



The Court Of Appeal for Bermuda

CIVIL APPEAL No. 2 of 2009

Between:

THE TELECOMMUNICATIONS COMMISSION

Appellant

-v-

**BERMUDA CABLEVISION LIMITED (1)
THE DEPARTMENT OF TELECOMMUNICATIONS (2)**

Respondents

Before: Hon. Justice Zacca, President
Hon. Justice Stuart-Smith, JA
Hon. Justice Ward, JA

Date of Hearing: 3 & 4 March 2009

Date of Judgment: 19 March 2009

Appearances: Mr. L. Mussenden and Ms. M. Matin for the Appellant
Mr. Ben Adamson, Mr. M. Douglas for the Respondents

JUDGMENT

STUART-SMITH, JA:

Introduction

1. This is an appeal from a decision of Ground CJ given on the 9th January 2009 in which he granted judicial review to Bermuda Cablevision Limited (Cablevision) of what he described as an apparent decision of the Acting Director of The Department of Telecommunications (The Department), which was conveyed to them by letter of the 2nd December 2008. That letter directed them not to cease to carry Channels 7 and 9 which are dedicated to the programming of the Bermuda Broadcasting Company Limited (BBC). He granted a declaration and made an order in terms sought by the applicants (now the respondents to this appeal) in the following terms:

It is hereby declared and ordered that sections 21(1) (i) and 23 (1) of the Telecommunications Act 1986 do not require that the Bermuda Cable Television Limited obtain the Telecommunications Commission's consent in order to cease free transmission of channels carried on its cable television service, in the event Bermuda Cable Television Limited elects not to carry those channels pursuant to regulation 12(6) of the Cable Television Service Regulations 1987.

2. Although the order in terms is only against The Department, the Telecommunications Commission (The Commission), and the BBC were also the respondents to Cablevision's application and were represented in the proceedings. It is The Commission who bring this appeal, supported in the main by The Department.

Background

3. Cablevision is the principal provider of cable television services in Bermuda. BBC operates two broadcast television channels, but until now those channels have also been carried on Cablevision's system, essentially free of charge to either side. Historically that arrangement derived from Regulation 12 of the Cable Television Service Regulations 1987 (The Regulation).

However Regulation 12 was revoked and replaced with effect from 10th July 2008. The new Regulation 12 introduced a radically different regime for the retransmission of broadcast stations. There is however a difference of opinion between the parties as to the meaning in effect with the new regime, and it is that dispute which is before the court.

4. The grounds on which the relief was sought are as follows:

The Cable Television Service Regulations 1987 and in particular Regulation 12 thereof, provide detailed and specific provision, and a complete code, for the manner in which cable operators should react to an election by a local broadcaster for its programming to be carried on a retransmission consent basis.

The Department of Telecommunications' decision that, in addition to following the processes set out in The Regulations, Cablevision must obtain the consent of the Telecommunications Commission is wrong in law and based upon a misunderstanding of the statutory regime. The applicant seeks a declaration as to the proper interpretation of The Regulations and The Act.

5. The material part of the acting director's letter of the 2nd December 2008 in respect of which the challenge is brought is in these terms:

As a specified carrier, BCV (i.e. Cablevision) must first obtain a direction/decision from The Commission before introducing any new service or varying the rates and charges for any existing service.

Finally we draw your attention to section 21 (1)(i) of the Act which states it is the duty of every carrier 'to maintain existing services unless permitted by The Commission to discontinue such services.' As a result BCV must not remove channels 7 and 9 as advertised in your articles.

6. The Chief Justice was careful to limit the application to the two points raised in that letter, namely 1) the application of the "specified carrier provisions, and 2) the application of section 21 (1)(i) of the Telecommunications Act (The Act). Both questions turn on what is meant by "telecommunication service".

The Statutory Framework

7. It is important to appreciate the scheme of The Act so far as it is relevant. The Act applies to all carriers of telecommunication services, for example radio, television, telephone and data services and not just cable television. “Telecommunication” is defined as “telecommunication means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio, optical, or other electromagnetic system and cognate expressions shall be construed accordingly.” “Telecommunication Service” is defined as “a service consisting in the conveyance of anything by means of telecommunication whether or not the circuits are provided by the service provider or others.” That definition clearly draws a distinction between what is conveyed and the means by which it is conveyed. “Carrier” means a person to whom a license has been granted pursuant to section 9 (1) of The Act and includes a person who provides—a) “a cable television service” meaning a service.... providing programmes to persons for their instruction, information and amusement by means of visual images and sounds conveyed by wire communication from a common centre but does not include--...(i) any service for which—b) the transmission includes only matter which is being simultaneously broadcast to the public in Bermuda by a broadcasting station licensed under The Act”. That suggests that a service is the transmission of broadcast matter. “Specified carrier” means a carrier specified in the first schedule; Cablevision is a specified carrier. See generally the definitions in section (2).
8. The existence of The Department of Telecommunications is confirmed. It is charged with the duty of assisting the Minister in discharging his duties (section 6). The Telecommunications Commission is established to advise the Minister in the discharge of his functions and such other functions as may be imposed (section 7(1)).

9. Part III of The Act is concerned with licensing. Section 9 provides:

a. Subject to subsection (3A), no person shall establish, maintain or operate a public telecommunication service in Bermuda without first obtaining the grant of a license from the Minister under this act or without being authorised by law.

(3) Subject to section 3 and subsection 3(A) of this section no person shall, save under and in accordance with a license, permit or certificate granted by the Minister—(i) Construct, establish, maintain or operate a telecommunications system.

These two subsections draw distinction between a service and the system by which the service is to be conveyed. The Minister has power to impose conditions in a license (section 10(2)). He must refer all applications for the grant of a license to establish, maintain or operate a public telecommunication service to The Commission, which must hold an enquiry and report to the Minister (section 11(1)). The Minister may vary the terms and conditions of the license on application by the licensee or of his own motion (section 13 (1)(b)). It is a criminal offence to contravene section 9 (section 39).

10. Section 14 of The Act is an important provision for the protection of the public in respect to rates and charges by those in a monopoly or virtual monopoly position. It provides

a. Subject to subsection (8), no carrier specified in the first schedule shall impose rates or charges for a telecommunication service operated by it or vary the amount thereof, unless notice in writing of the amount of such rates and charges or the proposed variation thereof has been given to The Commission pursuant to this section or to section 23 or as the case may be, and The Commission has made an inquiry into the matter.

b. Subject to subsection (3), where the Minister is of the opinion that—a) a Carrier or a group of Carriers is in substantial control of a telecommunication service so that there is insufficient competition to stimulate reduction in rates or charges and to provide adequate freedom of choice to the public; or b) a Carrier is not providing the general public or any section thereof or to another Carrier

fair and reasonable access to its services or is making unjust or unreasonable discrimination in rates, charges practices, classifications, regulations, facilities or services; he may by order amend the first Schedule by adding thereto another Carrier.

Cablevision is a specified carrier.

11. Part IV of The Act is concerned with Carriers. Section 21(1) provides:

subject to this section, it shall be the duty of every Carrier...(i) to maintain existing services unless permitted by The Commission to discontinue such services.

12. Section 23 is an important provision which relates only to specified carriers and it lies at the heart of this case, it provides:

Specified Carriers must give notice to Commission of charges

23 (1) *Subject to this Act, no specified Carrier shall initiate a new telecommunication service or vary its rates and charges for existing telecommunication services unless it gives notice in writing of the new variation in the rates and charges for the existing services and the amount thereof to the Commission and publishes a notice in accordance with subsection (2).*

(2) *A notice under subsection (1) shall be published in such form approved by the Commission on two separate days in not less than one local newspaper approved by the Commission and shall specify therein that any person may make objections and forward such objections to the Commission within twenty-one days from the second date of publication of the notice.*

(3) *Where a notice under subsection (1) is given, then subject to subsection (4) or subject to the Commission giving a direction under section 24 a new service and the rates and charges therefore or a variation in the existing rates and charges shall not be introduced.*

(4) *Where the Commission is satisfied with the notice given under subsection (1) and informs the specified Carrier in writing or by notice published in the Gazette that it does not intend to inquire into the matter, the specified Carrier may introduce the new service and*

the rates and charges therefore or the variation in the existing rates and charges as the case may be.

“Rates and charges” are defined as, “the rates, charges for, the terms and conditions applying to the offer of and the provision of any services connection with—ii) the transmission of intelligence by telecommunication and rental charges.” (See section 2)

13. Put shortly the appellant contends that channels 7 and 9 are part of the service provided by Cablevision and that by dropping them they are either initiating a new service or varying its rates and charges for existing services. What the public is interested in and what the Commission is charged with the duty of controlling is what they are required to pay for the programmes and channels, which they elect to receive. The respondent maintains, as the judge held, that’s “service” is the general provision of cable television, and not individual programmes or channels.
14. Section 24 (1) provides that “on receipt of a notice under section 23 (1) the Commission may, after making such inquiry into the matter as they think fit” give “various directions” either approving or varying the rates. Section 24 (2) sets out the matters to which the Commission shall have regard in exercising their discretion under section 24 (1) including “regulatory changes where applicable”. (Section 24 (2)(vii) and in the public interest (section 24 (2) (xi). Section 24 (5) provides:

On receipt of a complaint regarding a Carrier’s rates and charges, on the direction of the Minister, or of its own motion the Commission may review the Carrier’s rates and charges after making such inquiries into the matter as the Commission may think fit and having regard to subsection 2 where applicable, and may give a direction changing the rates and charges for the service in whole or in part.

15. The Act is designed to regulate the position as between the licensee/Carrier and the public. It does not regulate the position as between a broadcaster and cable television carrier. That is governed by the Cable Television Service Regulations 1987 BR 27/1987 (The Regulations) as amended. The Regulations were made under the provisions of section 59 (1) of The Act. Section 59 (1)(x) provides—

that the Minister may make regulations “generally regulating the conditions under which cable television servicemay be established, maintained and operated.”

The principal regulation with which we are concerned is Regulation 12. The problem in this case arises from the change in this Regulation which took place in 2008.

16. The old scheme as it existed until the 10th July 2008, when it was revoked by the Cable Television Service Amendment Regulations 2008. BR43/2008, (The Amendment Regulations) provided:-

Local television broadcast programmes

12 (1) A licensee shall carry on the System, free of charge, all television programmes broadcast by a broadcasting radio station licensed in Bermuda.

The other provisions of Regulations 12 are concerned with how the signal is to be carried and are not relevant.

Put simply under the old scheme Cablevision was bound to carry BBC channels including 7 and 9 without charge by either party.

The New Scheme

17. By The Amendment Regulations 2008, Regulation 12 was revoked and the new Regulation 12 was substituted by amendment that provides:

Local television programmes

12 (1) A licensee may carry on the System television programmes broadcast by a broadcasting radio station licensed in Bermuda

(2) A broadcasting radio station shall elect for every period of three years commencing 1 November 2008 (in these Regulations referred to as the “election period”) whether they wish their television programmes to be carried on a “must carry” or a “retransmission consent” basis.

(3) A Broadcasting radio station must make its election for the first election period before 1 November 2008, and must make its election for each subsequent election period at least four months prior to the end of the then current election period.

(4) If “must carry” is elected, a licensee shall carry on the System, free of charge, all television programmes broadcast by a broadcasting radio station.

(5) If “retransmission consent” is elected, a licensee must, within 30 days, confirm whether or not they intend to carry the television programmes of a broadcasting radio station.

(6) Where “retransmission consent” is elected under paragraph (5) and a licensee chooses not to carry the television programmes they must within fourteen days inform the public via the public printed media and by direct notice to their customers and must also within that fourteen day period file revised tariff rates with the Commission for the Programme tier in which the television programmes will no longer be available.

(7) Where “retransmission consent” is elected under paragraph (5) and a licensee chooses to carry the television programmes on a “retransmission consent” basis and the parties are not able to reach a commercial agreement within sixty days, then either party may refer the matter to the Commission for determination.

(8) The Commission shall, in not more than sixty days or such longer period as the Minister may allow, conclude its deliberations and forward a decision to the parties.

(9) The date of implementation of any new agreement shall be the day following the expiration of the previous election period.

(10) If either party is aggrieved by the decision of the Commission, they may appeal to the Minister in accordance with the procedures outlined under section 25 of the Act.

(11) During an election period in which a licensee has elected “must carry” or “retransmission consent”—

(a) neither party shall cause the television programmes of the broad-casting radio station to be unavailable on a licensee’s System without the express permission of the Minister;

18. It is apparent that whereas under the old scheme Cablevision were obliged to carry BBC channels 7 and 9, the new scheme gives the broadcaster the option of electing a “must carry” or “a retransmission consent” basis. If the latter is elected then Cablevision can choose whether to retransmit, in which case rates have to be agreed between the parties and in default of agreement by arbitration of the Commission, or not to carry the programmes.

Facts leading to the application

19. There is no dispute as to the factual background that led to the application. By letter dated the 29 October 2008 the BBC’s attorneys wrote to Cablevision electing the retransmission consent basis; they said

pursuant to Regulation 12 of the Cable Television Service Regulations 1987 as amended by the Cable Television Service Amendment Regulations 2008 our client hereby provides you with formal notice of its election for its television programmes on CBS, ABC, and BBC to be carried on a “retransmission consent” basis, from the commencement of the first election period, being the 1 November 2008.

In accordance with Regulation 12 as amended, within 30 days of the date of this letter, we expect to receive your written confirmation as to whether or not you intend to carry the television programmes on the above-mentioned channels.

20. The references CBS, ABC, BBC in that letter are to the programming of American and British broadcasting channels which are rebroadcast on BBC, and make up much of the programmes content. By letter of the 7 November BBC's attorneys made it plain that their previous letter referred to all the programmes currently carried by ZFB and ZBM, i.e. channels 7 and 9.

21. By letter dated 28 November Cablevision's attorneys wrote—

while Cablevision has always been happy to carry channels 7 and 9 over cable network and to do so free of charge, it does not believe that Cablevision and its customers should pay for channels available for free on antennae. Cablevision accordingly, and pursuant to Regulation 12 (6) of the Cable Television Service Regulations 1987, chooses not to carry your client's programming on a retransmission consent basis. Cablevision remains willing to carry these channels on the old basis.

22. No doubt in response to the media coverage which this decision evoked the Acting Director wrote the letter of the 2 December the subject of the application asserting that Cablevision required the permission of the Commission to discontinue its retransmission of BBC's programmes. The letter concluded,

as a result Cablevision must not remove Channels 7 and 9 as advertised in your articles.

Cablevision's attorneys responded the next day, saying that it would be unlawful for it to continue to retransmit the programming and setting out at length its position on the meaning in effect of Regulation 12, and its relationship with the rest of the legislation. They concluded by saying that if

the Acting Director did not agree with their position, it was the intention of Cablevision to have the matter resolved by the Supreme Court.

23. On the 5 December the Commission wrote to both parties declaring,

this is a matter of urgency thus therefore justify an ex parte decision to stop this matter proceeding any further until the Commission can hold an inter parties inquiry for the purpose of making a decision.

Bermuda Cablevision Limited and Bermuda Broadcasting Company Limited are to restrain from proceeding to any other body until Commission, the appropriate body to hear complaints and hold inquiries under the Telecommunications Act 1986 as amended can conclude its inquiries.

24. On the same date, BBC wrote a long letter to the Commission making a formal complaint about Cablevision's conduct in respect to the run up to this matter and dating back to a press release by Cablevision shortly after the making of the 2008 Regulations.

They asked for an audience with the Commission because they wanted clarification as to whether the matter was proceeding under Regulation 12(6) and 12(7). They consented to Cablevision continuing to carry their channels pending the Commission's inquiry and determination. It is important to note that BBC was not taking the same point as the Acting Director. They were not saying that their complaint about Cablevision was that the latter needed the Commission's consent. They were saying that as a matter of fact Cablevision had responded to their election by choosing "retransmission consent", and they wanted the Commission to rule on that issue.

Events since Trial

25. Since the Chief Justice's decision acceding to Cablevision's application there have been further developments. On the 21 January 2009, the Commission

filed Notice of Appeal. At about 6:00 p.m. on that day Cablevision disconnected Channels 7 and 9, without notice to the Commission or other parties. The following day the Commission applied for an interim injunction restraining Cablevision from disconnecting the channels pending the determination of the appeal; and that was granted the next day by Kawaley J. Cablevision restored the channels the same day. A subsequent attempt by Cablevision to set aside the injunction was unsuccessful.

The Chief Justice's decision

26. The Chief Justice's conclusion is set out in paragraphs 40 – 42 as follows:

40. On the face of these definitions the 'service' is the general provision of cable television, not the individual programmes, nor the channels. This is strongly reinforced by the general scheme of the Regulations, which are (with the notable exception of regulation 12) concerned with the overall system by which a "cablecasting service" is disseminated. Thus regulation 32 provides—

Provision of cable television service

32. Cablecasting service, as provided by a licensee through the System, shall be made available to all individual dwellings, residences, including apartments, condominiums, institutions, organizations, businesses and all other entities including any other System, within the area in which it is authorized by its licence to install and operate a System.

41. Against that background, I do not consider that Programming is the direct concern of the Commission, and is not the subject of control by it under section 23. Once that is understood it also clarifies the relationship between regulation 12 and the Act, and removes any apparent conflict. All this, of course, is quite distinct from the question of the price, and the Commission retains its jurisdiction over that. If it considers that the price of Cablevision's basic tier should be reviewed in light of the loss of ZBM's programming, it can undertake that review of its own motion at any time under section 24(5) of the

Act, which refers in terms to the pricing of 'part' of a service.

Section 21 points

42. The same reasoning also applies to section 21(1)(i). It has to be conceded that in this case the issue is not quite so clear, as that subsection refers to "existing services" rather than "existing telecommunications services", but I do not think that it would make sense to give the word "service" different meanings in different parts of the Act.

The Commission's Submissions

27. Mr. Lyon, QC on behalf of the Commission submitted that under the scheme of the Act and Regulations, if Cablevision lawfully elect under Regulations 12 not to carry BBC channels 7 and 9, then the Commission may inquire into the tariff that Cablevision had notified the Commission that it proposes to charge the public for its services without those channels. Until such inquiries are complete and the tariff has been approved or changed by the Commission (subject to appeal to the Minister) pursuant to sections 14, 23, and 24, the Commission has the discretion to withhold permission from Cablevision withdrawing its existing services including channels 7 and 9 under section 21(1)(i) and withholding its permission to introduce its new service, (i.e. a service without those channels) or vary its rates for what will then become its existing service without those channels (under section 23(3)). Whatever the position may have been before the Chief Justice, it is now accepted that in deciding whether to approve the introduction of a new service or new rates and charges under section 24(1), the Commission must take into account "the regulatory changes where applicable" (see section 24 (2)(vii)) and accordingly it does not have statutory power to withhold permission indefinitely for the introduction of the Cablevision's service without channels 7 and 9 or to "disallow the new service" under section 24(1) (d) where the procedure for Cablevision's ceasing to carry those channels pursuant to Regulation 12 has been properly followed. There is apparently some dispute between BBC and

Cablevision whether that procedure has been correctly followed; that may have to be resolved by the Commission, since BBC has made a complaint about it; but the court is not concerned with this dispute and we proceed on the basis that Cablevision has correctly followed the Regulation 12 procedure.

28. Accordingly the issue is not whether the Commission can withhold its permission indefinitely for Cablevision ceasing to carry channels 7 and 9, or could disallow them to be dropped, but whether it can withhold its permission for them to be dropped until its inquiries into the suitability of the new tariffs for Cablevision services without those channels are complete and it has approved or changed the tariff. It should be noted that the process of setting the tariff is not a consensual one; there does not have to be agreement between the Commission and Cablevision; the Commission can impose the rates consistently with its public duty.

29. Mr. Lyon submits that the consequences of the Chief Justice's construction of "services" leads to surprising and bizarre results. Cablevision currently carries some 400 channels; under its license it has to provide a minimum of 11 channels (see condition 5). If the Chief Justice is right, Cablevision can cease all except 11 channels and still comply with its license, but section 23(1) would not be engaged. This is an extraordinary proposition; but Mr. Hargun on behalf of Cablevision did not shrink from it. Moreover if the respondent's construction is right section 23(1) is only engaged if Cablevision ceases to carry any channels or wish to deliver them in a method entirely different from cable and wholly outside the terms of the current license. It cannot have been the intention of the legislature, Mr. Lyon submits to have confined the operation of section 23 to such extreme and improbable circumstances. No such new method can be introduced without a new license or variation of the old; and this will only be granted by the Minister with advice from the Commission. What the public are interested in are the rates which they have to pay to receive particular channels, and these rates fall into different tiers,

channels 7 and 9 being currently in the lowest or basic tier for which no charge is made. The whole purpose of sections 14 and 23 is to give the Commission power in the case of a monopoly carrier to regulate these rates. The judge's construction that "the service" referred to in sections 21 and 23 is simply the general provision of cable television seems to mean no more than the connection by wire of the subscribers set to the cable system. No doubt the cable and the transmission equipment operated by Cablevision are the "system" they are licensed to operate, but are not the service which is provided by means of that system.

30. The Chief Justice held that there was no separate definition of "service" in the Act and therefore, he was free to give it a very limited meaning, which he did. Mr. Lyon submits that this overlooks the various definitions in section 2. Thus "telecommunications service" means a "service consisting in a conveyance of anything by means of telecommunication." "Cable television service" means a service providing programmes; therefore, the relevant television service consists in the conveyance of programmes by cable. Accordingly the existing service includes the conveying of programmes (and the bundling of programmes into channels) including channels 7 and 9. Further Mr. Lyon submits that this is the ordinary natural meaning of the term 'service' in the context of cable television service and gives effect to the obvious intention of the Act to afford protection to the public in respect of rates charged by a monopoly supplier. Although it is not determinative of the position, the parties themselves have for sometime considered that the introduction of a new channel falls within section 23(1).

Respondents' Submissions

31. Mr. Hargun on behalf of the respondents seeks to uphold the judges' construction. First he points out that the present difficulty has arisen because there are no transitional provisions in the Regulations. The election period

started on the 1 November 2008, and BBC gave notice of its election of “retransmission consent” on the 29 October. This did not give scope for the periods allowed in the regulations, namely that the broadcaster must give his election four months before the expiry of the election period: the licensee then has 30 days in which to accept retransmission or not carry the programmes. The licensee then has 14 days to notify the public and give the Commission his proposed new tariffs. Mr. Hargun submits that in future two and a half months is sufficient time in which the Commission can make an inquiry and approve or disapprove the rates. That may be so; but I do not think it is necessarily so; it may depend on the magnitude of the change and the extent of the inquiry. In the present case the change involves dropping two of the three channels and those which carry some of the most popular programmes. And while most of the Island can still receive these channels by what are called “rabbit eared” antennae, there are parts of the Island where there is no such reception.

32. Mr. Hargun submits that having by its attorney’s letter of the 28 November 2008 chosen not to carry the channels, it was entitled without more to discontinue them, and indeed to do so with retrospective effect from the 1 November, the start of the election period, albeit in fact they continued to carry them until 20 January 2009. This somewhat curious situation arises, so Mr. Hargun submits because of the absence of proper transitional provisions in the Regulations. For any future election period, where the licensee chooses not to carry a channel, that will have effect at the commencement of the next election period.
33. Mr. Hargun points out that there is nothing in Regulation 12 to suggest that the Commission can override the licensee’s choice not to carry the programmes. That may be so, though I shall have to consider the effect of Regulation 12 (11) in due course. But this is not surprising; the Regulations

control relations between the broadcaster and the licensee; the Act regulates relationships between the licensee and the public. They are parallel schemes.

34. Mr. Hargun argues that once the licensee has chosen not to carry the channels or either of them from the 1 November 2008 in the present case, or from the start of the next election period in any subsequent occasion, the licensee has no statutory authority to carry the programmes and hence no protection from breach of copyright. The Copyright and Designs Act 2004 section 99 provides:

1) *This section applies where a broadcast made from a place in Bermuda is, by reception and immediate retransmission, included in a cable programme service.*

2) *The copyright in the broadcast and any work included in the broadcast is not infringed if the inclusion is in pursuance of a relevant requirement.*

3) *In this section “relevant requirement” means a requirement under regulations made pursuant to section 59 of the Telecommunications Act 1986 regulating the provision of cable television service in Bermuda.*

Clearly under the old regulation 12, the “must carry” provision afforded this protection. If Mr. Hargun is right and there is no statutory requirement to continue the programmes until permission to cease doing so is given by the Commission or Minister, Cablevision may be in breach of copyright from the 1 November or indeed from the 10 July 2008, when the original Regulation 12 was abrogated; if they continue to carry the programmes. That is not the case if section 21 subsection (1)(i) or section 23 of the Act require the continuance of the programmes until the Commission permits discontinuance.

35. Moreover I think that the position is covered by the somewhat obscure provisions of Regulation 5 and Regulation 12 (11). Regulation 5(2) provides:

Nothing herein shall be construed to render a licensee liable for the failure of a licensee.... of a broadcasting

station licensed in Bermuda, to secure the right to the copyright transmitted over the System.

36. Regulation 12(11) as I have already set out provides:

During an election period in which a licensee has elected 'must carry' or 'retransmission consent' –

a) neither party shall cause the television programmes of the broadcasting radio station to be unavailable on a licensee's System without the express permission of the Minister.

Both counsel accept that this regulation cannot mean literally what it says, since it is not the "licensee" as defined in the Regulations i.e. Cablevision, that makes any election at all. The simplest alteration, and that for which Mr. Lyon contends, is that 'licensee' is simply an error for "broadcasting station", since it is the broadcaster that makes the election, the licensee makes no election at all. The difficulty with this construction is that the broadcaster must make an election either to go for "must carry" or "retransmission consent", therefore the words "in which a broadcaster has elected "must carry" or "retransmission consent" would be otiose. But the alternative construction namely that it means something like "during an election period in which a licensee is obliged to carry programmes on a "must carry" basis or has agreed to do so on a "retransmission consent" basis" requires substantial rewriting of the regulation, and in any event the licensee cannot discontinue if it is operating on a "must carry" basis since this would involve a breach of section 21(1) of the Act, and there would be no need for this provision in the Regulations.

37. In my judgment Mr. Lyon construction is to be preferred and the alteration is necessary to avoid manifest nonsense. That being so the Regulations themselves continue the statutory protection afforded by the Copyright and Designs Act section 99 until such time as the Minister, on the advice of the Commission, gives permission for the discontinuance of the two programmes.

This seems to me to fit with the general scheme of the Act and the Regulations as Mr. Lyon submits. Moreover it fits with the requirements of the respondent's license, that it is a condition that they carry these programmes, unless and until the license is varied. It is accepted by the Commission and the Minister that, assuming that Cablevision has properly operated the procedure under Regulation 12 (6) Cablevision are entitled to have the license varied once the Commission has approved or set the rates.

38. Mr. Hargun also argued that if the word "service" in section 23 meant or included the provision of programmes, it could lead to absurd results that the legislature could not have intended, namely that the Commission would have the right to interfere in any trivial change of programme, for example if on a particular day a sports programme was substituted for a religious programme. I cannot accept this argument. Section 23 is only engaged if there is a variation in rates and charges; that is obviously a question of degree to some extent. But it is likely to arise on the introduction of a new channel for which a new tariff has to be set. It would not normally arise if a priced channel were given up, since the charge would automatically cease; but it may occur where a channel which has hitherto been carried free of charge is to be dropped without any alteration of the overall charges, the position proposed by Cablevision.
39. Mr. Hargun has always accepted that the Commission can exercise its powers in relation to rates and charges; but not under section 23. He submitted that it was implicit in Regulation 12 (6), which requires the licensee to file revised tariff rates with the Commission when it choose not to carry the programmes, that the Commission should have this power. But Regulation 12 (6) is merely the machinery for notifying the Commission; it does not give the Commission jurisdiction. That must be found in the Act. Mr. Hargun submits that this power is contained in section 24(5) and that the Chief Justice considered that this was so. But that subsection postulates that what it is

dealing with is the rates for “a service or part of a service”, since it is that in respect of which the Commission can give a direction following its inquiry. If the provision of channels is not a service for the purpose in section 21 and 23, it cannot be for section 24.

40. Mr. Hargun drew our attention to certain provisions of the Cable and Wireless Public Limited Company (Consolidated License) Act 1985 which is concerned with licensing certain telecommunications services. It may be that on the proper construction of that Act the term “telecommunication service”, which is not defined, bears a restricted meaning. I do not find this of assistance in the construction of the Act under consideration, where the term must be construed in the context of the Act.
41. For these reasons I prefer the submissions made on behalf of the Commission and the Department and reject those made by Mr. Hargun.
42. The Chief Justice held that, if he was wrong, and the word “service” extended to the programming of individual channels, he would have held that the provisions of the Act had to be complied with, as they are contained in primary legislation, which cannot be abrogated or modified by the Regulations and accordingly he would have held that the operation of Regulation 12 does not absolve Cablevision from obtaining the necessary consents. By respondent’s notice dated 19 February 2009 Cablevision challenged the Chief Justice’s decision on this point, and sought to uphold the Chief Justice’s decision on the main point for other reasons. As I understand it the argument is that by refusing consent to the cessation of the two channels the Commission would be requiring Cablevision to act in breach of copyright, since it would no longer have the protection of section 99 of the Copyright and Designs Act, and indeed did not have that since November 1, 2008. And that the Legislature can not have intended a result which would mean that the licensee was compelled to act unlawfully in breach of copyright. But I have

already dealt with this argument in paragraphs 35 – 38. The effect of section 21(i) section 23 and Regulations 5(2) and 12(11) either collectively or separately require that the channels should not be dropped until the Commission and or the Minister give consent, therefore the protection continues under section 99 of the Copyright and Design Act.

For these reasons I would allow the appeal.

Signed

Stuart-Smith, JA

Signed

Zacca, President

I Agree

Signed

Ward, JA

I Agree