



CIVIL APPEAL NO. 13 OF 2006

Between:

THE MINISTER OF TELECOMMUNICATIONS

Appellant

-V-

BERMUDA DIGITAL COMMUNICATIONS

Respondent

**Before: Hon. Justice Nazareth, JA
Hon. Justice Evans, JA
Hon. Justice Forte, JA**

**Date of Hearing: 9th November 2007
Date of Judgment: 29th November 2007**

EVANS, JA:

REASONS FOR JUDGMENT

1. In March 2005, Bermuda Digital Communications Ltd. which trades as Cellular One and is the Respondent in this Appeal (hereinafter “BDC”) advertised for sale or rent a device which, attached to a desktop PC (Personal Computer), permits access to the internet, and BDC offered to provide such access in return for payment of a monthly fee. The package was described as ‘the Bull’.
2. The issue in the Appeal is whether by offering to provide such access BDC was acting outside the terms of the Class B Licence dated 17 July 1998 granted to it by the Minister of Telecommunications and E-Commerce under the Telecommunications Act 1986. The Act was updated in 1998-1999 and has been amended by the Telecommunications Amendment Act 2001. The Minister is the Appellant.
3. The Appeal does not require any detailed knowledge of the technical processes involved, though a great deal of technical evidence was placed before the Court. It is common ground that access to the internet from Bermuda requires wireless or line communications both within Bermuda and beyond its shores. Such transmissions to or from Bermuda are effected by the holder of a Class A Licence issued under the Act. The particular holder, or “Class A Carrier”, that is relevant for present purposes is the international company known as Cable & Wireless (“C&W”), but C&W is not involved in the Appeal. Its part will become clear below.

4. The Bermuda subscriber has to be linked within Bermuda to the 'access gateway' operated by C&W which is notionally at its shore. The link may be by telephone line or by wireless using the radio facilities known as Cellular Base Stations. These have been developed for use by mobile phones, hence the description 'cell phones'. A Class B Carrier, such as BDC, operates a Central Office to which the Cellular Base Stations are linked by line, and a traditional international telephone call which it receives either direct by land line or from a cell phone via the Cellular Base Station is then routed by line to the access gateway operated by C&W for onward transmission abroad.

5. Access to the internet requires the same transmission within Bermuda to the access gateway operated by C&W or another Class A Carrier. The customer's PC is usually linked to the Central Office by land line, but the technology which enables cell phones to communicate by wireless via the Cellular Base Station has been extended to permit first laptops and then desk top PCs to be linked in this way. The Bull is a device which provides a wireless link between desk top PCs and the local Cellular Base Station from where a route is established to C&W's internet access gateway by BDC's equipment in Bermuda.

6. BDC's Licence is dated 17 July 1998 and is in the following terms-

PUBLIC TELECOMMUNICATION SERVICE LICENCE
CLASS B

In accordance with section 11 of the Telecommunications Act 1986 and in accordance with the Public Telecommunications Service (Licence) Regulations 1998, Bermuda Digital Communications Limited is hereby licensed as a Carrier, subject to the terms and conditions specified in the Schedule thereto, to maintain and operate within Bermuda, the public telecommunication services set out in the Appendix to the Schedule.

This Class B Licence shall continue in force for a term of fifteen years commencing on the 17th. Day of July 1998.

7. The Appendix to the licence stipulates –

“The Licensee is authorised to provide by means of a public network established for providing the following services:-

Voice Services

Fixed and mobile-switched telephone services using wireless means.....

Data Transmission Services

Fixed and mobile data transmission services using wireless means including but not limited to those services provided by circuit switched or packet switched technology.

Message Services
Wireless telecommunications services.....”.

8. The Schedule to the Licence includes –

“15. Conflicts

If at any time a conflict arises between any provision of this Licence and a provision of the Act or any Regulations made thereunder, the provision of the Act or Regulations, as the case may be, shall prevail.”

9. Section 9(1) of the Act provides that “no person in Bermuda.....shall establish, maintain or operate a public telecommunication service without first obtaining the grant of a licence from the Minister under this Act.” The Act’s definitions were amended in 2001, including-

“public telecommunication service” means the provision, whether by one person or by a number of persons jointly, of telecommunication services to members of the public upon payment of a fee” (section 2(b).

10. The Public Telecommunications Service (Licence) Regulations 1998(Statutory Instrument No. BR 47/1998) so far as relevant provides as follows-

“Interpretation

2. In these Regulations, unless the context otherwise requires-

.....

“Class A Licence” means a licence issued to a provider of public telecommunication service, to, from, or through Bermuda, using, unless otherwise provided for in the licence, circuits that are under the provider’s direct control and ownership;

“Class B Licence” means a licence issued to a provider of public telecommunication service, within Bermuda, using, unless otherwise provided for in the licence, circuits that are under the provider’s direct control and ownership;

“Class C Licence” means a licence issued to a provider of public telecommunication service using, unless otherwise provided for in the licence, circuits that are provided by either a provider issued with a Class A licence or Class B licence or a provider issued with both such licences.”

Application

3. These Regulations apply to any application for the grant of a licence to establish, maintain or operate a public telecommunication service.....in Bermuda.”

11. The issue in this appeal is whether BDC is acting within the scope of its Class B licence when it provides the service which it advertises as “the Bull”. It appears from the evidence and history of the proceedings that officials from the

Department of Telecommunications accompanied by police officers executed a search warrant at BDC's premises on 20 May 2005. They took away certain equipment and subscribers to the Bull service were disconnected. However, BDC applied to the Court on Monday 23 May 2005 for leave to issue proceedings for judicial review. Leave was granted and the search warrant and the steps taken under it were "stayed until the determination of the issues or further order". The service therefore was resumed.

12. Subsequently, proceedings took place before Telecommunications Commission, and statutory procedures followed, which resulted in the Minister writing to BDC on 7 November 2005 informing them of his decision that "the "Bull" Internet Access service is not a service that is included in the current Class "B" Licence". BDC appealed, and it has been agreed that the relevant issue is "Whether on the true construction of the Licence the Appellant is authorised to provide a telecommunication service which enables its customer to use a form of wireless modem known as "The Bull" device to connect laptops and personal computers to the Internet using BDC's network in Bermuda" (judgment paragraph 21).
13. We were also informed that BDC applied for a Class C Licence, which would have covered their provision of C&W (the Class A Carrier)'s service to and from Bermuda, but the application was refused. The Commission had suggested that BDC could only provide internet access in conjunction with the holder of a Class A or a Class C Licence, so that its customers would be required to open separate accounts with both providers.
14. BDC alleged that BDC previously had provided an internet access service for its customers using cell phones (mobile phones) and that, if the Minister's present contentions were correct, that service was outside the scope of its Class B Licence also. The Minister's representatives did not dispute this, but they contended (a) that the Minister had regarded that service as an enhancement of cellular telephony, and had not objected to a development which allowed limited mobile browsing on customers' cell phones, and (b) that the Minister's failure to object does not give a wider construction to the Act and the Regulations than the law permits (judgment, paragraph 38(9)).

The Judgment

15. On 6 March 2006, the Hon. Justice Norma Wade-Miller allowed BDC's appeal against the Minister's decision. She held that BDC's Class B Licence does not expressly require BDC to use a public network which is under its own direct control, and that the terms of the Licence do not permit a distinction to be drawn between cell phone (mobile telephone) access to the

internet, which BDC previously had provided to its customers without objection from the Commission or the Minister, and the same internet access which it provides by means of the “Bull” service to the users of laptop and desktop PCs.

Submissions

16. Mr. Melvin Douglas, for the Minister, submitted that the learned judge failed to appreciate that BDC’s Class B Licence is limited in scope to the provision of telecommunication services “within Bermuda” which involves the use of circuits which are “under the provider’s direct control and ownership” (Regulation 2, quoted above). Moreover, the Regulations expressly take precedence over the terms of the Licence (Schedule para.15). The service which BDC provides by means of the “Bull” device necessarily includes transmissions “to and from” as well as “within” Bermuda, and the internet access outside Bermuda is provided by C&W which is not under BDC’s direct control and ownership. He challenged the learned judge’s interpretation of the Licence as permitting BDC to provide services by means of “any” public network, specifically her conclusion that this entitled BDC to provide them “to and from” Bermuda using the network operated by C&W or another Class A Carrier.
17. In summary, the Minister’s contention is that the Licence has to be read together with the Regulations, which define the Classes of Licences and, it is submitted, make it clear, first, that the holder of a Class B Licence is not entitled to provide transmission services “to and from” Bermuda, which internet access necessarily involves, and secondly, that only the holder of a Class C Licence is permitted to make use of circuits which are not under its own direct ownership and control. Essentially, he submits, BDC is acting as an Internet Services Provider (“ISP”) so far as transmissions to and from Bermuda are concerned, and the scheme of the Act and Regulations is such that a Class A or Class C Licence is necessary for the purpose.
18. Mr. Mussenden, for BDC, submitted that BDC does no more than its Licence permits. It “maintains and operates” the “Data Transmission Services” defined in the Appendix to the Licence, and these are limited to transmissions within Bermuda. Clearly, BDC is permitted to make such transmissions to and from C&W’s access gateway in Bermuda, and if this involves the use of circuits which are not under its own control or ownership, that use is “otherwise provided for in its licence” and therefore is permitted by the Regulations.
19. He further submitted that the statutory framework does not specifically deal with concepts such as “Internet Service” or “Internet Access”, nor do the words “Internet” and “Internet Service Provider” appear in it. It is not expressly

provided that an ISP may not operate without a Class C Licence, and in any event, BDC had been permitted to provide internet access via mobile telephones and wireless data cards for laptops by virtue of its existing Class B Licence.

Conclusions

20. The correct starting point in our view is the terms of the Licence itself. It permits BDC to “maintain and operate within Bermuda the telecommunication services set out in the Appendix”, and these include “Data Transmission Services” as there defined, including “fixed and mobile services using wireless means”. It is clear that the services which BDC maintains and operates in Bermuda do no more than this. The service to and from Bermuda is maintained and operated by C&W as its Class A Licence entitles it to do.
21. The nub of the Minister’s contention is that BDC is providing a service for its customers which includes not only transmissions within Bermuda but also transmissions to and from Bermuda. In one sense that is correct, because BDC is offering a service which includes transmissions outside as well as within Bermuda. But factually it is incorrect, because the service outside Bermuda is operated and provided by C&W, not by BDC itself. The Minister responds that the Licence does not permit BDC to offer a service which it does not provide itself, having regard to the definition of “public telecommunication service” in section 2 of the Act, as amended (“the provision, whether by one person or by a number of persons jointly, of telecommunication services to members of the public upon payment of a fee”), and to the terms of the Licence itself, including the Appendix.
22. In our view, the terms of the Licence tend to support BDC’s contention that it is concerned with the physical provision of services, being concerned with maintaining and operating them and, in the Appendix, referring to the “circuits” and “technology” by which they are provided. So far as the Bull service includes transmissions to and from Bermuda, these are maintained and operated by C&W, not by BDC.
23. The Minister relies upon the definitions of the different classes of licence contained in the Regulations, specifically Class C which permits the provider of a service to use “circuits” that are not under its own direct control and ownership. Again, the reference to “circuits” suggests that this is concerned with the provision of physical services, and there is no express provision that the holder of a Class B (or Class A) Licence cannot offer a service which is provided partly by itself and partly by another duly licensed Carrier.

24. We conclude therefore that as part of the Bull service, BDC provides data transmission services within Bermuda, as its Licence permits it to do, and the transmissions to and from Bermuda are provided by C&W. The Act and Regulations do not preclude BDC from offering the combined service to its customers, on the basis of whatever arrangements are made between them and with C&W.
25. This conclusion is supported by the fact that apparently the Licence was interpreted in this way when the same issue arose in relation to cell phones, though we have not heard argument as to whether the interpretation is binding on the Minister for that reason alone.
26. For these reasons, the appeal is dismissed.

Costs

27. A further question arises with regard to the costs of the appeal. We will hear argument from counsel when this judgment is handed down.

I agree

Signed

Nazareth, JA

Signed

Evans, JA

I also agree

Signed

Forte, JA