

## CASE NOTE

### ***James G. Samuels v Guyana Telephone and Telegraph Company Limited (GT&T) [2015] CCJ 8 (AJ)***

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Restrictive terms governing use of VoIP telecommunications technology are not implied into contracts or are they a breach of the Telecommunications Act<sup>1</sup> according to the Caribbean Court of Justice.

CASE: *James G. Samuels v Guyana Telephone and Telegraph Company Limited (GT&T)*

CITATION: [2015] CCJ 8 (AJ)

PARTIES: James G. Samuels [Appellant]

Guyana Telephone and Telegraph Company Limited [Respondent]

PROCEDURAL HISTORY: Samuels entered into a contract for DSL (Broadband) Services with the Respondent company in 2006. GT&T disrupted the Appellants internet service in 2009 alleging breach of contractual terms for the use of internet telephony. Samuels commenced proceedings at the Commercial Court of Guyana claiming the contractual term relied upon by GT&T was not provided with sufficient notice. At first instance, Persaud, J. upheld Samuels' claim that the term was not made available at the time of contract formation. GT&T appealed the decision and it was set aside by the Court of Appeal. The reasoning of the Court of Appeal being that the term in itself should have been implied into the contract in the interests of business efficacy. Samuels now appeals to the Caribbean Court of Justice in their Appellate jurisdiction.

FACTS: The Appellant applied for, and was granted, the DSL service following the completion of a standard application form at one of the Respondent's outlets. It was factually disputed as to whether a signed copy of a separate document (The DSL Agreement), was provided at this time, containing additional acceptable use clauses. Shortly thereafter DSL service was initiated which the Appellant used for, amongst other purposes, Broadband telephony (VoIP) connectivity through a U.S firm, Vonage. Upon discovery of the use of Vonage by the Appellant, the Respondents severed the DSL connection in May 2009.

ISSUE(S):

- (1) Whether a restrictive use term could be implied into a contract for DSL services and if so in what circumstances;
- (2) Whether the Appellant's use of the VoIP amounted to the operation of an unlicensed telecommunications system for the purposes of the Guyana Telecommunications Act.<sup>2</sup>

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<sup>1</sup> CAP 47: 02.

<sup>2</sup> *Ibid* n.1.

RULE(S):

- (1) A term can be introduced to a contractual instrument. It can only be implied if that term would be conveyed to any reasonable persons having all the background knowledge when interpreting the contract;
- (2) Expert evidence must be adduced to decide if VoIP systems amount to the use of a telecommunications system.

REASONING:

(1) The Caribbean Court of Justice reviewed the first instance judgement of Persaud, J. which favoured the oral evidence given by the Appellant and Defence witness over the written pleadings at first instance. The pleadings were determined to be contradictory and confused due to their development over the course of the litigation and at no point had the Respondents requested to have those anomalies struck out, as was their right. The oral evidence showed that no party could be sure that the restrictive terms relied upon by the Respondent were made available in good time. The terms in question, which prohibited VoIP use, were available through the separate DSL Agreement document. Without said agreement, the only terms applicable to the contract were those available on the original application form. Based on this reasoning Persaud, J. found the way that he did. The Court of Appeal, however, overturned his decision on the basis that Persaud, J. did not consider implied terms. The Court of Appeal found that a term restricting VoIP use was necessary as an implied term of fact for reasons of business efficacy. That business efficacy being that the Respondents would have suffered a financial detriment had their monopoly on international telephone calls been hindered by such technologies. The Caribbean Court of Justice did not agree with the Court of Appeal's reasoning on the grounds that the common law rules governing implied terms were clarified in *AG of Belize and others v Belize Telecom Ltd* [2009] 1 WLR 1988 (P.C.)

. These rules state that a term can only be implied if such a term would be obvious to the reasonable person with all background knowledge. A reiteration of the *Moorcock* (1889) 14 PD 64 test, some 100+ years ago.

(2) The trial court reviewed as to whether a VoIP system as used by Mr Samuels constituted a 'telecommunications system' for the purposes of the Telecommunications Act and Persaud, J. found that it did not. Persaud, J. provided a caveat to his findings however, that he had no technical assistance presented to him which would have aided his decision making. The Court of Appeal, through Cummings-Edwards JA (at para. 45), agreed that the lack of expert witness placed the competence to make the determination outside the domain of the trial judge and in such an instance, normal rules for expert witnesses should apply. Furthermore, the Court of Appeal concluded they could not make such a determination, as neither could the CCJ without such expert evidence. The Caribbean Court of Justice reasoned that a ruling on a contemporary and significant technology such as VoIP could not go ahead without expert evidence and were not minded to provide a decision.

The court finally reasoned that, with responsibility for enforcement of the Telecommunications Act being the Director of Telecommunications, the Director's inaction would be pivotal to such a determination by the court.

#### IMPACT AND ANALYSIS:

(1) The decision of the court on the implied term brings Caribbean jurisprudence in line with the common law. *Belize* is the leading case which has been approved by the UK Supreme Court. Interestingly much of the judicial discussion was based around a potential mutual agreement of the parties which would never have been the case for Mr. Samuels. Even without this requirement, the case for business efficacy requires 'strict necessity' which would be difficult for GT&T to show. Loss of revenue from international telephony would not be sufficiently necessary. Furthermore, the Court of Appeal diluted the test for implied terms and this restores the centrality of the original decision in *Belize*. Potential claimants and applicants will now have to consider the stringent test before hoping to imply terms into contracts, even if both parties arguably anticipated them. The Caribbean Court of Justice perhaps failed to look at alternative judicial reasoning when dealing with timing and location of additional terms. Internet cases in the United States and the UK have acknowledged that many terms and conditions reside in different locations to the original application forms, especially for distance based services. Consider *Greer v. 1-800-Flowers.com, Inc.*<sup>3</sup> where terms and conditions resided on a website which were enforceable when an order was made over the telephone. Should the application form for DSL Service by GT&T have made reference to a website including the terms and conditions, including restrictive clauses, perhaps Mr. Samuels would not have had the outcome he did.

(2) It is important to note the impact of this case on future use of advanced communication technologies and its relation to older telecommunications statutes. The current reliance and significance of VoIP, being both video and voice, on the region is beneficial to consumers and companies and requires traditional telecoms firms to evolve with the technologies. Traditional jurisdiction based monopolies will start to make way for global and internet based competition. The Caribbean Court of Justice was right to refuse to be held to such an advance technological ruling without the benefit of expert evidence. There is no lack of technical experts in the Caribbean and claimants and defendants will be urged to use such in future cases.

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<sup>3</sup> 7 2007 WL 3102178, 2007 US Dist. LEXIS 73961 (S.D. Tex. Oct. 03, 2007).

