



**IN THE SUPREME COURT OF BERMUDA**

**CIVIL JURISDICTION**

**2008: No. 305**

**BERMUDA CABLEVISION LIMITED**

**Applicant**

**-v-**

**DEPARTMENT OF TELECOMMUNICATIONS**

**Respondent**

**REASONS FOR DECISION**

Date of Ruling: 30<sup>th</sup> day of January, 2009

Date of Reasons: 13<sup>th</sup> day of February, 2009

Mr. Jeffrey Elkinson and Mr. Ben Adamson,  
Conyers Dill & Pearman, for Bermuda Cablevision Ltd  
("BCL")

Mr. Victor Lyon QC, Mr. Larry Mussenden and  
Ms. Mina Matin, Attride-Stirling & Woloniecki, for the  
Telecommunications Commission ("the Commission")

**Introductory**

1. On January 22, 2009, following an ex parte hearing of the application of the Commission on notice to BCL, I granted an interlocutory mandatory injunction requiring BCL to restore part of their telecommunications service (namely two channels broadcast by Bermuda Broadcasting Company Ltd. ("BBC")) pending the determination of the Commission's appeal against the Chief Justice's January 9, 2009 judgment. I also ordered the Commission to give the usual undertaking in damages.

2. This somewhat unusual form of order was intended to achieve what I considered to be the usual position in judicial review proceedings; namely that the status quo when the judicial review proceedings were commenced is usually preserved until the proceedings are finally determined and all appeal rights have been exhausted. While it is not customary for the Crown to be required to give undertakings as to damages, I requested an undertaking because the commercial context in which the application was made appeared to me to be sufficiently unusual to justify giving BCL comfort that, if it suffered any loss by reason of the injunction, it would be able to resort to a summary remedy.
3. On January 27, 2009, BCL issued a Summons seeking to discharge the injunction. The Respondent issued a Summons seeking an injunction in the terms of the Commission's injunction two days later. This Summons was supported by the Affidavit of Hiram Edwards, also dated January 29, 2009. Paragraph 1 of the Edwards Affidavit made it clear that the Department of Telecommunications would only be seeking an Injunction "*in the event that the Honourable Court should find that the Telecommunications Commission ...lack the capacity or authority to give an undertaking in damages.*"
4. On January 28, 2009, Attride-Stirling & Woloniecki for the Commission invited BCL's attorneys to consent to an order on the Respondent's Summons replacing the injunction obtained by the Commission with an injunction in like terms in favour of the Department, to save the costs of a contested hearing of BCL's January 27, 2009 Summons. This request was repeated by letter dated January 29, 2009.
5. On January 30, 2009 BCL insisted on proceeding with its Summons, on the grounds that the Commission lacked the standing to obtain the January 22, 2009 injunction and/or to give the undertaking purportedly given. The invitation to consent to an order on the Department's Summons was again declined. Having heard argument, I dismissed BCL's application to discharge, and awarded the costs of the application to the Commission to be taxed, if not agreed. I declined to order that the costs should be payable forthwith.
6. I now give reasons for that decision.

### **Brief procedural history**

7. On December 8, 2008, BCL obtained leave to issue its December 9, 2008 Originating Notice of Motion for Judicial Review under Order 53 of the Rules of the Supreme Court. Although the Department of Telecommunications was the only named Respondent, page 2 of the Originating Notice indicated that it was also proposed to serve the Notice on BBC and the Commission. The Chairman of the Commission, Ronald Simmons, through the Commission's attorneys, filed an Affidavit on December 17, 2008, the day prior to the first return date of the

application. The back-sheet described the Commission as an “*Intervening Interested Party*”.

8. The hearing took place over three days between December 18 and December 20, 2008. The Commission, it is a matter of record, appeared by its counsel throughout. The Second Affidavit of Ronald Simmons was filed on the second day of the hearing. It appears from the Judgment of the Chief Justice dated January 9, 2009 that the Commission essentially supported the Department’s position. The interest of the Commission in the subject-matter of the application appears to be self-evident on the face of the Judgment, paragraphs 45 and 46 of which state in salient part as follows:

*“45. In summary, therefore, the decision before me is simply one as to the interpretation of regulation 12 and the meaning of sections 21 and 23 of the Act...*

*46. Regulation 12 allows Cablevision to choose not to carry ZBM in certain circumstances. If Cablevision has properly and effectively exercised its choice under regulation 12 not to carry ZBM, then no further permission is required from the Commission under section 21(1)(i) or under sections 23 and 24 of the Act, and the Commission has no power under 24(1)(d) to forbid or ‘disallow’ this course...” [emphasis added]*

9. Unsurprisingly, the recitals to the Chief Justice’s Order dated January 9, 2009, which was filed and presumably drafted by BCL’s attorneys, describes the Commission and BBC as “*interested parties*”. That Order declared that BCL could discontinue retransmission channels at its own election without the Commission’s consent.
10. On January 21, 2009, ‘*The Royal Gazette*’ reported on page 1 that BCL “*has dropped channels 7 and 9*”. That same day, the Commission filed its Notice of Appeal in respect of the January 9, 2009 Judgment. On January 22, 2009, the following day, the Commission’s application for an injunction was filed, heard and granted.
11. BCL’s present application was filed on January 26, 2009. On January 29, 2009, its skeleton argument was filed, raising for the first time the point that the Commission lacked the standing to be a party to legal proceedings.

**Legal findings: the Commission’s standing as a party in the present public law proceedings**

12. BCL in its written submissions made essentially two broad contentions: (a) the Commission was not a juristic person; and (b) the Telecommunications Act 1986 did not permit the Commission to sue or give undertakings. The Commission in response submitted: (a) it was a statutory body whose decisions were reviewable

- as a matter of public law and which was capable of being a party to judicial review proceedings; (b) since the Commission had appeared in the proceedings, it was a party in any event under the Rules; and (c) the application was a waste of costs because the Department was able to stand in the shoes of the Commission, and give an undertaking in place of the Commission in return for being granted an equivalent injunction.
13. In my judgment the Commission's right to sue and give undertakings as a matter of private law under the Crown Proceedings Act 1947 was wholly irrelevant to the question of standing for the purposes of the present public law proceedings. The 1986 Act was however, theoretically at least, relevant to the question of the ability of BCL to enforce its undertaking. I say theoretically, because in my judgment the notion of a statutory body in Bermuda failing to comply with an order of this Court to pay damages pursuant to an undertaking is purely fanciful. Nevertheless, I was satisfied that section 61C of the 1986 Act did not, as Mr. Elkinson contended, give the Commission complete immunity from suit. Rather, it grants immunity "*in respect of any act or omission done or made in good faith in execution of any function under this Act.*"
  14. It seemed obvious that the Commission could not in good faith give an undertaking in damages to this Court as a condition for obtaining an injunction, and then refuse to honour that undertaking when called upon by this Court to do so. In this eventuality, the Commission could be sued by BCL, because section 61C makes it clear that the Commission can be sued in circumstances where its statutory immunity is not engaged. Accordingly, the complaint that the Commission's undertaking was legally worthless was rejected.
  15. As far as standing to participate in public law proceedings is concerned, BCL's complaints were even easier to reject. The Commission's counsel aptly suggested that one way of determining whether a statutory body had the capacity to participate in public law proceedings as an applicant for relief was to determine whether or not its own decisions were amenable to judicial review. On this analysis, it was clear that the exercise of the Commission's express statutory powers were themselves amenable to judicial review. Mr. Elkinson nevertheless submitted that even if a statutory body had the power to participate in legal proceedings for some purposes, whether they were empowered to participate in specific proceedings fell to be scrutinised on a case by case basis. This submission was also conceptually sound, and was supported by reference to *In Re Northern Ireland Human Rights Commission* [2002] UKHL 25. This was a case where the Northern Ireland Human Rights Commission ("NIHRC") sought to intervene in an inquest into deaths caused by a bomb explosion after the Coroner indicated in correspondence that he considered the position of the NIHRC to be equivalent to "*that of a properly interested person*". When the NIHRC sought to intervene to invite the Coroner to consider applicable human rights standing, the Coroner ruled after hearing oral submissions that it had no power to do so. This decision was upheld by the House of Lords.

16. Mr. Lyon submitted that the present case was very far removed from the *Northern Ireland Human Rights Commission* case. Firstly because the appeal that the Commission was pursuing here, in support of which the injunction was obtained, manifestly related to the scope of the express statutory powers of the Commission under its governing statute. Secondly, counsel argued, as a matter of law the Commission had been determined by this Court to be an interested party, and so the issue was *res judicata*. Moreover, the Commission's right to participate in the present proceedings had been acknowledged by BCL at the outset when they elected to serve the Commission with their original judicial review application. Mr. Lyon's crisp and clear analysis was clearly sound and dispositive of the standing issue.

17. Order 53 rule 5 of the Rules of this Court provides in material part as follows:

**“(3)The notice of motion or summons must be served on all persons directly affected and where it relates to any proceedings in or before a court and the object of the application is either to compel the court or an officer of the Court to do any act in relation to the proceedings or to quash them or any order made therein, the notice or summons must also be served on the Clerk or Registrar of the Court and, where any objection to the conduct of the Judge is to be made, on the Judge.”** [emphasis added]

18. Section 1 of the Supreme Court Act 1905 defines the term party as follows:

*“"party" includes every person served with notice of, or attending, any proceeding, although not named on the record...”*

19. So the legal consequence of BCL serving the Commission with its Originating Notice of Motion combined with the Commission attending the substantive hearing of the application is that the Commission became a non-named party to the proceedings in the capacity of a person *“directly affected”*. Mr. Lyon pointed, with a forensic flourish, to the recitals to the January 9, 2009 Order as evidence that the Chief Justice had determined the issue of the Commission's standing. While the recitals do perhaps evidence such a finding, in my judgment this Court implicitly decided that the Commission was a party when it permitted it to appear through its counsel at the three day hearing of BCL's judicial review application, which commenced on December 18, 2008.

20. Where a judicial review applicant such as BCL serves a public body such as the Commission and permits them to participate in the substantive judicial review hearing, it does not lie in their mouth to contend for the first time that the Commission is not properly a party at the conclusion of the proceedings, in the context of an application for a stay pending appeal. This does not mean that the

standing of an affected party to maintain an appeal on issues wholly unconnected with its participation in the first instance proceedings may not be challenged before this Court (in the context of a stay application) or before the Court of Appeal. But in the present case, the Notice of Appeal relates to the very same legal issues which prompted the Commission intervention in the first place so the factual basis for such a challenge does not exist.

## **Conclusion**

21. For these reasons, the application to discharge the injunction brought by BCL was dismissed.
22. The Commission's attorneys sought a costs order in terms of indemnity costs payable forthwith, as foreshadowed in correspondence when they invited BCL's attorneys to agree to a substitution of the Department for the Commission as the injunction applicant, to save costs. Consenting to such a course would have met the concerns BCL raised and would have avoided the necessity for a contested hearing. Offering this compromise was more than reasonable considering that: (a) BCL's application was liable to be dismissed on its merits in any event, and (b) the timing of BCL's raising of the standing issue bordered on an abuse of the process of this Court. I was unable to discern any justification for BCL insisting on pursuing its unmeritorious application, although doubtless some tactical motive did exist.
23. Accordingly, I awarded costs to the Commission in any event, though I saw no need to go so far as to order such costs to be taxed and payable forthwith.<sup>1</sup> No order was made as to the costs of the Commission or BBC, who attended but did not actively participate in the hearing.

Dated this 13<sup>th</sup> day of February, 2009

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KAWALEY J.

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<sup>1</sup> The transcript of the hearing confirms that I accidentally omitted to state my intentions of awarding costs on an indemnity basis as the Commission sought. The decision as pronounced accordingly stands.