
2 no defence to the Plaintiff's claim; or
3 ii. That the Defence dated the 8th February 2015 and filed on the 9th February
4 2015 be struck out pursuant to GCR O.18 r.19(1).
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6 3. The second Summons is much more recent in time – issued on the 3rd August 2015 –
7 seeking leave, pursuant to GCR O.20 r.5, for the Defendant to '*amend its Defence*',
8 and consequential directions.
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10 4. The Plaintiff contends that, by virtue of its Summons being the earlier in time, and, in
11 any case, more logically, its Summons should be dealt with first. If the Plaintiff is
12 successful, the need for any '*amendment*' to the Defence will fall away. The Plaintiff
13 argues that it is only if the Plaintiff is not successful on either of its applications that
14 the Defendant's Summons falls to be considered. I agree with that contention.
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BACKGROUND

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3 5. The Plaintiff issued a Writ on the 23rd December 2014 seeking the liquidated sum of
4 US\$40,000, as invoiced, or payment *quantum meruit* in the alternative, and arising
5 under the terms of a letter of engagement ("the Agreement") between the Plaintiff and
6 the Defendant executed on the 28th November 2012, for professional accountancy/
7 auditing services to the Defendant.

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9 6. The invoice numbered 26706 was issued on the 3rd March 2014 and remains unpaid.

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11 7. The Defendant filed an acknowledgment on the 20th January 2015 and a belated
12 Defence on the 9th February 2015. The Plaintiff would have been entitled to Judgment
13 in Default, but for an error on the part of Court staff that resulted in a refusal by Justice
14 Mangatal of an application that had been made.

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16 8. The Plaintiff contends that the Defence made little or no sense and disclosed no
17 reasonable defence to the action in any case; a Request for Further & Better Particulars
18 was issued and again, after some delay, was responded to by the Defendant.

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20 9. The position of the Plaintiff has not changed: That no viable Defence is ascertainable
21 from the original Defence even with the Replies to hand.

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23 10. The Defendant has now applied to amend its Defence, although, in fact, the proposed
24 'amendment' does not amend the Defence as such but seeks to add a Counterclaim.

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26 11. In the alternative the Plaintiff invites the Court to strike out the Defence under GCR
27 O.18 r.19.

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THE PLEADINGS

12. The Statement of Claim is as follows:

"Statement of Claim

1. *The Plaintiff is a partnership (for the avoidance of doubt comprising Terry William Carson and Ian Richard Johnson) of accountants and auditors with trading premises located at 5th Floor, Bermuda House, Dr. Roy's Drive, George Town, Grand Cayman, Cayman Islands.*
2. *The Defendant is a company in the business of telecommunications and with registered offices at 40 Linwood Street, George Town, Grand Cayman, Cayman Islands.*
3. *By an engagement letter dated 27th November 2012 duly signed by the Defendant or its servant or agent on 28th November 2012 (the 'agreement') the Defendant instructed the Plaintiff to carry out the work set out in the said agreement. So far as is material to this claim the fee for the said work was,*
 - a. Stipulated at Plaintiff's normal hourly rates and in addition to include its expenses, and*
 - b. Capped at no more than US\$45,000, and*
 - c. Payable upon receipt.*
4. *On 3rd March 2014 a 'Fee Note' was raised for the said work (the 'invoice') and delivered to the Defendant claiming the sum of US\$40,000 under invoice number 26706.*
5. *In breach of the agreement the Defendant has to date failed to discharge the said invoice or pay any sum in part-payment thereof.*
6. *The Plaintiff is entitled to and seeks the liquidated sum of US\$40,000 as invoiced and in the alternative seeks payment quantum meruit for the work carried out as such rate and for such time as the Court may determine. The Defendant has benefitted from the work carried out by the Plaintiff and in the premises the Plaintiff contends that it is entitled to payment and interest*



thereupon pursuant to section 34(1) Judicature Law (2013 Revision) and the Judgment Debts (Rates of Interest) Rules 2012.
Statement Regarding Interest;

7. Pursuant to section 34(1) (a) and (b) the Plaintiff claims interest on the said debt at the prescribed rate of 2.375% per annum pro rata at the daily rate of US\$2.60 and amounting to US\$769.60 from 3rd March 2014 to date and continuing until Judgment or sooner payment together with interest at the same daily rate post-Judgment until the date of payment unless the Court shall otherwise direct.

8. And the Plaintiff Claims:

- a. The liquidated sum of US\$40,000.00; or
- b. Damages in such sum and at such rate and for such time and the Court may determine; and
- c. Interest pursuant to section 34(1) (a) and (b) of the Judicature Law (2013 Revision) in the sum of US\$769.60 and continuing at the daily rate of US\$2.60 until Judgment or sooner payment or at such rate and for such time as the Court shall deem fit; and
- d. Costs”

13. The Defence states as follows:

“Defence

1. Paragraph 1 and 2 of the Statement of Claim are admitted.
2. With respect to paragraph 3 of the Statement of Claim, it is admitted that there is an engagement letter dated 27 November 2012 executed by Albert Fitzgibbons a director of Javelin Communications Bermuda Ltd. (“Javelin”) the former owner of the Defendant (the “Engagement Letter”). It is averred that to the knowledge of the Plaintiff, Javelin sold its ownership interest in the Defendant to WestTel Limited in March 2013. It is further averred that instead of taking instructions from the new owner and directors of the Defendant the Plaintiff continued to take instructions from Javelin to complete works that



1 were necessary for Javelin and/or for the benefit its subsidiary,
2 TeleBermuda International Limited ("TeleBermuda").

- 3 3. With respect to paragraph 4 of the Statement of Claim, it is admitted
4 that the Plaintiff prepared fee notes. It is averred that as the Plaintiff
5 recognized it was taking instructions from Javelin and/or
6 TeleBermuda to complete work for the benefit of those entities it
7 invoiced those entities for the work. When Javelin and/or
8 TeleBermuda refused to pay for the works the Plaintiff later demanded
9 payment from the Defendant.
- 10 4. Paragraph 5 of the Statement of Claim is denied. It is averred that the
11 Plaintiff knowingly took instructions to complete works from an entity
12 not entitled to give instructions on behalf of the Defendant. It is further
13 averred that the works were not for the benefit of the Defendant but
14 rather were necessary for Javelin and/or TeleBermuda. The Defendant
15 did not authorize the works to be completed and was unaware that the
16 Plaintiff was taking instructions from Javelin/TeleBermuda.
- 17 5. Paragraph 6 is denied. The Defendant did not benefit from the works
18 completed. The Defendant further does not admit the extent or value of
19 the work completed and the Plaintiff is put to strict proof as to all
20 aspects of the work including what was completed, when it was
21 completed, its value, and upon whose instructions.
- 22 6. Paragraph 7 is denied. In the premises it is denied that the Defendant
23 is liable to the Plaintiff for the amount claimed or for any amount.
- 24 7. Save as is hereinbefore expressly admitted or averred, each and every
25 allegation set forth in the Statement of Claim is denied as if the same
26 were herein set out and traversed seriatim"
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1 *THE SUMMONSES*

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3 14. The Plaintiff's Summons is in these terms:

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5 "1. *There be Judgment for the Plaintiff as against the Defendant pursuant to*
6 *GCR Order 14 rule 1 on the ground that the Defendant has no defence to*
7 *the Plaintiff's claim; or*
8 2. *The Defendant's defence dated 8th February and filed on 9th February*
9 *2015 be struck out pursuant to GCR Order 18 rule 19(1) and there be*
10 *judgment for the Plaintiff and*
11 3. *The Defendant do pay or cause to be paid to the Plaintiff within 14 days*
12 *from the date of this Order the sum of US\$40,000 together with interest to*
13 *the date of this judgment; and*
14 4. *The Defendant do pay the Plaintiff's costs of the proceedings to be taxed if*
15 *not agreed."*
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17 15. The Defendant's Summons, on the other hand, is in these terms:

- 18 "1. *Pursuant to Order 20, Rule 5 of the GCR that leave be granted to the*
19 *Defendant to amend its Defence as set forth in the draft amended Defence*
20 *and Counterclaim that is attached hereto.*
21 2. *An Order stating that the Plaintiff has 14 days from service of the*
22 *amended Defence and counterclaim to serve any Reply to Counterclaim.*
23 3. *Directions for the exchange Lists of Documents and witness statements.*
24 4. *Further or other Order that may be deemed necessary.*
25 5. *An Order disposing of the Costs of this Summons."*
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1 16. The proposed Amended Defence and Counterclaim contains a new Counterclaim as
2 follows:

3 *"Counterclaim:*

4 8. *The description of the parties as set out in paragraphs 1 and 2 is*
5 *repeated.*

6 9. *By memorandum of agreement dated the 27 November 2012 made*
7 *between the Plaintiff and the Defendant herein, the Plaintiff*
8 *agreed to audit the accounts of the Defendant Company for the*
9 *year ending 2011.*

10 10. *It was an express and implied term and condition of that*
11 *agreement that:*

12 a. *That the Plaintiff owed a duty of good faith and*
13 *fidelity to the Defendant;*

14 b. *That the Plaintiff owed a duty of confidentiality to*
15 *the Defendant in respect of its financial*
16 *information;*

17 c. *That the Plaintiff would not disclose to any*
18 *unauthorized third parties any financial information*
19 *relating to the Defendant.*

20 11. *Further or in the alternative the Plaintiff herein owed to the*
21 *Defendant a duty of care and in particular a duty of*
22 *confidentiality.*

23 12. *The Defendant herein communicated confidential information,*
24 *namely its financial information for the year 2011 to the Plaintiff.*
25 *The sole purpose for that communication was to allow an audit to*
26 *occur.*

27 13. *In the premises, the Plaintiff received the said information well*
28 *knowing the limited purpose for which it was communicated and*
29 *where at all material times was under a duty of care and duty of*
30 *confidence towards the Defendant in respect of the confidential*
31 *financial information and each part thereof.*



1 14. *The Plaintiff at all material times was not entitled to use or*
2 *disseminate that confidential information, or any part thereof*
3 *without the prior consent of the Defendant.*

4 15. *On diverse dates in 2013 and 2014 the Plaintiff herein knowingly*
5 *disclosed the said confidential financial information of the*
6 *Defendant to a third party. The Defendant will give further and*
7 *better particulars of the breaches once discovery is made.*

8 16. *The said disclosure by the Plaintiff was negligent, a breach of duty*
9 *of care and of confidentiality and a breach of contract.*

10 17. *By reason of the matters aforesaid the Defendant had suffered*
11 *loss, damage, inconvenience and expense.*

12 *AND THE PLAINTIFF CLAIMS:*

13 1. *Damages for breach of duty, confidentiality and*
14 *breach of contract;*

15 2. *An Order for set-off, if necessary;*

16 3. *Pre-Judgment interest on damages pursuant to the*
17 *Judicature Law (2007 Revision);*

18 4. *Post-Judgment interest on damages pursuant to*
19 *the Judicature Law (2007 Revision);*

20 5. *Costs;*

21 6. *Such other relief as this Honourable Court sees*
22 *fit."*



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THE EVIDENCE

17. Evidence in support of the Plaintiff's case is provided by an Affidavit of Mr. Terry Carson, a part owner of Grant Thornton Accountants and Auditors, dated the 4th May 2015. Mr. Carson sets out the basis of the claim arising from the agreement entered into between Grant Thornton and the Defendant Company dated the 27th November 2012.

18. He asserts, *inter alia*, that no breach of contract of any kind is pleaded in answer to the claim and that the Defence does not, for example, allege that the fee note rendered "*is the liability of some other entity*". The central question, however, remains whether the fee note rendered is the liability of the Defendant. Mr. Carson further states that at no stage did the Defendant cancel or terminate the Agreement.

19. Mr. Carson, in summary, contends that the Defendant has failed to set out any actual defence.

20. The Defendant relies upon the Affidavit of Leslie Rams, dated the 3rd August 2015. Mr. Rams states in paragraph 1:



"1. I am the Chief Financial Officer of Keytech Ltd, which is the parent company of Westel Ltd, the entity which is in full ownership of the Defendant in these proceedings. I am duly authorized to swear this Affidavit on its behalf in response to the application by the Plaintiff, Grant Thornton ("the Plaintiff") for summary judgment against the Defendant."

1 21. The Plaintiff takes issue as to whether this Affidavit is from the Defendant in Reply,
2 arguing that it is made only on behalf of Keytech Ltd. However, I am prepared to
3 accept for the purpose of this hearing that Mr. Rams is duly authorized to swear the
4 Affidavit, as indeed he asserts under oath. In addition, as the Affidavit contains
5 evidence intended to assist the Court, I consider that it would be contrary to the
6 interests of justice for the Court not to consider it and simply to ignore it.

7
8 22. Mr. Rams states at paragraphs 3-6::

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10 *"Necessary Background"*



11 3. *The Defendant is a limited liability company. It was previously*
12 *owned by an entity called Telebermuda (International) Ltd.*
13 *("Telebermuda"). The Vice President of Telebermuda was*
14 *Deirdre Mellamphy, who was also at one point the Chief*
15 *Financial Officer ("CFO") of the Defendant Company. Ms.*
16 *Mellamphy performed the role of CFO as an adjunct to her main*
17 *duties with Telebermuda, I believe. She attended on the Island for*
18 *about one day a month for this purpose. Mr. Carson states at*
19 *paragraph 9 of this Affidavit that Ms. Mellamphy was difficult to*
20 *get hold of and get instructions from, but I have no direct*
21 *knowledge of this.*

22 4. *I believe that it was Ms. Mellamphy who originally instructed the*
23 *Plaintiff Company to perform an audit of the 2011 accounts of the*
24 *Defendant Company. The Letter of Instruction with regard to the*
25 *audit was signed by Albert Fitzgibbons on the 27th November*
26 *2012. Mr. Fitzgibbons was a director of the Defendant Company*
27 *until March 2013 and consequently had authority to sign on its*
28 *behalf. Now shown to me and exhibited hereto as "LRI" is the*
29 *aforementioned Letter of Instruction dated the 27th November*
30 *2012.*



1 5. *I understand that audit was commenced in very late 2012 and the*
2 *Affidavit of Mr. Carson dated the 4th May 2015 states that some*
3 *work was completed, however it was not finalized. At paragraph 2*
4 *of his Affidavit he refers to "detailed time-records" in respect of*
5 *the work, however these are not exhibited nor were they provided*
6 *to the Defendant at any point to date. Apparently a number of*
7 *queries were sent to Ms. Mellamphy, to which she did not respond*
8 *in a timely manner. Consequently the matter of the audit was left*
9 *open and was not concluded.*

10 6. *On the 6th March 2013 the entirety of the shares of the Defendant*
11 *Company was purchased by Westtel Ltd t/a Logic ("Logic"). It is*
12 *apparent from paragraph 16 (d)(ii) the Affidavit of Mr. Carson*
13 *that the Plaintiff was aware of the sale of Logic prior to the event*
14 *itself. I would put the matter further and say that the Plaintiff*
15 *Company was notified on the 22nd February 2013 that a sale was*
16 *imminent. The Plaintiff was approached to complete an Agreed*
17 *upon Procedures (AUP), which would assist in the sale. As set out*
18 *at paragraph 10 of the Affidavit of Mr. Carson this instruction was*
19 *under a separate letter of engagement, with a fee note numbered*
20 *26308 in the amount of \$4,000 being raised on the 27th February*
21 *2013. The fee was discharged by the Defendant on the 25th April*
22 *2013. By way of further support of the proposition that the*
23 *Plaintiff was aware of the sale of the Defendant I refer to the*
24 *email of Joni Steffan, audit manager in the Plaintiff Company*
25 *dated the 4th August 2014.*

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27 23. Mr. Rams continues at paragraph 14:
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14. *"It might further be noted that it appears from Ms. Mellamphy's email of the 15th October 2013 that she gave instructions to proceed with the audit. The Defendant Company did not receive the bill until the 3rd March 2014. Given the long time lapse and the fact that instructions were coming from Telebermuda it seems logical that the bill had earlier been presented to them and declined. I appreciate that there is some supposition in this statement, however I would point out that in paragraph 6(d) of Mr. Carson's affidavit, rather than outright deny such a thing happened, the Plaintiff simply laments the fact that we have not had sight of such a document. I would respectfully suggest to the Court that this might be a matter for discovery, which suggestion was set out in our Replies to Particulars dated the 22nd April 2015."*

24. Mr. Rams then goes on to state in paragraph 16 that the Defendant Company did not authorize any work post 6th March 2013.

25. Finally, in paragraph 17, Mr. Rams comments that it appears that the Plaintiff Company was communicating with an unauthorized third party (Ms. Mellamphy) in respect of the accounts and finances of the Company.

26. Indeed the evidence which Mr. Rams adduces is consistent with the primary facts set out in the Defence.

27. At this point I should record that it is my understanding that both parties have agreed that, insofar as the evidence of Mr. Carson and Mr. Rams may be relevant and admissible, it is relevant and admissible in relation to the O.14 application, but not in relation to the O.18 application, and the Court will proceed upon that basis.

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THE O.14 APPLICATION

28. The Plaintiff contends that it is entitled to summary judgment unless the Court dismisses the application or the Defendant satisfies the court that there is an issue or question in dispute which ought to be tried.

29. In this case, the preliminary requirements for proceedings under O.14 having been satisfied, the Plaintiff has therefore established a *prima facie* case, and "*the burden, as it were, then shifts to the Defendant to satisfy the Court why Judgment should not be given against him.*"¹.

30. Upon reviewing and considering the Defence, the Court enquired of counsel for the Defendant whether based upon the primary facts pleaded the Defendant was in effect stating that the work undertaken was in fact not undertaken in furtherance of the original agreement, and counsel agreed that in essential terms this was the Defendant's position.

31. Although the Defence does not per se allude to that specific proposition, nonetheless if the facts set out in the Defence were accepted by the Court as accurate, those facts might well have a bearing on whether on a balance of probabilities the Plaintiff ultimately proved its own case. Put more succinctly, it can be said that for the purpose of a summary judgment application, in the Court's view, the issues between the parties have been properly joined.



¹ (See the Supreme Court Practice 1999, Volume I, Note 14/4/1)

1 32. It is the view of the Court that the Defendant has indeed satisfied the Court as to why
2 Judgment should not be given against it. Both the Defence itself and the Affidavit of
3 Mr. Rams "*condescend upon particulars*", and therefore state sufficiently how the
4 Defence arises and what facts are relied upon to support it.

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6 33. In this context the Court reminds itself of the very pertinent comment of Smellie C.J.
7 in *ABC International Molson Coors Brewing Company v. ABC International*,²
8 where the learned Chief Justice emphasizes at paragraph 44 that the Court must be
9 "*very careful*" in granting relief by way of summary judgment to satisfy itself that the
10 defendant is unable to establish a *bona fide* case.

11
12 34. Furthermore, adopting the language of Vos J.A. in *Merren v. Cayman National*
13 *Bank*³, I find that the Defendant has shown a fair and reasonable probability that it has
14 a real, or *bona fide*, defence.

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16 35. In other words, guided by these judicial pronouncements I am satisfied that in relation
17 to O.14 there is a triable issue which ought to proceed to trial.



² 2008 CILR 87

³ 2008 CILR 428, paragraph 8

THE O.18 APPLICATION

36. Further to the findings which the Court has made above, the Court is also unable to agree with the Plaintiff's argument that on the pleaded case "*the Defence makes little sense*".

37. As stated at Note 18/19/10 of the Supreme Court Practice referred to previously: A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered. If the facts pleaded in the Defence are accepted by the Court as accurate, then once again it is impossible to consider that the Defendant is indeed lacking at least some chance of success.

38. Once it is pleaded as it has been that the Plaintiff knowingly took instructions to complete works from an entity not entitled to give instructions on behalf of the Defendant, and that those works were not for the benefit of the Defendant, it clearly follows that any such works were not done in furtherance of an agreement even if that assertion has not been stated in formal terms. Accordingly I find that this assertion has been stated in substance because of the facts pleaded.

39. The Court therefore concludes that there is no want of a reasonable defence and correspondingly that the Defence could not in any conceivable way tend to prejudice, embarrass or delay the fair trial of the action.



1 **THE DEFENDANT'S APPLICATION TO AMEND**

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3 40. In light of the Court's rulings as set out above, it is now necessary to consider and
4 decide upon the Defendant's application that leave be granted to amend its Defence by
5 the addition of a Counterclaim, as also set out above.
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7 41. The governing principle of law is succinctly described by Smellie C.J. in *Cayman*
8 *Islands Civil Aviation Authority v. Island Air Limited*⁴, where the learned Chief
9 Justice states at paragraph 8:

10 *"It is now settled law in this jurisdiction that an amendment should always be*
11 *allowed unless it would cause injustice to the other party or constitute a useless*
12 *claim because no evidence would be available to support it. This principle applies*
13 *at any time up to the time of trial."*
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15 42. It is to be noted that the amendment application has been made at what is still a
16 relatively early stage of these proceedings. In addition, there is no reasonable basis on
17 which it could cause injustice to the Plaintiff, nor cannot it be validly said to be a
18 useless claim because no evidence would be available to support it.
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20 43. Accordingly the Court grants leave to amend the Defence as requested the Court also
21 directs that the Plaintiff has fourteen (14) days from service of the Amended Defence
22 and Counterclaim upon the Plaintiff to serve any Reply to the Counterclaim.
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⁴ 2003 CILR 483



1 44. The Plaintiff's applications are dismissed and the Defendant's application is granted.
2 Before making a determination as to the costs of this hearing, I shall hear the parties
3 upon that matter.
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8 **Dated this the 14th day of September 2015**
9

Robin McMillan



10
11 **Mr. Justice Robin McMillan (Actg.)**
12 **Acting Judge of the Grand Court**