

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

**CCJ Appeal No GYCV2014/008
GY Civil Appeal No 52A of 2012**

BETWEEN

JAMES G. SAMUELS

APPELLANT

AND

**GUYANA TELEPHONE AND TELEGRAPH
COMPANY LIMITED**, a company continued under
the Companies Act 1001, as amended

RESPONDENT

**Before the Honourables:- Mr Justice Nelson
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson
Mme Justice Rajnauth-Lee**

Appearances

Mr Devindra Kissoon for the Appellant

Mr. Miles Fitzpatrick, SC and Mr F Timothy M Jonas for the Respondent

JUDGMENT

of

The Honourable Justices Nelson, Wit, Hayton, Anderson & Rajnauth-Lee

Delivered by

The Honourable Mr Justice Nelson

on the 20th day of July, 2015

Introduction

[1] This appeal deals with the question whether the Respondent Company, Guyana Telephone and Telegraph Company Limited (“GT&T”), lawfully blocked or suspended the Digital Subscriber Line (“DSL”) internet access provided to the Appellant, Mr James Samuels. GT&T’s actions were preceded by its discovery that Mr Samuels had begun using his DSL internet service for the purpose of making and receiving international calls using Voice Over Internet Protocol (“VoIP”) technology provided by the Vonage Company of the United States of America (“Vonage”). The issue of whether GT&T’s action was justified depends, in large measure, on whether the contract between the parties contained prohibitions restricting Mr Samuels’ use of his DSL internet service. After careful examination of the facts and the law, this Court holds that GT&T was in breach of contract when it disconnected or suspended Mr Samuels’ DSL internet service owing to his use of Vonage. For the reasons set out below, this appeal is therefore allowed, the cross appeal is dismissed, the decision of the Court of Appeal is set aside and the decision of the trial judge is hereby affirmed.

Factual Background

[2] In 2006, Mr Samuels, applied for and obtained DSL internet service from GT&T. Thereafter he subscribed to Vonage, a VoIP service which uses a subscriber’s internet connection to make and receive calls electronically. Mr Samuels wrote GT&T seeking a response to his intention to use his internet connection for VoIP purposes after signing up for Vonage. GT&T responded informing Mr Samuels that the terms of his contract prohibited him from using his DSL service for international telephone activity and international telephonic traffic bypass (i.e., bringing in or sending out international telephone calls).

[3] Mr Samuels proceeded nonetheless to use Vonage to contact his business associates in the United States of America. Upon discovering that Mr Samuels was using his DSL internet service to access his Vonage account, GT&T disrupted his internet service. On May 22, 2009 Mr Samuels

commenced these proceedings by generally indorsed writ claiming that the disconnection of his DSL internet access by GT&T was a breach of contract. Although at paragraph 5 of Mr Samuels' Amended Statement of Claim there is some ambiguity with reference to the "contract" pleaded, paragraphs 4 and 5 of the Amended Reply make it clear that there was no restriction in his contract for DSL internet services when he entered into the contract with GT&T. That contract consisted, so it was alleged, of the application form which Mr Samuels signed and which contained no conditions.

[4] GT&T argued that its contract consisted of both the signed application form and the DSL Agreement (also signed by Mr Samuels) which contained express restrictions on the use of GT&T's DSL service for "any international telephony activity" or for the purpose of international telephony traffic bypass. It also argued that Mr Samuels' use of Vonage was not only contrary to the terms of his written DSL contract but also contravened GT&T's exclusive licence to provide voice and data transmission service in Guyana as well as the provisions of the Telecommunications Act¹ (the Act) which prohibit the operation of an unlicensed telecommunications system.

[5] The trial judge, Rishi Persaud J, found in favour of Mr Samuels, holding that GT&T did not give Mr Samuels sufficient notice of the restrictive terms which were only brought to his attention after his DSL internet service had been disconnected. Persaud J was not convinced that Mr Samuels' use of Vonage contravened the Act, noting that the Act was first passed as far back as 1990 and would not have covered recent advances in technology such as VoIP. Persaud J also held that the GT&T's licence was void in that it contravened the Civil Law Act² which prohibits illegal monopolies. This conclusion was based on an earlier Court of Appeal decision, *Vieira Communication Ltd v Attorney General of Guyana*.³ By way of relief,

¹ Cap. 47:02.

² Cap 6:01.

³ (2009) 76 WIR 279.

Persaud J granted a declaration that GT&T was in breach of contract, an injunction restraining any interference with Mr Samuels' internet service, a mandatory injunction requiring a cessation of the interruption of Mr Samuels' internet service and damages to the tune of GUY\$1,000,000.

- [6] This decision was set aside by the Court of Appeal, with written decisions being handed down by Chang CJ (Ag.) and Cummings-Edwards JA; both of which were agreed to by Bovell-Drakes J., sitting as an additional judge. The premise of the Court of Appeal's reversal was that Persaud J did not consider the issue of implied terms. The court held that the restrictive clause contended for by GT&T ought to be implied into the contract between the parties in the interests of business efficacy. The Court of Appeal declined to express any opinion on Mr Samuels' alleged breach of the Act, owing to the dearth of expert evidence led at trial in relation to this issue. The court also found that the findings of Persaud J in relation to the validity of GT&T's licence had no bearing on the private law claim for breach of contract. The court therefore allowed GT&T's appeal and granted costs in the amount of GUY\$25,000. Both Mr Samuels and GT&T have challenged this decision by way of notice of appeal filed on December 19, 2014 and notice of cross appeal filed on January 28, 2015, respectively.

The Issues

- [7] Based on Mr Samuels' notice of appeal and GT&T's notice of cross appeal, this Court has been called upon to determine -
- (i) Whether the Court of Appeal erred in upholding the findings of fact of the trial judge, which findings were contrary to the weight of the evidence (the cross appeal);
 - (ii) Whether the Court of Appeal erred in implying a term into the contract restricting Mr Samuels' use of his DSL internet service for VoIP purposes (the appeal);

- (iii) Whether Mr Samuels' actions amounted to the operation of an unlicensed telecommunications system in breach of the Act (the cross appeal); and
- (iv) Whether GT&T's licence was void based on a violation of the provisions in the Civil Law Act which prohibits illegal monopolies and the right to freedom of expression granted under section 146 of the Constitution of Guyana (the appeal).

Reversal of findings of fact by an appellate court

[8] GT&T has argued that the Court of Appeal erred in upholding the findings of fact of the trial judge. In particular, Counsel submits that the findings of Persaud J that there was no written agreement between the parties, that there was no restrictive term in the parties' agreement and that GT&T did not sufficiently notify Mr Samuels of any restriction on his internet usage, runs contrary to the weight of the evidence. In support of its contentions, GT&T focuses on the numerous inconsistencies in Mr Samuels' pleadings and the evidence presented at trial. The litany of complaints highlighted by GT&T warrants close scrutiny of the pleaded case of both parties as well as the evidence before Persaud J. Given the prominence with which this material featured in the submissions of GT&T, we feel obliged to set out the pleadings and the evidence at trial in significant detail.

The Pleadings

[9] Pleadings are averments which a party makes to enable another party or parties to know in advance of the trial what case they have to meet and to define the issues on which the Court will adjudicate.⁴ If pleadings are contradictory or internally inconsistent, it falls upon the party affected to apply to strike out the same. The failure to take such preemptive action exposes a litigant to the risk that his adversary will lead evidence in accordance with such allegations in the pleading as he or she may wish to prove. In such a situation, the trial judge would then be compelled to decide

⁴ Halsbury's Laws of England (3rd edn.) at para. 4.

the case on the evidence actually placed before the court, as occurred in the instant appeal.

- [10] In this regard, it is clear that Mr Samuels' pleaded case evolved over the course of the litigation with no objection forthcoming from GT&T. Mr. Samuels put the following allegations before the trial court in his pleadings:

Amended Statement of Claim

"5. The Plaintiff will further contend that his use of the VOIP equipment was not a breach of the terms of his Contract that the service was not to be used for international telephony traffic bypass nor for any other purpose prohibited by the Telecommunications Act 1990 as alleged in the hereinafter set out letter delivered by the Defendant to him."

Paragraph 5 also sets out a related letter dated April 13, 2007 from GT&T which states, *inter alia*:

"... the contract that you signed as a DSL subscriber strictly prohibits using GT&T's DSL service for any "international telephony activity" and you agreed in that contract that you will not "use the [DSL] Service for the purpose of international telephony traffic bypass [i.e. bringing in or sending out international telephone calls]."

- [11] GT&T in its Amended Defence pleaded as follows:

"6. In 2006 the plaintiff entered into, and signed, a written contract with GT&T whereby GT&T would provide the plaintiff with DSL service pursuant to the terms and conditions of the contract. The parties to the contract were GT&T and James G. Samuels ..."

Paragraph 7 of the Amended Defence further alleged that the contract signed by Mr Samuels gave GT&T a right to discontinue its service for breach and provided as follows:

"(ii) The service does not facilitate international telephony activity and the customer shall not attempt to use the Service for the purpose of international telephony traffic Bypass [i.e. bringing in or sending out international telephone calls] nor for any other purpose prohibited by the Telecommunications Act of 1990."

[12] In his Amended Reply, at paragraphs 4 and 5, Mr Samuels expressly denied the contract pleaded in the Amended Defence or signature of it:

“4. Paragraph 6 of the Defendant’s Defence is denied and so far (sic) that the Plaintiff entered into and signed a written contract with the Defendant Company for the provision of DSL Service to him. The terms and conditions of the contract were never supplied to the Plaintiff upon entering the said contract with the Defendant. After the Plaintiff entered the contract with the Defendant and paid for the DSL Service the Defendant supplied a document to the Plaintiff entitled GT&T’s DSL agreement. The documents were never signed by the Plaintiff.

5. With regards to paragraph 7(ii) of the Defence even though the Defendant supplied its terms and conditions to the Plaintiff after he entered the contract, the Plaintiff will contend that he is not engaged in international telephony traffic bypass.”

[13] It is clear that when these pleadings are placed side by side, Mr Samuels neither admitted nor conceded that there was a contract between him and GT&T as pleaded in paragraph 6 of the Amended Defence or as alleged in the letter dated April 13, 2007 pleaded at paragraph 5 of the Amended Statement of Claim. It bears note that GT&T took no objection and allowed the matter to go to trial based on the pleadings as set out above.

The evidence before the trial judge

[14] Given that the state of the pleadings at the outset of the trial left the issues unclear, Persaud J ultimately had to be guided by the evidence before him. At the trial, Mr. Samuels in his witness statement and cross-examination gave evidence, which the judge was required to accept or reject. The evidence before Persaud J consisted of the answers to interrogatories, the witness statements, and the *viva voce* evidence of the witnesses. In this regard, the evidence of Mr Samuels himself and of Mr Gene Evelyn was of crucial significance to the judge’s ultimate findings of fact.

[15] In terms of the interrogatories, Mr Samuels stated in his answer filed on April 6, 2010:

“I say that the contract was an oral contract. After I paid the fee to the Defendant for the DSL service, it supplied a written agreement to me. I did not sign the Agreement.”

[16] Mr Samuels also filed a witness statement and attested to its truth and veracity. The Judge’s note of his evidence under cross-examination is as follows:

“Paragraph (2) W/S – Written contract – filled out a form; handed it over to them. Subsequently sent a written contract sent after a conversation with GT&T – April 2007 spoke with customer services in relation to VOIP being blocked.

A letter sent thereafter, in August 07’ by Director Evelyn. Letter dated 13th April 07’ (TAM Ex. “A”).

Fax contract dated 13th May 08’ (TAM Ex. “B”). The contract not supplied to me at time of filling up of form; read contract – Exhibit “B”.

This contract I was told by customer service that this represented the (sic) terms and conditions thereof. I did not agree to be so bound.”

[17] Mr Samuels was also cross-examined on the answers to the interrogatories, the notes of which read as follows:

“Sugg: Copy handed/supplied to me when I paid fee.

A: Not possible.

Sugg: Agreement **not** supplied to me before my inquiries and letter from GT&T.

Sugg: Refers to service agreement some time before.

A: Not possible. In none of my two (2) services prior to this did I have a contract. I did sign appl. no terms and conditions. Did have to apply in previous contracts. This was a feature attached to tele service. Two (2) previous cases were same. Did not see any terms and conditions. Those numbers are 233-5743 and 225-3969 – DSL services. Fees were paid by office. Can’t recall signing appl. form or getting terms and conditions.”

[18] From this note it seems that Mr Samuels is stating that no copy of the DSL agreement was supplied to him before his inquiries and the letter dated April 13, 2007 from GT&T. When it was put to him that he was referred to the DSL service agreement some time before, Mr Samuels is emphatic that in

previous contracts with GT&T he signed an application form but there were no terms and conditions.

[19] The main witness for GT&T was Mr Gene Evelyn, a director employed since 1998 by GT&T and responsible for rate fixing, regulation and public communications. He adopted and verified his witness statement. Mr Evelyn, at paragraph 12 of his witness statement, avers that in 2006 Mr Samuels entered into a written contract with GT&T for the provision of DSL service “pursuant to the terms and conditions of the contract.” Under cross-examination, Mr Evelyn stated:

“In normal course application has to be signed and he would have to agree to terms and conditions ... At time of signing terms handed to customer. I have no reason to believe it was not done here. I was not there. Can’t swear it was done.”

[20] When further pressed as to the alleged terms and conditions, Mr Evelyn said to the judge:

“Leaflet is terms and conditions. Not required to sign service agreement. There is a **place** to sign – Customers are not required to sign. Copies not made to be signed because we have to retain this. Don’t know if Samuels signed. Did say in Writ of Summons signed – this is not true. Don’t know if he was given service agreement...”

[21] Mr Evelyn thereafter expressed the view that Mr Samuels was carrying on an unlicensed telecommunications service and that the Director of Telecommunications was charged with enforcement of the Act. Enigmatically he essayed the view that GT&T had the power to disconnect or suspend service to Mr Samuels and thereby to enforce the Act. No provisions of the Act were referred to in this regard.

[22] When the parties closed their respective cases, the battle lines were clearly drawn. Mr Samuels contended for a contract that was in effect partly oral and partly written but was concluded by the overt conduct of GT&T in accepting monthly DSL payments and the supply of DSL internet access. On the other hand, GT&T advocated that the contract consisted of the application form which referred to terms and conditions contained in a

leaflet and the DSL internet access agreement said to be signed by Mr Samuels.

[23] The original application form of 2006 was not in evidence and no one could say whether it was the same or similar to the form labelled exhibit “D” which was produced at the trial. In addition, no DSL agreement signed by Mr. Samuels was put into evidence. Thus, the issue of the nature of the contract and its terms turned solely on the credibility of the witnesses.

[24] GT&T attempted to undermine Mr Samuels’ credibility by producing an affidavit filed on May 13, 2008 in previous proceedings between the parties which had commenced in 2007 (“the 2008 affidavit”). In the 2008 affidavit, Mr Samuels had stated that he entered into a DSL contract with GT&T, and exhibited thereto a copy of an unsigned DSL Agreement faxed to him by GT&T on April 16, 2007. It is evident that Persaud J was aware of this apparent inconsistency. After hearing the evidence, Persaud J in his written judgment, observed that there were ambiguities in the references to ‘contract’⁵ in pleadings filed in an earlier claim between the parties but noted that at trial Mr. Samuels adamantly denied having notice of any restrictive terms when he signed up for his DSL internet service.

[25] We can find no error in the approach of Persaud J who quite properly preferred the *viva voce* evidence given by Mr Samuels. In cross-examination Mr Samuels explained that the statement in the 2008 affidavit was attributable to a misunderstanding of his instructions to his then attorney. In any event, the statement in the 2008 affidavit was not matched by the document exhibited thereto which was (a) unsigned and (b) bore a fax date of April 16, 2007 when it was sent to Mr. Samuels. Further, under cross-examination Mr Evelyn, admitted that he could not swear that the terms and conditions were handed to Mr Samuels at the time of signing the application form. He went on to say that he did not know if Mr Samuels signed or was given a copy of the service agreement. Mr Evelyn then admitted that the

⁵ Decision of the Trial Judge in Claim No. 819-CD of 2009 at p. 3.

allegation in the witness statement (not the Writ of Summons as the transcript says) that Mr Samuels signed the DSL agreement was not true. It was, therefore, not surprising that the learned judge's assessment of Mr Samuels' oral evidence was not affected by the 2008 affidavit. After hearing all evidence, Persaud J concluded as follows:

“... I find the Defendant has failed to prove that the terms were brought to the attention of the Defendant (sic) at the relevant time or that he had an opportunity to read them when he applied for the DSL service. I accept the evidence of the Plaintiff on this issue and find that the Defendant did not do all that was reasonably sufficient to give the Defendant (sic) notice of the conditions relied upon ...”⁶

[26] Persaud J therefore held that “the unilateral termination of the Plaintiff's DSL Service by the Defendant was whimsical and unlawful.”⁷ The judge nevertheless went on to hold that he was unable to find that Mr. Samuels' use of his Vonage VoIP equipment on GT&T's DSL line constituted a “telecommunications service” within the Act. Despite the existence of inconsistencies in the pleadings, the learned trial judge heard the witnesses and made findings of fact on their credibility. He found that the contract between the parties did not contain any restrictive terms. He also found that GT&T did not do all that was reasonably sufficient to give Mr Samuels notice of the conditions it relied on in justifying its disconnection of his internet service.

[27] These findings were upheld by the Court of Appeal. Both Chang CJ (ag.) and Cummings-Edwards JA accepted that there was no express term in the contract between the parties restricting Mr. Samuels' use of Vonage equipment on GT&T's DSL line.⁸ Rather the Court of Appeal reversed the decision of Persaud J on a point of law, i.e. on the basis of an implied term.

[28] After careful examination of the facts and the law, this Court affirms Persaud J's acceptance of the evidence of Mr. Samuels as well as the finding

⁶ Ibid at pgs. 3-4.

⁷ Ibid at p. 7.

⁸ Decision of the Court of Appeal in Civil Appeal No 52A of 2012.

that GT&T did not do all that was reasonably sufficient to give Mr. Samuels notice of the conditions it relied on. It is well settled that a final appellate court should be slow to reverse a trial judge's findings of fact, not disputed by the Court of Appeal, see *Meenavalli v Matute*⁹ and *Ali v Choong*.¹⁰ The principle is vividly stated in *McGraddie v McGraddie*,¹¹ where Lord Reed in the U.K. Supreme Court cited with approval a passage from Lord Hope of Craighead in *Thomas v Kvaener Govan*:¹²

“It can, of course, only be on the rarest occasions and in cases where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.”

[29] We can find no basis upon which the findings of Persaud J ought to be disturbed. The case ultimately turned upon issues of credibility. It is trite law that such matters are almost the exclusive domain of the trial judge who would have seen and heard the *viva voce* evidence. This appeal is not one of those rare cases warranting appellate intervention. Therefore this aspect of GT&T's cross-appeal cannot succeed.

Implied Terms

[30] Although the Notice of Appeal dated July 24, 2012 did not raise any issue regarding implied terms, the Court of Appeal considered Persaud J should have implied a term restricting Mr Samuels' use of his DSL internet service. It should be noted the Court of Appeal raised the issue of implied terms *sua sponte* as neither the pleadings nor the evidence led at trial contain any reference to implied terms.

[31] The Court of Appeal felt convinced that a term should be implied into the contract between the parties prohibiting Mr Samuels' use of his DSL internet service for “any international telephony activity” or for the purpose of international telephony traffic bypass. In the view of the court, such an implied term was necessary to give “business efficacy” to the agreement in

⁹ [2014] 4 C.C.J. 8 (A.J.).

¹⁰ (2013) 81 W.I.R. 579.

¹¹ [2013] 1 W.I.R. 2477.

¹² [2003] UKHL 45; 2004 SC (H.L.) at [17].

light of the following factors: GT&T viewed the utilisation of its DSL services to access VoIP as a breach of the Act; GT&T considered its monopoly over the international telecommunications services would be undermined if it allowed the use of VoIP and Mr Samuels own actions in writing to GT&T seeking a favourable response before signing up for Vonage.

[32] The modern law on implied terms was stated by Lord Hoffmann in *Attorney-General of Belize and others v Belize Telecom Limited*.¹³ The observations of his Lordship in this regard merit being set out in full:

“Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: See Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All ER 98, [1998] 1 BCLC 493, [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. **The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so.** Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.” (emphasis added)

[33] This Court accepts this statement of the common law and respectfully states that it also represents the law of Guyana. Neither the Court of Appeal *proprio motu* nor GT&T before this Court properly applied the principles

¹³ [2009] 1 WLR 1988 (P.C.) at [16] and [17].

on implied terms set out in *Attorney-General of Belize v Belize Telecom* (supra). On the contrary, the background knowledge reasonably available might have revealed that commercial DSL internet access providers in some Caribbean countries raise no objection to the use of Vonage VoIP equipment on their DSL lines. In fact, in the course of argument, counsel for GT&T accepted that in some countries of the region the use of Vonage equipment on internet access DSL lines is permitted. We have also taken judicial notice of the European Union regulatory framework for electronic communication¹⁴ which came into force in 2003 and supersedes the EC Directive 98/10/; the latter being highlighted in *Minister of Industry Commerce and Technology and ors. v Infochannel Ltd and ors.*¹⁵ This framework is constructed on the understanding that VoIP is frequently used in different contexts, i.e. on a personal computer, on a private network or as a public service. The nature of the service being offered is the determining factor as to whether the use of VoIP falls within the regulatory framework or not.¹⁶ Further, GT&T contended that in the course of its operations it became necessary to have an express term prohibiting the use of Vonage VoIP equipment on its DSL internet service for the purpose of making and receiving voice communication. The foregoing suggests that GT&T came to the clear conclusion that it could not assume that such a term was implied in its contracts.

[34] Neither the pleadings nor the evidence led at trial by GT&T spoke to the issue of implied terms. Rather its case was argued on the basis that there was an express restrictive term in their contract with Mr. Samuels. Nonetheless the Court of Appeal came to the conclusion that an implied term was necessary in the interests of business efficacy, even in the absence of any evidence led by GT&T as to how Mr. Samuels' actions would

¹⁴ Framework Directive (2002/21/EC); Authorisation Directive (2002/20/EC); Access Directive (2002/19/EC); Universal Service Directive (2002/22/EC); Privacy Directive (2002/58/EC) and the Competition Directive (2002/77 EC).

¹⁵ Civil Appeal Nos. 1&6/2003.

¹⁶ The Treatment of Voice over Internet Protocol (VoIP) under the EU Regulatory Framework, European Commission Staff Working Document, 14 June 2002.

jeopardise their business interests. The reasoning of the court, as per Cummings-Edwards JA, was that:

“Mr. Samuels' action in simple terms, allows him to make free overseas calls without going through GT&T. If GT&T is the sole provider of overseas calls, it goes without saying that such actions would be damaging to it.”¹⁷

[35] The Court of Appeal seems to have assumed that GT&T's business would be so adversely affected by the actions of only one of their customers that a term must be implied in their contract with Mr. Samuels. In so doing the Court of Appeal fell into error. As observed in *Payzone UK Ltd v Charmatz* the issue of implied terms must be pleaded and must be supported by evidence. Especially given the recent vintage of technological advancements such as VoIP, the Court cannot accept as a foregone conclusion that an implied term was necessary in the interests of business efficacy. There is great force in the following observations of the Court of Appeal in *Payzone* which apply with equal force to the instant appeal:

“this is not ... a case which can simply be taken as a question of law. There are serious factual matters to be investigated. It seems to me that, as with any implied term, it would be necessary to investigate what the facts were in the contemplation of the parties at the time the original contract was made.”¹⁸

[36] The decision of the Court of Appeal is also unsustainable given that the court was driven to imply a term on the basis of Mr. Samuels' conduct subsequent to the formation and execution of the contract, namely his letter of April 13, 2007. By this letter, Mr. Samuels informed GT&T of his intention to use Vonage via his DSL internet connection. Chang CJ (Ag.) considered that that fact “spoke loudly”¹⁹ in favour of an implied term that GT&T's permission was required before Vonage VoIP facilities could be used on its DSL lines. However, it is well established that conduct related to acts subsequent to the formation of the contract is of limited value in

¹⁷ Decision of Cummings-Edwards JA at [22].

¹⁸ [2014] EWCA Civ 1359 at [12].

¹⁹ Decision of Chang CJ (ag.) at p. 9.

assessing the contemporaneous terms of the contract in the event of a dispute. This principle was correctly stated by Sales J in *Sattar v Sattar*²⁰ as follows:

“Conduct of a party after the making of a contract does not provide relevant factual context to explicate the meaning with which the parties used the words at the time they made the contract.”

[37] We therefore hold that the decision of the Court of Appeal implying a restrictive term into the contract between Mr Samuels and GT&T must be set aside. Mr. Samuels is therefore entitled to succeed on this aspect of his appeal.

[38] Our conclusion on the nature and terms of the contract between GT&T and Mr Samuels and the absence of any implied term therein are sufficient to dispose of this appeal and cross-appeal. However, out of deference to counsel, we proceed to deal with GT&T’s claim that the suspension of Mr Samuels’ DSL internet service was justified because he was in breach of the Telecommunications Act and Mr Samuels’ contention that GT&T’s exclusive licence was invalid by virtue of the Civil Law Act and the Constitution of Guyana.

Breach of the Telecommunications Act

[39] The telecommunications sector in Guyana is regulated by specific legislation which provides for the issuance of a licence by the Minister or the Director of Telecommunications to all persons interested in operating a telecommunications system within Guyana. The terms “telecommunication system” and “telecommunication service” are defined in the Act as follows:

“telecommunication service” means any of the following, that is to say –

- (a) a service consisting in the conveyance by means of a telecommunication system of anything falling within

²⁰ [2009] EWHC 289 (Ch) at [36].

paragraphs (a) to (d) of the definition of “telecommunication system”;

- (b) a directory information service;
- (c) a service consisting in the installation, maintenance, adjustment, repair, alteration, moving, removal or replacement of apparatus which is or is to be connected to a telecommunication system.

“telecommunication system” means a system for the conveyance, through the agency of electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy, of –

- (a) speech, music and other sounds;
- (b) visual images;
- (c) signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images; or
- (d) signals serving for the actuation or control of machinery or apparatus;

[40] The Act penalizes the operation of an unlicensed telecommunications system.²¹ In this regard liability can attach to third parties whose act or default facilitates a breach of the Act: section 5(4). The licensing scheme created by the Act envisages the provision of exclusive licences, licences with limited territorial scope and conditional licences²² to persons desirous of operating a telecommunication system for the provision of telecommunication services. It also grants the Minister the power to designate a telecommunications system as a public telecommunications system subject to negative resolution of the Parliament.²³ Such a designation was made in relation to GT&T by Order 83 of 1990. It is against the backdrop of this legislative scheme that GT&T obtained an exclusive licence in 2006.

[41] The Act also places enforcement in the hands of the Director of Telecommunications. Section 5(7) of the Act provides that no proceedings shall be instituted in respect of an offence under this section except by or on

²¹ Section 5(1) of the Act.

²² See sections 7(4) – 7(6) of the Act.

²³ Section 9 of the Act.

behalf of the Director. Furthermore, section 13 of the Act empowers the Director to ensure compliance with licence conditions:

13. (1) ...where the Director is satisfied that a person who is authorized by a licence granted under section 7 to run a telecommunication system (in this Act referred to as a “telecommunications operator”) is contravening, or has contravened and is likely again to contravene, any of the provisions of this Act or the conditions of his licence, the Director shall by final order make such provision as is requisite for the purpose of securing compliance with that provision or condition.

[42] GT&T sought to defend suspension of Mr Samuels’ DSL internet service on the basis that his actions amount to the operation of an unlicensed telecommunications system within the meaning of the Act. Persaud J concluded that he was unable to find that the subscription to and activation of VoIP by Mr Samuels constituted a telecommunication service within the Act. The judge noted that GT&T had disconnected Mr Samuels’ DSL service on the assumption that he was operating a telecommunications service which fell within the parameters of the Act. He observed that Mr Evelyn, GT&T’s witness, so contended but had conceded that an internet based service such as that provided by Vonage was not a telecommunication service. Persaud J noted that Mr Evelyn went on to say that it was in fact treated as a communication service but not by the United States of America. The judge also noted that Mr Evelyn did not identify any country which treated internet based services as a telecommunication service.

[43] Having considered the unreported decision of the Jamaican Court of Appeal in *Minister of Industry Commerce and Technology and ors. v Infochannel Ltd and ors.*²⁴, Persaud J stated that he had not had the benefit of assistance from experts by way of oral evidence or upon affidavits. He therefore observed that he had to guard against the attempt to equate terms so as to bring the material in the Jamaican case within the scope of the dispute whether VoIP services could be deemed to be a telephony traffic bypass.

²⁴ *Supra*, *Infochannel* at note 15.

The judge observed that his task was to examine the status of technology in Guyana at the relevant time and to look at the relevant statutory provisions in that jurisdiction.

[44] The Court of Appeal was of the view that it was immaterial for the purpose of contract whether the sending and receipt of voice communication through the internet utilising Vonage VoIP service constituted a “telephone service” under the Act. Chang CJ (Ag.) observed that the legal finding in public law made by the trial judge that Mr. Samuels was not operating unlawfully, that is, in breach of public law, was not determinative of the central preliminary issue since it was open to GT&T to provide contractual limits to the use of its own DSL service. In his view, the central preliminary issue was whether there was a breach of contract by Mr. Samuels not in the usage of Vonage VoIP service to effect international voice or data communication but rather in the usage of GT&T’s DSL service to effect that purpose. He therefore did not determine whether there was a breach of the Act.

[45] Cummings-Edwards JA on the other hand faced the issue frontally. She observed that what constituted VoIP service was not a fact of notoriety and that expert evidence was required to determine if such service amounted to a “telecommunication system”. She noted that the subject called for expertise which a judge could not be expected to possess. She further observed that expert witnesses furnished the judge with the necessary scientific criteria for testing the accuracy of their conclusions. The trial judge had to form his/her own independent judgment by applying those criteria to the facts of the case which were proved. In her view, the necessary foundation and basis for treating Mr Evelyn’s testimony as expert had to be laid bearing in mind the witness’ experience, technical qualifications and training. The trial judge had to consider whether the witness was an expert in the field and make a ruling in that regard. That exercise had not been carried out by the trial judge. Cummings-Edwards JA concluded that, in the absence of expert evidence to explain whether VoIP fell within those

activities for which a licence was required pursuant to the provisions of the Act, the trial judge could not make the determination that he had made.

[46] Before us, GT&T has argued that the Act is crafted in ordinary language and does not require expert evidence to determine a breach thereof. GT&T submits that there is no material difference between VoIP and an ordinary telephone system such as that invented by Alexander Graham Bell. Both systems involve a speaker, a listener, electric conversion of sound and the conveyance of speech by electricity. Viewed in this light, GT&T contends that the use of VoIP must fall within the definition of “telecommunication system” as defined in the Act. It also cites the *Infochannel* case²⁵ where the Court of Appeal of Jamaica was called upon to determine a similar question in relation to Jamaican legislation which is substantially similar to its Guyanese counterpart and *Attorney General v Edison Telephone Co.*²⁶ GT&T further argues that the remit of the office of the Director of Telecommunications is irrelevant given that the Act would ascribe liability to GT&T for Mr. Samuels’ breach under section 5(4).

[47] Counsel for Mr Samuels submits that Mr Evelyn’s testimony (i.e. that VoIP is “not deemed a telecom service”), the legislative history of the UK parent legislation (i.e. introduction of the term ‘electronic communications network’ into the Communications Act 2003 (UK)) and leading US authorities²⁷ all make it plain that VoIP involves the transmission of data by electronic or digital means and therefore falls outside the ambit of the Act. Counsel further submits that the *Infochannel* case is inapposite given it dealt with Jamaican legislation in the context of the Jamaican telecommunications sector and there was expert evidence which was untested by cross-examination. Similarly the *Edison* case is distinguished on the basis that the two methods of communication involved the same agency, i.e. wire whereas VoIP involves data transmission. In any event,

²⁵ *Ibid.*

²⁶ (1880) 6 QBD 244.

²⁷ *Vonage Holdings Corp v Neb. Pub. Serv. Comm’n* [2009] 564 F.3d 900 (8th Cir. 2009) and *Minnesota Public Utilities Commission v FCC* [2007] 483 F. 3d 570 (8th Cir. 2007).

Counsel submits that GT&T is not empowered to make a determination of this issue given that any complaint that a person is operating a telecommunication service without a licence must be adjudicated upon by the Director of Telecommunications in accordance with the Act.

[48] We entirely agree with Cummings-Edwards JA that the trial judge required expert evidence to determine this issue, as demonstrated by the approach in the *Infochannel* case. We also agree with her that the Court of Appeal was in no better position than the lower court to decide the issue of VoIP in the absence of such testimony and cross examination thereon. This Court is also in no better position. We note further the crucial significance of this issue to the general public in Guyana and we dare say in the entire Caribbean region. This Court is not disposed to decide such a fundamental issue without the requisite evidential foundation.

[49] Moreover, we cannot ignore the central role played by the Director of Telecommunications in enforcing the provisions of the Act. As such, we have asked the question: Could the trial judge find that Mr. Samuels' use of VoIP was a breach of the Act in the absence of a ruling by the Director of Telecommunications to that effect?

[50] In Guyana, it is clear that based on section 5(7) of the Act (referenced at [41] above) the only authority with power to assert a contravention of the Act is the Director of Telecommunications. We have observed that the Director has played no part in this dispute. He has not ruled that Mr Samuels has acted in contravention of the Act. He has not intervened in these proceedings on the basis that Mr Samuels has contravened the Act. He has not instituted proceedings against GT&T for facilitating a breach of the Act. In our view, in the absence of such involvement by the Director, we are not in a position to conclude that there has been a contravention of the Act.

The Validity of GT&T's telecommunications licence

[51] In framing his case for breach of contract, Counsel for Mr Samuels cast a wide net, mounting a challenge to the legality of GT&T's exclusive

telecommunications licence itself. Counsel argued that GT&T's exclusive licence was void because it furthers an illegal monopoly and it facilitates a breach of the right to freedom of expression under section 146(1) of the Constitution of Guyana. He further submitted that the Court of Appeal erred in holding that these were matters of public law which could not be ventilated under the auspices of a private law claim for breach of contract. In our view, Mr Samuels is not entitled to succeed on this aspect of his appeal for the following reasons.

[52] In making his case on the furtherance of an illegal monopoly, Counsel for Mr Samuels placed particular reliance upon the following provision in the Civil Law Act which appears in the Schedule to section 21:

PROVISION RELATING TO MONOPOLIES

1. All monopolies and all commissions, grants, licences, charters, and letters patent heretofore made or granted, or hereafter to be made or granted to any person or persons, bodies politic or corporate whatsoever, or for the sole buying, selling, making, working, or using of anything within Guyana, or of any other monopolies, or of power, liberty, or faculty, to dispense with any others, or to give licence or toleration to do, use, or exercise anything against the tenor or purport of any law or statute; or to give or make any warrant for any such dispensation, licence, or toleration to be had or made; or to agree or compound with any others for any penalty or forfeiture limited by any statute; or for any grant or promise of the benefit, profit, or commodity of any forfeiture, penalty, or sum of money that is or shall be due by any statute before judgment thereupon had; and all proclamations, inhibitions, restraints, warrants of assistance, any all other matters and things whatsoever, any way tending to the instituting, erecting, strengthening, furthering, or countenancing of the same, or any of them, are altogether contrary to the laws of Guyana, and so are and shall be utterly void.

[53] At first instance, Persaud J, after finding GT&T in breach of contract went on further to rule that "the licence granting an exclusive right or monopoly to the Defendant to provide telecommunications service or to control or

regulate voice and data transmission on the internet is unlawful and void.”²⁸ Express reliance was placed upon the foregoing portion of the Civil Law Act as well as the binding precedent of *Vieira Communication Ltd v Attorney General of Guyana*.²⁹ In *Vieira*, the Court of Appeal of Guyana held that the grant of exclusive radio licences to government controlled radio stations fell afoul of the aforementioned section 21. Persaud J held that GT&T’s licence was similarly void by parity of reasoning. It is interesting to note that no declaratory order to that effect appears in the decision of the trial judge.

[54] The Court of Appeal declined to make any pronouncement on the validity of GT&T’s telecommunications licence. In his decision, Chang CJ (Ag.) chided Persaud J for focusing “his judicial attention almost solely to the determination of public law issues” and further noted that the “findings made in favour of Mr Samuels on those public law issues were not at all consequentially determinative of the private law contractual issue i.e. contractual breach by G.T.&T.”³⁰ Cummings-Edwards JA agreed with Chang CJ (Ag.) on this issue and bolstered her conclusion by noting that the issue concerning the illegal monopoly did not form part of Mr Samuels’ statement of claim, that leave to amend their pleadings was refused in the Court of Appeal, that Mr Samuels brought his claim in the commercial court rather than the constitutional court and that the State was not a party to the proceedings. As such, Cummings-Edwards JA held that “Mr Samuels’ claim cannot properly justify an investigation into the public law issue of the grant of an unlawful monopoly by the State which he seeks to raise in his claim in contract.”³¹

[55] Before us, Counsel for Mr Samuels argues that the Court of Appeal erred in law in ruling that the matters concerning the validity of GT&T’s licence could not be ventilated in a private law claim. Counsel submits that the

²⁸ Decision of Persaud J. at p. 8.

²⁹ *Supra*, *Vieira* at note 3.

³⁰ Decision of Chang CJ (ag.) at pgs. 17-18.

³¹ Decision of Cummings-Edwards JA at [53].

Court of Appeal ought not to have relied upon the stringency of rules of procedure in seeking to defeat this aspect of his claim but rather should have been concerned to do justice to the case, particularly where allegations of a breach of constitutional rights are raised. Reliance was placed upon the cases of *Attorney General v Mohamed Alli*³² and *Cecil Abrams v The Attorney General of Guyana*³³ to make the point that rules of procedure ought not to be used to defeat the ends of justice.

[56] From a practical standpoint, Counsel for Mr Samuels also submits that to force him to commence fresh legal proceedings by way of constitutional motion would be a waste of judicial resources. Counsel further argues that the decision of the Court of Appeal runs contrary to the weight of authority, namely section 21 of the Civil Law Act and the *Vieira* case. The case of *Retrofit (Pvt) Ltd v Minister of Information, Ports and Telecommunication*,³⁴ where the Court of Appeal of Zimbabwe ruled that the monopoly licence granted to a mobile cellular provider contravened the right to freedom of expression under section 20(1) of the Constitution, is also cited by Counsel for Mr Samuels.

[57] From inception, Mr Samuels' claim was couched in the language of contract law. There is simply no indication on his pleadings that his was a mixed claim. As such the main issues between the parties centred on whether there was an oral or written contract and what the terms of their agreement were. To allow Mr Samuels to challenge the validity of GT&T's licence in these proceedings would be manifestly unfair to GT&T. This is simply not the pleaded case that GT&T was called upon to answer. Mr Samuels gave no notice to GT&T that wider public interest issues, such as the legality of monopolies and the infringement of constitutional rights, were at stake. It goes without saying that the principles of fairness and justice must be considered from the standpoint of all the parties to litigation. As Lord

³² (1987) 41 WIR 176.

³³ [1996 – 1998] GLR 1.

³⁴ [1996] 4 LRC 512.

Mustill observed in his oft-quoted observations in *R v Secretary of State for the Home Department, Ex p Doody*³⁵, though the standards of fairness are not immutable, they do require that a party be informed of the “gist of the case which he has to answer.”

[58] We note also that neither the State nor the Director of Telecommunications, both of whom would have an interest in the resolution of this issue, is a party to this appeal. This fact, in and of itself, serves as a basis upon which *Vieira* and *Retrofit* can be validly distinguished. For completeness we also note that a similar distinction can also be made in relation to the *Infochannel* case, to which reference was made earlier. In *Infochannel* that Court was dealing with a constitutional motion, not a breach of contract claim. We accept that there are instances where claims of public and private law can be pursued in one action. However this is generally an exceptional course of action as demonstrated by the following passage in *Swann v Attorney General of the Turks and Caicos Islands*:³⁶

“There are occasions where it may be appropriate to permit public law issues to be raised in what is essentially a private law claim, but they are relatively exceptional. Those occasions would normally be where the public law issues are of particular importance to the applicant or where they should be aired in the public interest.”

[59] Regrettably Mr Samuels has not provided any basis for treating his appeal as involving exceptional circumstances, as the groundwork for which could have been laid by joining the relevant parties or framing his pleadings and evidence to alert both GT&T and the lower courts as to the public law issues now being raised. We reiterate that the issues raised in this case have wider implications for the public of Guyana and the telecommunications sector throughout the region. We note also that under the Act, both the Minister and the Director of Telecommunications have a duty to “promote the interests of consumers, purchasers and other users in Guyana ... in respect of the prices charged for, and **the quality and variety of,**

³⁵ [1994] 1 AC 531 at 560.

³⁶ [2009] UKPC 22 at [16].

telecommunications services provided and telecommunication apparatus supplied³⁷ and to “**promote research into and the development of new techniques**”³⁸ by persons engaged in commercial activities involving the telecommunications sector in Guyana. (emphasis added).

[60] Based on the foregoing we feel fortified in our conclusion that this aspect of Mr Samuels’ appeal must be dismissed. In this regard, we prefer to wait until such issues are ripe for determination and are properly before us before expressing any views on such matters of fundamental public importance. Sight must not be lost of the fact that the essence of this appeal is what was the contract between Mr Samuels and GT&T. Did it contain restrictive terms? If so, did Mr Samuels breach those terms or any of them? As indicated earlier we agree with Persaud J that there was a contract between the parties, and Mr Samuels was not given sufficient notice of any restrictive terms in relation thereto. Therefore, in disconnecting Mr. Samuels’ DSL internet service, GT&T acted in breach of contract.

Conclusion

[61] We therefore uphold the findings of fact of Persaud J and the Court of Appeal and further reject the notion that a term was to be implied in the contract. We accordingly reject the ground of the cross-appeal that the decision of the trial judge was against the weight of the evidence. We also reject the argument of GT&T that Mr Samuels’ use of his Vonage VoIP equipment on GT&T’s internet DSL line was a breach of the Act. In this Court’s view, enforcement was a matter for the Director of Telecommunications as regulator and was not relevant to the issue of breach of the contract between GT&T and Mr Samuels. We decline to express any view on the validity of GT&T’s exclusive licence as well as the alleged infringement of section 146 of the Constitution and therefore dismiss this aspect of the appeal.

³⁷ Section 4(2)(a) of the Act.

³⁸ Section 4(2)(d) of the Act.

[62] The Court therefore makes the following orders:

- (i) that the GT&T Company is in breach of the contract between GT&T and Mr Samuels for the provision of DSL internet service at Mr Samuels' premises;
- (ii) that the order as to damages and to costs made by Persaud J on 28th July 2012 will stand;
- (iii) the order of the Court of Appeal dated July 8th 2014 is hereby set aside;
- (iv) the appeal is allowed;
- (v) the cross-appeal is dismissed;
- (vi) GT&T will pay the costs of Mr Samuels on the appeal and the cross-appeal and Mr Samuels' costs in the Court of Appeal to be taxed if not agreed.

/s/ R. Nelson

The Hon Mr Justice R Nelson

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee