

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)**

APPLICATION NO COA2025APP00031

BETWEEN	VERTICAST MEDIA GROUP LIMITED	APPLICANT
AND	AIC (BARBADOS) LIMITED	RESPONDENT

Douglas Leys KC and Clifton Campbell instructed by Archer, Cummings & Co for the applicant

Ms Carlene Larmond KC and Ms Giselle Campbell instructed by Patterson Mair Hamilton for the respondent

5, 8, 22 May 2025 and 13 March 2026

Civil Procedure – Leave to appeal – Realistic prospect of success – Contract law – Share sale agreement with no set-off clause – Ancillary claim alleging negligent and fraudulent misrepresentation and non-disclosure – Whether the learned trial judge failed to conduct an assessment of damages – Whether payment was due – Court of Appeal Rules, 2002, rule 1.8(7)

Civil Procedure – Stay of execution – Applicable principles – Relief sought not properly before the court – Costs

STRAW JA

[1] I have read in draft the judgment of G Fraser JA (Ag), and I agree and have nothing to add.

D FRASER JA

[2] I too, have read in draft the judgment of G Fraser JA (Ag), and I agree and have nothing to add.

G FRASER JA (AG)

[3] By notice of application for court orders filed 14 February 2025, the applicant, Verticast Media Group Limited ('VMG'), sought the following orders:

- "1. That the Applicant be granted leave to appeal the order of Mrs. Justice Brown Beckford contained in the Order dated 31st day of January 2025
2. That there be stay of proceeding in this matter in the Supreme Court pending the outcome of the appeal.
3. That such other and/or further relief as this Honourable Court deems fit."

[4] This court made the following orders, on 22 May 2025, after hearing the matter:

- "1. The application for leave to appeal the order of Mrs Justice Brown Beckford made 31 January 2025 in the matter of AIC (Barbados) Limited v Verticast Media Group Limited [2025] JMCC COMM 07, is refused.
2. With the leave of the court the application for stay of execution of the judgment on the claim pending the outcome of any appeal, is withdrawn.
3. Verticast Media Group Limited to file and serve written submissions on costs on or before 30 May 2025.
4. AIC (Barbados) Limited to file and serve submissions on costs on or before 6 June 2025."

We promised to give our reasons in writing, and this is in fulfilment of that promise.

Background

[5] The background to the matter is largely set out at paras. [5] to [10] in the judgment cited as **AIC (Barbados) Limited v Verticast Media Group Limited** [2025] JMCC Comm 07. I, however, deem it necessary to share the following details.

[6] VMG, and the respondent, AIC (Barbados) Limited ('AICB'), were parties to a share sale agreement dated 14 March 2022, pursuant to which AICB agreed to sell to VMG

22,937,010 shares, representing 90% of the total issued equity capital of CVM Television Limited then held by AICB. The agreed consideration for the transaction was US\$18,000,000.00. The agreement included an express no set-off clause.

[7] In performance of the agreement, AICB transferred the purchased shares to VMG. However, VMG failed to remit payment to AICB in accordance with the stipulated payment schedule and also failed to comply with certain other contractual obligations.

[8] As a consequence, AICB commenced proceedings in the court below against VMG seeking damages arising from breach of contract. In turn, VMG filed a defence and an ancillary claim, alleging that it had been induced to enter into the agreement by negligent and/or fraudulent misrepresentations and material non-disclosures by AICB.

[9] VMG admitted the existence and terms of the agreement, and did not dispute that it had failed to pay the full purchase price in accordance with its contractual obligations. It nevertheless asserted an entitlement to "set-off" its claim for damages allegedly incurred in mitigating the consequences of the misrepresentations and non-disclosures of which it complained, against any outstanding balance it owed AICB.

[10] AICB, for its part, contended that the no set-off clause operated to bar any such defence. It argued that, in light of that contractual provision, VMG's reliance on set-off was untenable, that its defence disclosed no real prospect of success, and that summary judgment ought, therefore, to be entered in its favour.

[11] Brown Beckford J ('the learned trial judge'), having heard the attorneys-at-law in the court below, made the following orders on 31 January 2025:

"On the Claim

1. Summary Judgment is granted to the Claimant on the claim as follows:

(i) Damages for breach of contract in the sum of US\$800,000.00 (equivalent to the sum of J\$124,026,320.00 at the exchange rate of

J\$155.0329:US\$1.00 being the most recently published Bank of Jamaica selling rate as at 9 February 2023).

(ii) Interest on the said sum of US\$800,000.00 at the rate of US 3' month Treasury Bill Rate plus 3% per month from 1 February 2023 until payment.

(iii) Damages for breach of contract in the sum of US\$2,000,000.00 (equivalent to the sum of J\$310,065,800.00 at the exchange rate of J\$155.0329: US\$1.00 being the most recently published Bank of Jamaica selling rate as at 9 February 2023).

(iv) Interest on the said sum of US\$2,000,000.00 at the rate of US 3' month Treasury Bill Rate plus 3% per month from 1 October 2023 until payment.

2. Cost of the Claim to be the Claimant's.

3. Leave to Appeal refused.

4. Application for stay of execution refused.

On the Ancillary Claim

5. Summary Judgment is granted to the Ancillary Defendant on the Ancillary Claim, save that the issue of whether the Ancillary Defendant falsely reported on the extent of the litigation exposure with respect to Claim No SU 2020 CV 02920 **Horace Reid v John Barnes, CVM-TV and Ors** shall proceed to trial.

6. Mediation is dispensed with.

7. Case Management Conference is fixed for June 2, 2025 at 11:00am.

8. The Ancillary Defendant is to have 80% of its Costs incurred to date.

9. Leave to Appeal refused.

10. Claimant's Attorneys to prepare, file and serve Order."

[12] The present application arose from VMG's dissatisfaction with the orders made by the learned trial judge and represented a further step in the procedural aftermath of those determinations.

[13] On 9 April 2025, VMG filed an affidavit of urgency in support of its notice of application for a stay of execution. In that affidavit, VMG deposed that AICB had secured 9 April 2025 as the date for the *ex parte* hearing, in the court below, of an application for a provisional charging order against VMG. VMG expressed concern that, if such an order were granted, its application for a stay would be rendered nugatory. Of particular significance was the apprehension that, should VMG satisfy the sums ordered by the learned trial judge and thereafter succeed on appeal, AICB might be unable to repay those sums. This concern was said to arise from publicly reported liquidity challenges affecting AICB and from allegations that it had failed to meet certain other financial obligations.

[14] On 29 April 2025, AICB filed an affidavit in opposition to the applications for a stay of execution and for permission to appeal. AICB maintained that the reports relied upon by VMG did not accurately reflect its financial position and were not indicative of any inability to repay the judgment debt if required to do so. Notwithstanding that position, AICB indicated that it would not oppose the grant of a conditional stay. In particular, it expressed its willingness to abide by an order requiring VMG to pay the judgment sum, together with accrued interest, into a joint interest-bearing account in the names of the parties' attorneys-at-law pending the determination of the appeal.

Application for leave to appeal

[15] The proposed grounds of appeal, as contained in the applicant's written submissions filed on 1 May 2025, were as follows:

"i. When the court upheld the no set-off clause, it failed to adequately consider that such clauses may not be enforceable in cases of fraudulent misrepresentation.

ii. The court did not sufficiently examine whether enforcing the no set-off clause in this context would be unconscionable. Given the significant allegations of misrepresentation and non-disclosure by the Respondent, strictly applying the no set-off clause could lead to an unfair result that unjustly enriches Respondent at the Appellant 's expense

iii. The court did not fully consider the materiality of the Appellant allegations. If the Respondent alleged misrepresentations and non-disclosures are proven to be material breaches of the contract, it could be argued that these breaches are so fundamental as to go to the root of the contract, potentially overriding the no set-off clause.

iv. While the court cited cases upholding no set-off clauses, it did not fully explore potential equitable exceptions. Given the nature of the Appellant's allegations, there may be grounds for the court to exercise its equitable jurisdiction to prevent a potentially unjust application of the clause.

v. The court did not adequately weigh the public policy implications of strictly enforcing the no set-off clause in this case. There may be a broader public interest in ensuring that parties cannot use such clauses to shield themselves from the consequences of fraudulent or negligent misrepresentations in major business transactions.

vi. The court could have considered a narrower interpretation of the no set-off clause, potentially limiting its application to routine payment disputes rather than fundamental issues of misrepresentation and non-disclosure that go to the heart of the agreement.

vii. The court erred when it held that the Respondent was entitled to damages for breach of contract in a particular sum without an assessment of damages hearing or a special pecuniary damage clause within the contract and the sum claim was not due at the time of filing the claim and Notice of Application for summary judgment."

Submissions

The applicant

[16] VMG's attorney-at-law, Mr Douglas Leys KC ('Mr Leys'), commenced his submissions, by drawing the court's attention to the provisions of rule 1.8 of the Court of Appeal Rules 2002 ('CAR') and the well-known principle that, in applications of this nature, the applicant must demonstrate that the appeal has a "realistic prospect of success" (see also **Swain v Hillman and another** [2001] 1 All ER 91 and **The Iran Nabuvat** [1990] 3 All ER 9 (where the court highlighted that what is required was for the applicant to show that there was an "arguable case by way of appeal")).

[17] In relation to set-off rights, Mr Leys relied on the cases of **HIH Casualty and General Insurance Ltd and others v Chase Manhattan Bank and others** [2003] UKHL 6; **BSkyB Ltd and another v HP Enterprise Services UK Ltd (formerly Electronic Data Systems Ltd) and another** [2010] EWHC 86 (TCC) in support of the argument that, in respect of breach of warranty or other claims, clear and unequivocal language is required, and that such exclusion is often contrary to public policy where it seeks to shield a party from the consequences of its own fraud.

[18] In that regard, Mr Leys further submitted that the learned trial judge "failed to consider whether the alleged misrepresentations constituted breaches so fundamental as to go to the root of the contract, potentially overriding the no set-off clause even absent fraud" (**Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd** [1974] AC 689 was referred to). Relying on **Stewart Gill Ltd v Horatio Myer & Co Ltd** [1992] 1 QB 600, it was further contended that:

"the learned judge erred in failing to consider the reasonableness of enforcing the no set-off clause in the specific circumstances of this case, particularly given the serious allegations of misrepresentation, as required by principles analogous to those under the Unfair Contract Terms Act 1977 (UK), which has persuasive value."

[19] VMG complained that “the court did not adequately weigh the public policy implications of strictly enforcing the no set-off clause in this case”, noting that there is a broader public interest in safeguarding against parties’ use of such clauses to shield themselves from the outcome resulting from fraudulent or negligent misrepresentations in a major business agreement. Mr Leys further submitted that the learned trial judge erred procedurally by giving undue weight to the no set-off clause, which was allegedly initiated by the court of its own motion and neither fully pleaded nor argued by the respondent, resulting in potential procedural unfairness (see **Nada Fadil Al-Medenni v Mars UK Limited** [2005] EWCA Civ 1041 (**‘Al-Medenni’**)).

[20] VMG alleged that AICB made fraudulent misrepresentations regarding distribution agreements and litigation exposure. It was argued that, “[if] proven, these fraudulent acts could potentially void the entire contract, including the no set-off clause”. It was further submitted that the court did not fully consider the materiality of the applicant’s allegations and that if established, the respondent’s alleged misrepresentations and non-disclosures may constitute fundamental breaches going to the root of the contract, potentially rendering the no set-off clause inapplicable.

[21] Mr Leys submitted that the learned trial judge erred in law by granting summary judgment in circumstances where they had raised serious allegations of fraudulent misrepresentation against AICB, supported by affidavit evidence. The authority of **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37 (**‘ASE Metals’**), was cited, noting that summary judgment procedure should not involve a mini-trial.

[22] Mr Leys cited the decision of **William Derry and others v Sir Henry William Peek** (1889) 14 App Cas 337 (**‘Derry v Peek’**), noting that fraud requires a high threshold of proof and is inherently unsuitable for summary determination. VMG submitted that the learned trial judge erred in failing to properly assess the applicant’s allegations of fraudulent misrepresentation and material non-disclosure, which, if

established at trial, could entitle the applicant to rescind the contract or claim substantial damages, thereby forming a valid basis for a defence and counterclaim.

[23] Additionally, King's Counsel submitted that the learned trial judge "erred in awarding damages without assessment". As the sum was not due at the time of judgment, it could only properly be claimed as damages for breach of contract, which required assessment.

The respondent

[23] On behalf of AICB, Ms Carlene Larmond KC ('Ms Larmond') referred the court to **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 and rule 1.8(7) of the CAR. It was submitted on AICB's behalf that the learned trial judge demonstrated a full grasp of the law in relation to summary judgment. It was pointed out that:

"In their written submissions on the no set-off clause in the court below, VMG advanced no arguments to the learned judge that the clause would be unenforceable in cases of fraudulent misrepresentation, neither did it invite the court to 'explore equitable exceptions'."

[24] Ms Larmond further submitted that the learned trial judge expressly acknowledged the principle that contracting parties may exclude the right of a set-off, in relation to alleged fraudulent misrepresentations. The point was made that "[t]his is strictly a matter of interpretation of the contract which required the learned judge to review the contract to ascertain the existence of such a clause; and to consider and make findings in respect of the contract". Furthermore, the learned trial judge was fully cognisant of parties freedom to contract and the court's role in upholding contractual terms.

[26] Ms Larmond argued that six of the applicant's proposed grounds sought to introduce arguments that had not been raised in the court below.

[21] Finally, King's counsel submitted that the learned trial judge committed no error in assessing the evidence and that the proposed grounds of appeal lacked merit.

Analysis

[27] This application fell to be determined in accordance with rule 1.8 of the CAR. By rule 1.8(7), leave to appeal shall not be granted unless the court is satisfied that the proposed appeal “will have a real chance of success” or the court is of the view that there is some other compelling reason the appeal should be heard. While the latter statement is not included in the governing procedural criteria, the court’s evaluative assessment is not undertaken in a vacuum. In determining whether the criterion in rule 1.8(7) is satisfied, the court may also take into account discrete, case-specific considerations which, though not expressly enumerated in the rule, inform the overall justice of the application and the proper exercise of the court’s discretion.

[28] The expression “real chance of success” has become synonymous with “reasonable prospect of success” and “realistic prospect of success” and has consistently been understood as meaning more than a fanciful chance, but not necessarily a probability of success. The jurisprudence shows these formulations are used interchangeably to express the same threshold, and courts have repeatedly treated them as conveying one and the same standard, rather than distinct tests (see **Swain v Hillman** and also **The Iran Nabuvat**). That approach has been adopted and applied by this court in numerous decisions, including **The Attorney General of Jamaica v John Mackay** and **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12.

[29] In considering whether that threshold is met, the court does not undertake a hearing of the appeal. It undertakes a provisional examination of the proposed grounds to determine whether they disclose an arguable error of law, principle, or approach, or whether the decision under challenge is plainly sustainable (as held in **National Commercial Bank Jamaica Ltd v Owen Campbell and another** [2014] JMCA Civ 19).

[30] The appeal that the applicant sought to pursue arose from the grant of summary judgment. The governing principles are well settled. Summary judgment is a draconian jurisdiction which enables the court to determine proceedings without a trial only where

it is clear that a party has no real prospect of succeeding and there is no other compelling reason for a trial (see 15.2 of the Civil Procedure Rules, 2002 ('CPR'); **Swain v Hillman** and **Three Rivers District Council and others v Bank of England (No 3)** [2001] UKHL 16 ('**Three Rivers**')).

[31] In this jurisdiction, it has repeatedly been emphasised that the power must be exercised with caution, particularly where serious disputes of fact arise or where the issues turn on inferences drawn from contested evidence. In **ASE Metals**, this court underscored that the summary judgment procedure is not intended to become a "mini trial" and is ill-suited to the resolution of complex factual controversies. Similar caution was expressed in **National Commercial Bank Jamaica Ltd v Owen Campbell and another** and **Real Time Systems Ltd v Renraw Investments Ltd** [2014] JMCA Civ 15.

[32] As I understood it, the main thrust of VMG's complaint, which it sought to have dealt with by appeal, was that the learned trial judge upheld the no-set-off clause in agreement with AICB and granted summary judgment in a case where fraud was alleged.

[33] It is appreciated that, where allegations of fraud, misrepresentation, or serious impropriety are advanced and supported by affidavit evidence, the court must be slow to determine such matters summarily, since credibility, intention, materiality, and reliance are paradigmatically issues for trial (as recognised in **ASE Metals; Royal Bank of Scotland Plc v Highland Finance Partners LP** [2013] EWCA Civ 328). However, as made clear at para. 15(vii) of the judgment of Lewison J in **Easyair Ltd (trading as Openair) v Opal Telecom Ltd** [2009] EWHC 339 (Ch), where a case raises a point of law:

"...and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real

prospect of succeeding on his claim or successfully defending the claim...”.

Authorities further illustrating this principle include **ICI Chemicals & Polymers Ltd v TTE Training Ltd** [2007] EWCA Civ 725 at para. 12; **Global Asset Capital Inc and another v Aabar Block SARL and others** [2017] EWCA Civ 37; [2017] 4 WLR 163 at para. 27.

[34] VMG pleaded a defence and an ancillary claim alleging fraudulent and/or negligent misrepresentation and material non-disclosure in relation, *inter alia*, to litigation exposure and commercial arrangements. The learned trial judge accepted that the agreement contained a no set-off clause and treated that provision as dispositive of VMG’s ability to resist the claim. Additionally, VMG proposes to argue on appeal, that the learned trial judge erred in entering judgment for substantial damages without an assessment, where the sums claimed were neither liquidated nor due as at the date of the claim.

The “no set off” clause

[35] It is a well-settled and elementary principle of the common law that parties are, in general, free to regulate their affairs by contract and to determine for themselves the allocation of rights, obligations and risks arising from their bargain. The courts have long recognised freedom of contract as a foundational tenet of commercial certainty and private ordering. As Lord Morris of Borth-Y-Gest observed in **Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd** [1968] AC 269 at 304, the law ordinarily respects the autonomy of contracting parties and will give effect to the agreement which they have chosen to make for themselves.

[36] Although that case concerned restraint of trade, the principle intimated applies with equal force to contractual obligations generally. At page 305, Lord Morris adopted the oft-cited dictum of Sir George Jessel MR in **Printing and Numerical Registering Co v Sampson** (1875) LR 19 Eq 462, at page 465:

“It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being

against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.”

Lord Morris referred also to **English Hop Growers Ltd v Dering**, [1928] 2 KB 174, 181 and the enunciation of Scrutton LJ, who said:

“I have always myself regarded it as in the public interest that parties who, being in an equal position of bargaining, make contracts, should be compelled to perform them, and not to escape from their liabilities by saying that they had agreed to something which was unreasonable.”

[37] This principle is not merely historical rhetoric; it continues to inform the modern approach to contractual enforcement, except where an agreement is procured or tainted by recognised legal wrongs.

[38] The emphasis on certainty is especially pronounced in commercial transactions between parties dealing at arm’s length. In such circumstances, predictability and stability of contractual rights are matters of public importance, enabling parties to order their affairs and assess risk with confidence. Accordingly, where the language employed is clear and unambiguous, the court is bound to enforce it according to its terms. The judicial task is one of construction and application, not modification. It follows that the mere fact that the bargain subsequently proves onerous or inconvenient to one party provides no legal basis for the court to decline enforcement.

[39] I was also guided by the principle set out in the text, *A Practical Approach to Civil Procedure*, by Stuart Sime, 6th edition at page 260, that:

“... ”

It is open to the parties to a contract to exclude any right to set-off by an express term to that effect (*Hong Kong and*

Shanghai Banking Corporation v Kloeckner & Co. AG [1990] 2 QB 514), but it is possible that such a term may be unreasonable and rendered ineffective by virtue of the Unfair Contract Terms Act 1977, as happened in *Stewart Gill Ltd v Horatio Myer and Co. Ltd* [1992] QB 600.”

[40] It is accepted that, unlike England and Wales, this jurisdiction has not enacted statutory controls equivalent to the Unfair Contract Terms Act 1977, which empowers courts, in defined circumstances, to scrutinize and invalidate exclusionary or limitation clauses on grounds of reasonableness. The absence of such legislation, however, does not imply that contractual autonomy operates without restraint. The common law has long recognised narrowly confined doctrines which intervene where the integrity of consent is undermined or enforcement would offend settled principle. These include misrepresentation, mistake, undue influence, duress, unconscionability, illegality, and public policy. Further, statutory measures of general application, such as the Consumer Protection Act (2005), proscribe misleading or deceptive conduct in commercial dealings. These doctrines and statutory protections represent the recognised limits upon contractual enforcement.

[41] Beyond those established constraints, however, there is no general equitable jurisdiction to relieve a party from the consequences of a bad or imprudent bargain. The courts have consistently affirmed that commercial parties are the authors of their own agreements and must ordinarily be held to the allocation of risk which they have negotiated. Freedom of contract and certainty of outcome remain central organising principles of commercial law. As the authorities repeatedly emphasise, it is not the function of the court to rewrite an agreement to achieve what might appear, with hindsight, to be a fairer result. Where language is clear and unambiguous, it is worthwhile reiterating that the judicial task is one of enforcement, not revision.

[42] It is against that doctrinal and policy framework that the learned trial judge’s reliance on **National Commercial Bank Ja Ltd v Chagod Tour Jamaica Limited (formerly Shago Tours Jamaica Ltd)** [2024] JMCA Civ 29 (**‘Chagod Tour’**) was assessed. In that decision, Brooks P reaffirmed the orthodox approach to contractual

interpretation: that the court must ascertain, objectively, the intention of the parties from the words they have chosen, construed in their documentary, commercial and factual context, and must give effect to those words according to their ordinary and natural meaning. That approach is consistent with long-standing Commonwealth authority, including **Chartbrook Ltd v Persimmon Homes Ltd and another** [2009] UKHL 38, which stresses that commercial certainty is best served when courts respect the language of the contract rather than substitute what might appear to be a more reasonable arrangement.

[43] The same philosophy is reflected in cases concerning the enforcement of exclusionary and risk-allocation clauses. In the persuasive authority of **Photo Production Ltd v Securicor Transport Ltd** [1980] AC 827, the House of Lords rejected a broad rule of law invalidating such clauses and emphasised that, in commercial contracts freely entered into, parties are entitled to apportion risk as they see fit. That reasoning has been repeatedly endorsed in this region. It follows that where sophisticated parties, bargaining at arm's length, have employed clear and unequivocal language to regulate their rights and obligations, the court must ordinarily hold them to that bargain unless some recognised vitiating factor is established.

[44] In those circumstances, the learned trial judge correctly approached the matter as one of construction and application of settled principle, rather than as an invitation to dilute or circumvent the parties' express allocation of risk. Her reliance on **Chagod Tour** was, therefore, not only appropriate but entirely consonant with the wider jurisprudence recognising that contractual certainty and predictability are themselves integral to the due administration of commercial justice.

[45] The learned trial judge, at para. [39] of her judgment, reproduced the 'no set-off' provision contained in clause 2.02 of the share sale agreement, which is in the following terms:

"...

'Section 2.02 Closing. (a) Subject to the terms and conditions of this Agreement, the Purchaser **shall make the following payments, in each case in USD by wire transfer of immediately available funds, without set-off or counterclaim, to the account** for the benefit of Seller designated in Appendix 2, observing the instructions set out therein as under ...such that the Purchase Price may be received for the benefit of the Seller all in accordance with the procedures set forth in this Agreement...'

..." (My emphasis)

[46] The issue for determination was whether, on a proper construction of clause 2.02 of the share sale agreement, the obligation to make payment "without set-off or counterclaim" is expressed in clear and unequivocal language, leaving no scope for objective qualification. In her judgment, the learned trial judge stated at paras. [56] to [59]

"[56] In this application for Summary Judgment, the issue before the Court is whether VMG can set-off the sums claimed under its Ancillary Claim against the outstanding sums pursuant to the Reinstated Agreement. VMG has asserted that it is entitled to set-off the sums it claims to have incurred as a result of the AICB's alleged misrepresentations and non-disclosure. AICB, on the other hand, has maintained that the no set-off clause operates as a complete bar to the VMG's attempt to set-off the sums outstanding.

[57] I accept the cases referred to above as persuasive authority reflecting the common law. Since there is no statutory provision to the contrary, I accept as the common law applicable to this jurisdiction, that a no set-off clause, where clearly drafted, will generally be enforced by the courts. This is in keeping with the principle that parties to a contract are free to agree on the terms of that contract, and such terms will generally be enforced unless there is an overriding reason not to do so, such as an issue of public policy or statutory prohibition....

[58] The no set-off clause as contained in Clause 2.02 of the Share Sale Agreement provides for the Purchaser to make the payments without set-off or counterclaim. This in effect prohibits VMG from asserting any form of set-off, whether

legal or equitable. VMG is then unable to rely on its Ancillary Claims to reduce the payments owed under the agreement. This was the position in **AMC III Purple B.V. v Amethyst Radiotherapy Limited** (*supra*). The court enforced a no set-off clause in the face of a counterclaim, ruling that the clause operated to preclude both legal and equitable set-offs, regardless of the validity of the counterclaim. The court held that even if the defendant had valid cross claims against the claimant, they were not entitled to set them off against interest or principal payments which were outstanding. This principle was also affirmed in **Arani v Cordic Group Ltd** (*supra*) where the court held that a no set-off clause, when clearly worded, excluded the possibility of a set-off even where the defendant had an alleged counterclaim arising from a breach of contract.

[59] In the present case, the no set-off clause is drafted in clear and unambiguous terms and there is no reason to depart from its plain meaning. The clause is unequivocal in its prohibition of set-offs or counterclaims. The clause was clearly designed to ensure that payments under the agreement are made in full, without any deductions or disputes regarding unrelated claims. There is no provision in the agreement which allows for exceptions to the no set-off clause, and neither has VMG advanced any argument to suggest that there is a valid exception to the no set-off clause in this case. There is no suggestion that the clause is unenforceable or should be interpreted narrowly to allow for equitable set-offs, as was argued and rejected in the cases cited above. There can be no doubt that the purpose of a no set-off clause was to ensure that the amounts due under the contract are paid in full, irrespective of any claims which may arise. For the reasons outlined above, I find that VMG's Ancillary Claim, as in **Arani and others v Cordic Group** (*supra*), cannot be used as a basis to reduce or withhold the payments owed under the Share Sale Agreement. VMG's attempt to set-off the Ancillary Claim against the sums due to AICB under the Reinstated Agreement is precluded by the terms of the contract."

[47] In my view, the learned trial judge undertook a careful examination of the clause and the relevant authorities. She correctly concluded that the clause precluded both legal and equitable set-off and that VMG could not rely on its ancillary claim to withhold or

reduce the contractual payments. Her reasoning accorded with established common law authority and disclosed no error of principle. I therefore agreed that the learned trial judge correctly assessed the law governing set-off and was entitled to uphold the clause.

No set off clause, summary judgment and fraud

[48] VMG further contended that the learned trial judge erred in granting summary judgment in circumstances where allegations of fraudulent misrepresentation were advanced and supported by affidavit evidence.

[49] The record demonstrated that the learned trial judge directly engaged this issue. She considered the case of **Dr Faramarz Shayan Arani and others v Cordic Group Limited** [2021] EWHC 829 (Comm) ('**Arani**'), in which summary judgment was granted notwithstanding counterclaims alleging breach of warranty and fraudulent misrepresentation, where a valid no set-off clause applied. The court in that case observed:

"54. The effect of a valid no set off clause means that the Claimants are entitled to summary judgment on their claim forthwith with no stay of execution, and that any cross-claim could not be ventilated in these proceedings (to the extent that it is not struck out in any event): see *Lotus Cars* at [29]."

[50] In **Arani**, the court also considered the defendant's claims for breach of warranty, misrepresentation, and negligent misstatement, holding that the relevant clause permitted only fraud claims under the contract. The court further opined that:

"[56] The allegation of breach of warranty based on fraud is hopeless and should never have been made. There is no fact or matter alleged which makes the allegation of fraud tenable. **A party alleging fraud must allege and prove primary facts which justify the inference of dishonesty.** This is not merely the test at trial, but as was made expressly clear in *Three Rivers District Council v Bank of England* [2001] UKHL 16, [2003] 2 AC 1, per Lord Millett at [186], is a question which equally must be addressed in the statements of case." (My emphasis)

[51] The court in **Arani** reaffirmed that, even where fraud is alleged, the presence of a valid contractual exclusion may entitle a claimant to judgment. Allegations of fraud must be properly particularised and supported by primary facts capable of justifying the inference of dishonesty (see **Three Rivers**). The court also reiterated the well-established principle in **Paragon Finance plc v DB Thakerar & Co (a firm)** [1999] 1 All ER 400 that an allegation that a party “knew or ought to have known” is insufficient to ground fraud.

[52] The tenor of the learned trial judge’s decision in the case at bar indicated that consideration was given to these principles. I observed that she referred to the case of **Arani**, in which an application for summary judgment was granted in a claim by vendors relating to unpaid consideration held in escrow. The claim for fraudulent misrepresentation was dismissed as a contractual warranty constitutes a promise within the contract, rather than a representation. Also, the court accepted, based on the authority of **WRM Group Ltd v Woods and others** [1998] CLC 189 (**WRM Group Ltd**), that “...[t]he parties to a contract could exclude the remedy of set-off in relation to allegedly fraudulent misrepresentations”. Thus, the court in **WRM Group Ltd** recognised that parties to a contract are, in principle, free to agree that no right of set-off shall arise under the contract, even where a party seeks to rely upon an allegation of fraudulent misrepresentation. In other words, a contractual clause excluding set-off may be sufficiently wide to prevent a defendant from withholding payment based on a cross-claim grounded in alleged fraud. The existence of such a clause meant that the defendant’s remedy, if any, lies in pursuing a separate claim rather than in reducing or extinguishing the contractual liability by way of set-off. Accordingly, even if the attempted set-off was not strictly contrary to the contractual terms, or was advanced under some misapprehension, the court in **WRM Group Ltd** could not assist the defendants merely on the strength of their factual allegations. The contractual allocation of risk prevailed, and the defendants could not circumvent the agreed exclusion of set-off by asserting fraud as a defence to payment.

[53] In the instant case, the ancillary claim did not supply any evidence of fraud or misrepresentation. The learned trial judge correctly reasoned that:

“[66] VMG’s case rests on allegations of breach of contract and/or for fraudulent and/or negligent misrepresentation. In its Particulars of Claim, it alleges AICB induced it to enter into the various agreements by falsely representing that:

(a) There were no distribution agreements or arrangements, specifically with Ready TV, and that no obligations were owed to any entity in that regard.

(b) There were no other claims against CVM TV save those outlined in the disclosure letter dated 9th March 2022.

(c) Falsely reporting on the litigation exposure by not disclosing the existence of a default judgment in Claim No. SU 2020 CV 02920 (**Horace Reid v John Barnes, CVM-TV, and Ors**).

VMG, in its particulars of special damage, also averred that AICB’s legal fees incurred on the transfer of the shares had been settled by CVM TV and constituted an incident of leakage.”

[54] The learned trial judge conducted a detailed analysis of VMG’s ancillary claim. She correctly directed herself by reference to **Derry v Peek** and considered whether VMG had adduced evidence capable of establishing fraudulent or negligent misrepresentation. At para. [70] she said:

“[70] To establish negligent misrepresentation, VMG must show that AICB failed to take reasonable care to ensure the accuracy of the representations made during the negotiation of the agreements. (See **Cramaso LLP v Ogilvie-Grant and others** [2014] UKSC 9) Here, the claim is supported by allegations that the AICB failed to exercise due diligence in disclosing material agreements and legal exposures.”

[55] Regarding the Ready TV allegations, the learned trial judge found that no representation or warranty was made in the share sale agreement, no documentary

support for inducement, and that VMG would be “hard-pressed” to establish actionable misrepresentation.

[56] The learned trial judge accepted that the Horace Reid litigation raised a live factual dispute and correctly preserved it for trial. She therefore did not shut out the entirety of the ancillary claim but rather applied the summary judgment jurisdiction carefully. At para. [78] of her judgment, she concluded that “[a]ccordingly, AICB’s application for Summary Judgment on the Ancillary Claim is granted, save on the issue of the non-disclosure with respect to Claim No SU 2020 CV 02920 **Horace Reid v John Barnes, CVM-TV and Ors**”.

[57] Rule 15.2 of the CPR empowers the court to grant summary judgment where a party has no real prospect of success. While summary judgment is inappropriate where complex facts or credibility issues arise (see **Three Rivers; ASE Metals**), more than bare assertions are required to defeat such an application.

[58] I was satisfied that the learned trial judge did not conduct a “mini-trial” but properly assessed whether VMG had demonstrated a realistic prospect of success. Her conclusion that VMG had not done so (save in respect of the Horace Reid issue) was well within the proper exercise of her discretion.

Assessment of damages

[59] The complaint concerning the award of damages without assessment was similarly fact-sensitive and turned on the nature of the contractual entitlement, and the findings made. No arguable error of law has been demonstrated. The learned trial judge did, in fact, assess damages (as seen in paras. [60] to [64] of the judgment) and therefore the complaint is unsustainable. That ground is indeed without merit.

[60] The learned trial judge also addressed whether the sums were due, and correctly concluded, on VMG’s own pleadings, that the payment obligations had accrued.

[61] I further rejected the suggestion of procedural unfairness. I noted that this was not a case in which the court raised the no set-off clause *sua sponte*. Although the issue was not fully pleaded or argued in its initial application, the applicant raised it, and there was therefore no potential procedural unfairness. This case is, therefore, distinguishable from **Al-Medenni**, a case in which the trial judge accepted a 'third man theory' that an unknown third employee caused the accident, which was never pleaded or fully explored, and which the parties did not have a fair opportunity to address. The English Court of Appeal held that this was procedural unfairness and a breach of the adversarial system, which requires that all issues be explicitly stated in the pleadings. Thereby emphasising the principle that judges must try the issues the parties have raised and not create their own "new" cases.

Whether payment due

[62] The learned trial judge also addressed whether the sums were due and correctly concluded that, on VMG's own pleadings, the payment obligations had accrued. I observed the learned trial judge's treatment of this issue at paras. [63] to [64]:

"[63] VMG has not averred that it has either satisfied the condition to provide the support document or that it was not due. There is no factual dispute because as noted before, VMG intentionally failed to adhere to this term of the contract. Paragraph 8 of the Ancillary Claim and Ancillary Particulars of Claim makes it clear that both the US\$800,000.00 and the Support Document were due. VMG pleaded that it withheld the payment of the US\$800,000.00 and withheld the delivery of the bank guarantee.

[64] Consequently, VMG's argument that the claim for US\$2,000,000.00 payment pursuant to the Second Supplemental Letter Agreement was not due at the time of the commencement of the claim is without merit since no such claim was made by AICB."

Nothing further needed to be said on this point.

New arguments advanced on appeal

[63] It is also material that several of the arguments advanced, including reliance on equitable or public policy exceptions to the no set-off clause, were not distinctly raised before the court below. While this court has a narrow discretion to entertain a new point of law on appeal, that discretion is confined to cases where the point raises a pure question of law, requires no further factual or evidential inquiry, and causes no prejudice to the opposing party (**see Pittalis v Grant** [1989] QB 605; **Singh v Dass** [2019] EWCA Civ 360). Appellate proceedings are not an opportunity to reconstruct or materially recast the case as presented at trial, and this court has consistently applied this principle, confirming that leave under rule 1.8(7) of the CAR must be assessed by reference to the case as framed below (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1).

[64] In addition, the general principle has been affirmed in various decisions dealing with attempts to raise new arguments on appeal. In **Tikal Limited (T/A Super Plus Food Stores) v Tewani Limited** [2021] JMCA Civ 38, this court considered whether an appellant could rely on a point raised for the first time on appeal. The court noted that although rule 1.16(2) of the CAR generally restricted parties from relying on matters not raised below, and rule 1.16(3) permitted the court to consider new grounds where the opposing party had been afforded an opportunity to respond, the appellant's frustration argument had not been pleaded or argued at trial. The court held that the mere inclusion of the point in the notice of appeal did not make it permissible to advance it for the first time on appeal. Relying on the classical statement in **Ex parte Firth; In re Cowburn** (1882) 19 Ch D 419, the court reiterated that appellate courts should be slow to entertain points not raised at trial, particularly where their consideration would require new factual inquiry or where the issue might have been approached differently had it been raised earlier. While a new point may, in limited circumstances, be entertained where it raises a pure question of law, all the relevant facts are already established, and no prejudice arises, appellate proceedings are not an opportunity for a party to recast its case or advance a new line of argument that was neither pleaded nor ventilated below.

Conclusion

[65] Having considered the proposed grounds advanced and the parties' submissions, this court was not satisfied that the applicant had met the threshold prescribed by rule 1.8 of the CAR. The proposed appeal centred on the learned trial judge's treatment of the no set-off clause, which required no more than the interpretation of the agreement and the application of settled principles of contractual construction and the summary judgment test to the pleaded case and evidentiary material. The learned trial judge properly directed herself as to the governing law and the applicable test. Upon review of the judgment and the submissions below, no misdirection of law or principle has been demonstrated.

[66] Although VMG sought to recast the matter as engaging broader considerations of fraud, unconscionability, and public policy, it is common ground that the agreement and the failure to pay the purchase price were admitted. The learned trial judge's task was therefore confined to determining whether, in light of the contractual framework and the nature of the defence advanced, VMG had a realistic prospect of successfully resisting the claim. Her evaluative conclusion in that regard disclosed no error capable of founding a viable appeal.

[67] Nor does the mere presence of allegations of fraud render a claim inherently unsuitable for summary determination. There is no absolute rule to that effect. The question remains whether, on the pleadings and the evidence, those allegations disclose a real prospect of success. The learned trial judge addressed that question in accordance with established authority, and no basis has been shown for concluding that she applied an incorrect approach.

[68] In substance, the proposed appeal sought to challenge the weight accorded to particular considerations and the conclusions drawn from the contractual terms and the evidence. Such matters fell squarely within the evaluative judgment of the trial court and did not, without more, raise any point of law of substance or demonstrate a realistic prospect that the decision would be disturbed on appeal.

[69] The applicant's reliance on equitable or public policy exceptions to the no-set-off clause was raised for the first time in this court. The overriding factor is whether allowing the new point would cause unfairness or injustice to the other party, such as by preventing evidence from being tested at the initial trial. In the absence of circumstances justifying consideration of points not previously advanced, this meant those arguments could not establish a real chance of success, and the application for leave was accordingly refused.

[70] In those circumstances, the proposed appeal disclosed no *bona fide* question of law or principle and no arguable basis for this court to properly intervene. The interests of justice are not served by permitting further litigation where the applicable principles are settled and have been correctly applied by the learned trial judge. The application must, therefore, fail.

Application for stay of execution

[71] Both parties filed written submissions in relation to this application. However, during oral submissions on the related application for leave to appeal, it emerged that the relief sought to be stayed in substance was a charging order made by the court below. That order, however, was not before this court and could not properly be the subject of determination. Upon that clarification, counsel for the applicant withdrew the application for a stay of execution. In any event, in light of the court's refusal of the application for leave to appeal, no proper basis subsisted for the grant of a stay of execution.

[72] Accordingly, on 22 May 2025, the court made the orders set out in para. [4] above.

Costs

[73] In accordance with the court's directions, the parties filed submissions on costs. Thereafter, they jointly informed the court that they had agreed to a consent order to be endorsed in terms as set out below:

"By and with the consent of the parties, each party shall bear its own attorneys' costs of the application for permission to appeal and application for stay of execution."