In The Supreme Court of Bermuda

CIVIL JURISDICTION
2011: No. 387

BETWEEN:

(1) TELECOMMUNICATIONS (BERMUDA & WEST INDIES) LTD.
(Trading as Digicel)

(2) TRANSACT LIMITED

Plaintiffs

- and -

(1) BERMUDA DIGITAL COMMUNICATIONS LIMITED
(Trading as CellOne)

(2) TELEBERMUDA INTERNATIONAL LIMITED

(3) MINISTRY OF ENVIRONMENT, PLANNING & INFRASTRUCTURE STRATEGY

(4) MINISTRY OF BUSINESS DEVELOPMENT & TOURISM

Defendants

Date of Hearing: 14, 15 and 22 February 2012
Date of Judgment: 28 February 2011

Victor Lyon QC, Jan Woloniecki and Nathaniel Turner for the plaintiffs;
Larry Mussenden and Shade Subair for the first defendant;
Tim Marshall and Kevin Taylor for the second defendant;
Anthony Cottle for the third and fourth defendants (14 February);
Venous Memari for the third and fourth defendants (15 February);
Saul Froomkin QC and Venous Memari for the third and fourth defendants (22 February)

JUDGMENT

INTRODUCTION

1. This matter comes before me on the plaintiffs' application to lift a stay which I imposed on the proceedings on 14 December 2011. The stay was to allow the disputes between the parties to be referred to the Telecommunications Commission ('the Commission') under the Telecommunications Act 1986 ('the Act'). The application to lift the stay is made on the basis that circumstances have changed.

2. The underlying dispute has a complex history. The first plaintiff ('Digicel') is the provider of a local cellphone service under a Class B telecommunications licence. The second plaintiff ('Transact') is an internet services provider with a Class C licence. Class C licence holders are permitted to provide long distance telephone services over the internet. Digicel and Transact have come together under common ownership to amalgamate their services so that Digicel can provide its subscribers with a long distance service via Transact.

3. The litigation began as a dispute between the plaintiffs and the first defendant ('CellOne'). CellOne is the only other cellphone service provider in Bermuda, and hence a keen commercial rival of Digicel. On 12th October the plaintiffs requested CellOne to provide interconnection so as to enable CellOne's customers to subscribe to Transact's long distance service. CellOne refused and the plaintiffs started these proceedings in order to compel them to interconnect.

4. As explained in more detail below, the matter came on before me on 14 December 2011 for trial, but having heard preliminary argument I stayed it. This was done over the objection of the plaintiffs, who wished to have the issues resolved by the Court. I gave short oral reasons at the time, and although I then promised written reasons to follow I subsequently thought it best not to embroider what I had said, and notified the parties accordingly.

HISTORY OF THE ACTION

5. The action was begun by writ of 17th October 2011. In it the plaintiffs claimed that CellOne was under a statutory duty pursuant to section 21(1)(b) of the Act to provide interconnection to each of the plaintiffs (not just to Transact) so as to enable its customers to subscribe to Transact's long distance service. But it did not stop there. The writ also sought declarations that Transact's long distance service was legal under its Class C licence, and that the plaintiffs could market that service under the Digicel brand name. Finally the writ also sought a mandatory injunction to compel CellOne to provide full interconnection with "the networks of the Plaintiffs for the purpose of enabling all mobile telephone customers of the Defendant to have full access to the long distance telephone service offered by the Second Plaintiff".

6. At the same time as the writ the plaintiffs issued an interlocutory *ex parte* summons seeking an interim mandatory injunction to like effect, and they made that summons returnable the next day. I have had no satisfactory explanation why it was done in that way. It is hard to see that the urgency was so great that they could not afford CellOne the normal notice period of two clear days for such applications. It is only in cases of real urgency that the courts have jurisdiction to entertain *ex parte* applications, and this was recently reinforced by Practice Direction #6 of 2011. The plaintiffs did give notice of their application to the other side, but the resort to the *ex parte* procedure nevertheless meant that they were able to rush CellOne into court the next day for the hearing of a mandatory application that would, of necessity, change the real *status quo*.

7. The matter then came before Kawaley J on the 18th October, and he heard it. By that time CellOne had filed an affidavit in opposition. They raised a question about the legality of what was proposed, based on the fact that in the past they had been ordered by the Department of Telecommunications ('the Department') to desist from offering long distance services via Class C ISPs. They said that they had raised this question with the

Department (in fact they had raised it with the Permanent Secretary, Dr. Binns) who had, unsurprisingly given the short timetable, not been able to provide an immediate answer. Meanwhile the plaintiffs had provided correspondence and the record of a meeting with the officials at the Department on 16 September 2011which suggested the service had been approved. Kawaley J dealt with all that in a short written judgment, in the course of which he said:

> "3. . . . Mr Mussenden implied that the Plaintiffs, with aggressive commercial and legal manoeuvrings, may have "blindsided" the regulators into giving uninformed approval to their new service plans.
>
> 4. This seems implausible, but in my judgment the Ministry should be afforded an opportunity to be heard before the Court makes an order with potentially wide-ranging ramifications. I take this view because the only serious issue to be tried is whether or not the (Acting) Minister of Business Development and/or the Minister of Telecommunications[1] has/have as a matter of fact granted the Second Plaintiff's September 1, 2011 license on the understanding that (as read with the earlier July 1, 2009 Class C License) it permitted the Plaintiffs to do what they are seeking to do. The position of the regulatory authorities is so decisive and ought to be so easy to ascertain, that there is no rational justification for a "rush to judgment" on this Court's part."

8. Kawaley J therefore made a conditional order in the following terms:

> "Unless the Minister for Tourism and International Business and/or the Minister for Telecommunications apply within seven (7) days by letter to the Registrar to be heard in opposition to the Plaintiffs' application for ex parte relief, until trial or further Order the Defendant shall take all necessary steps to establish, as soon as practicable and in any event within two days of the date of this Order, full interconnection (within the meaning of section 21(1)(b) of the Telecommunications Act 1986) between the Defendant's network and the networks of the Plaintiffs for the purpose of enabling all mobile telephone customers of the Defendant to have full access to the long distance telephone service offered by the Second Plaintiff."

[1] The Minister of the Environment t etc. is the Minister responsible for Telecommunications. The Minister of Business Development and Tourism is the Minister responsible for licensing under the Companies Act 1981. The plaintiffs require licences under section 114B of that Act to do business in Bermuda as they are foreign owned.

9. As it turns out the regulators did feel "blind-sided", and by letter of 21st October the Department[2] applied to be heard in opposition to the Plaintiffs' application. At about the same time the second defendant ('TBI'), a long distance provider, who had not hitherto been a party, applied to be joined, and it also applied for the joinder of the two Ministers. In addition, TBI, in the same summons, also applied to discharge the order of 18th October and to strike out the action as frivolous and vexatious. Not to be outdone, CellOne then applied on 26th October to set aside the Order of 18th October, and also for their own injunction to require the plaintiffs to stop advertising their long distance service.

10. The matter then came back before Kawaley J on those summonses, which were both returnable for the 27th October. Mr. Cottle from the Attorney General's chambers also appeared on that date, ostensibly acting for the third and fourth defendants, and consented to the joinder. In the event Kawaley J joined the second to fourth defendants, and (as explained below) the Commission as well, and gave directions for the governmental parties to file full particulars of the grounds for their objections, and their evidence in support within 21 days. The governmental parties that he joined were the respective Ministries, not the Ministers either in their personal or institutional capacities, and that is clear from the title of the Order he made and the action from then on. That was in keeping with the letter application of 21 October referred to above.

11. Kawaley J also gave directions for the other defendants to file evidence, and then ordered that the matter be set down for trial on the first available date after 1st December. That was the full trial of the action. Although the order does not use the words "speedy trial" that was its effect. The result was that this writ action was to be tried on affidavits, without pleadings or discovery, and that would necessarily apply to all the issues in the action, not just the narrow interconnectivity dispute.

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[2] The letter was on the letterhead of the Attorney-General's Chambers, was addressed to the Registrar of the Supreme Court, and the body of it read:

> "The Ministry of Environment, Planning & Infrastructure Strategy, Department of Telecommunications, consequent upon the Order made on 18 October 2011 . . . wishes to be heard in opposition to the Plaintiff's application for *ex parte* relief or any relief in the subject matter."

12. The Order of 27th October did three other things. First, it cleared the earlier order (for a conditional mandatory injunction) out the way, by discharging it. Second, it dealt with CellOne's application for an injunction by accepting an undertaking from the plaintiffs to publish a statement that they would not accept further long distance customers until trial. Third, it adjourned all other interlocutory applications to trial.

13. When the Order was being drawn up, the plaintiffs promulgated a draft which provided for the joinder of the second to fourth defendants only, and a cross-undertaking in damages from CellOne in respect of the undertaking. Mr. Cottle then argued that the joinder should include the fifth defendant, the Commission, and that was done over the plaintiffs' objections. The cross-undertaking was not included in the final form of the Order.

14. It appears that at the hearing on 18th October counsel for CellOne had raised the question of whether or not the Court should entertain the litigation at all, or whether it should not rather require it to be referred to the Commission: see the 5th affidavit of Frank Amaral, paragraph 17(a). It was a point taken up by the governmental defendants in paragraph 3 of their grounds of objection. At the same time the fifth defendant, by way of the Chairman of the Commission, swore an affidavit on 25th November, pointing out that there were procedures in the Act for resolving interconnection disputes, and that such disputes should be referred to the Commission.

15. By the time of the hearing before me on 14 December the Commission had (I think rightly) decided that it should be separately represented from the governmental defendants, and should stand aloof in case it had to exercise any of its statutory functions in respect of this dispute. Indeed, by its new counsel it applied to be dismissed from the action on that ground, and on the ground that none of its actions were the subject of complaint or review, and volunteered an undertaking to be bound by the outcome. I agreed with that position, and felt that, once the ministerial position had been fully articulated, it had become clear that there was no commonality of interest between the governmental parties and the Commission and that it was wrongly joined. I therefore

dismissed it from the action. As to the remaining defendants they each joined in urging me to stay the proceedings in favour of adjudication by the Commission.

16. Moreover, on 13 December CellOne had made its own complaint to the Commission, which was expressed to be in response the request for interconnection. CellOne's complaint alleged various breaches of duty by Digicel under section 21(1)(b) of the Act, and was expressed to be made under section 22(4) of the Act (for which see below). The complaint was that various breaches by Digicel were not "reasonable terms and conditions" as required by the section. There has to be some doubt whether that is a permissible reference under section 22(4) of the Act, as it is hard to see what statutory duty Digicel has failed to discharge.

MY JUDGMENT OF 14 DECEMBER 2011

17. On 14 December I stayed the proceedings in order to allow the disputes between the parties to be referred to the Commission under the Act. Section 21(1)(b) of the Act places a statutory duty upon Carriers to interconnect:

> "(1) Subject to this section, it shall be the duty of every Carrier –
> . . .
> (b) to establish upon reasonable terms and conditions, interconnection, at any technically feasible point within its network, with other Carriers; and such interconnection shall be at least equal in quality to that provided to itself . . . ;"

The Act also provides, in section 22(4), a mechanism for resolving disputes between Carriers:

> "(4) A Carrier aggrieved by the failure of another carrier to discharge a duty to which it is subject by virtue of this Act or any regulation may make a written complaint on that account to the Commission and shall provide a copy of the complaint to the Carrier concerned."

18. In my oral reasons I said:

> "I think it plain that the scheme of the legislation envisages a section 22 mechanism as the primary dispute resolution mechanism. The use of "may" notwithstanding, I consider that it is obvious and beyond argument that the statutory mechanism is what Parliament, what the Legislature intended to be the

> first recourse of someone aggrieved by something in the field of telecommunications. I therefore stay these proceedings so that the Commission may adjudicate the interconnection dispute. That's on the assumption that the Plaintiffs choose to have recourse to them. They don't have to, but if they don't, the courts will intercess [sic] them."

19. Mr. Lyon characterizes that as a stay in order to give ADR a chance. I think, with respect, that that is incorrect. It was a stay in favour of a statutory procedure, which I envisaged to be the exclusive means of resolving interconnection disputes between the plaintiffs and CellOne. That was the section 22 procedure, which in this context governed the interconnection dispute.

20. Insofar as the interconnection dispute is concerned I do not think I can revisit that decision, nor would I be minded to in any event. It seems to me that section 22 of the Act is concerned with the enforcement of statutory duties. That is what it says:

> "A Carrier aggrieved by the failure of another Carrier *to discharge a duty to which it is subject by virtue of this Act* or any regulation may make a written complaint on that account to the Commission . . . " [My emphasis]

21. Although I was not referred to Barraclough v Brown & Ors. [1897] AC 615 at the time, I have been now, and I consider that it applies to the complaint of breach of statutory duty in this case. I also consider that the statutory remedies, which include but are not limited to section 22[3], are the only remedies for breach of duties imposed by the Act.

22. While I can well see that different arguments might apply to the licence disputes between the plaintiffs and government, those disputes only came into the action because they had become a necessary part of resolving the interconnection dispute. It may be that they also had a separate life of their own, and that would have been apparent had Digicel

[3] The statutory remedies include an action for damages in the Supreme Court: see section 59A of the Act. The plaintiffs now seek leave to amend these proceedings to bring such a claim, but at the time of writing that application has not yet been heard, as it was not lodged until 4:36 p.m. on 21 February, too late to be returnable on 22 February, which was the final day of the hearing.

for instance sued Government in separate proceedings. But there were no separate proceedings.

THE FAILURE OF THE PLAINTIFFS TO COMPLAIN UNDER SECTION 22(4)

23. By the time of the hearing on 14 December the question of the plaintiffs' recourse to the Commission had already become an issue. At the hearing before Kawaley J on 18th October, the plaintiffs had undertaken to file within seven days a complaint to the Commission pursuant to section 22 of the Act relating to the conduct of the Defendant. That undertaking was given formally to the Court and recorded in the Order. While the plaintiffs did indeed file such a complaint, they almost immediately withdrew it. That was rather surprising conduct, but it seems to have been overtaken by the Order of 27 October, and no further point was made on it.

24. Following my ruling on 14 December the plaintiffs have again declined to avail themselves of the statutory process. It was my view on 14 December, and remains my view, that in those circumstances the court cannot and will not help the plaintiffs in respect of the interconnection dispute. That is what I said in my ruling:

> "That's on the assumption that the Plaintiffs choose to have recourse to them. They don't have to, but if they don't, the courts will intercess [sic] them."

It is a pity that there is a word there that was inaudible on the tape and could not therefore be transcribed, but I think that even without it the meaning is plain, namely that I was saying that if the plaintiffs would not avail themselves of the statutory procedure the courts would not assist them. That remains my view.

SUBSEQUENT EVENTS

25. Although the plaintiffs chose not to apply under section 22(4) of the Act for a resolution of the interconnection dispute, the Minister for Telecommunications did make a reference pursuant to section 16 of the Act. That section provides –

> "16 (3) The Minister may, of his own volition, refer any matter regarding telecommunications to the Commission for their investigation and report and it shall be the duty of the Commission thereupon to hold such an enquiry and report thereon to the Minister."

26. The Minister's reference was contained in a letter of 22 December 2011 ('the first reference'). It was on letterhead saying "Office of the Minister", which is different from that used by the Department, and it read –

> "You will be aware of an announcement made in the press yesterday December 21, 2011 by Digicel stating that [the plaintiffs], Class B and Class C . . . Licence holders respectrively, both trading under the Digicel brand, will resume the provision of International Long Distance Service by Transact Ltd., to all mobile phone subscribers.
>
> As the Minister responsible for Telecommunications, I refer this matter to the Telecommunications Commission for its inquiry and report, pursuant to section 16 of the Telecommunications Act 1986, on whether the ILD service that Digicel (TBWL)/Transact Ltd. intends to provide or is providing, is in compliance with the terms and conditions of the telecommunications licences issues to TBWL and Transact Ltd. I would be grateful if you would provide your report as expeditiously as possible and no later than 3rd February, 2012."

27. That did not in fact refer the whole dispute, and in particular it did not include the issues relating to Transact's licence under section 114B of the Companies Act 1981. Nor did the Commission meet the deadline, as it did not hold a hearing until 7th February. In the meantime there was voluminous correspondence between the parties and the Commission as to how its inquiry would be conducted, who would participate and how it would proceed. However, on 5th January the plaintiffs did file submissions expressly in relation to that reference, arguing that "the only possible conclusion which any reasonable Commission properly directing its collective mind to the factual evidence and to the law can possible reach is that Digicel and Transact are acting lawfully in compliance with the terms of their respective telecommunications licences."

28. The attorneys for the plaintiffs were at pains to stress that the reference did not include the whole dispute. They flagged that up in their submissions, and they wrote to the Chairman of the Commission on 10th January 2012 to that effect:

"It is also very important to know, at the outset, what position the Department intends to take with respect to the issues which will be before the Commission. As you will no doubt be aware, in the Digicel Proceedings (which are currently stayed by order of the Chief Justice) it has been suggested that Transact is in breach of the conditions attached to its licence issued under section 114B licence issued pursuant to the Companies Act 1981 by the Minister of Business Development, and that as a consequence Transact's section 114B licence is void. Plainly, the validity of Transact's section 114B licence is a matter outside the scope of the Telecommunications Act 1986 and the Commission has no jurisdiction to address the matter. Nor, with respect, does the Commission have any jurisdiction to determine the issue, which has also been raised in the Digicel Proceedings, whether Digicel had a reasonable expectation that pursuant to the terms of the various licences it was entitled to market a long distance telephone service under the Digicel brand name as a result of express representations made by members of the Department at a meeting held on 16 September 2011. It was on the basis of the understanding which Digicel had, following the 16 September 2011 meeting, that the acquisition of Transact took place."

29. Prompted by that, on 6th February the Minister made a further reference:

"Messrs. Attride-Sterling & Woloniecki, by letter dated 18 January, 2012 have taken issue on several matters related to the reference to the Commission for inquiry and report. In particular, complaint has been made about the restricted scope of the reference.

In the interest of efficiency and cost effectiveness, and in an attempt to have all possible points of contention in the matter resolved at the same time, I, as the Minister responsible for Telecommunications, refer the additional points for inquiry and report by the Telecommunications Commission, pursuant to section 16 of the Telecommunications Act 1986:

1. Whether or not Bermuda Digital Communications Ltd. is under a duty to provide network interconnection to each of TBWL and Transact Ltd and, if yes, whether or not such provision has to be without charge; and, if yes, whether or not a written interconnection agreement is required to be put in place; and if yes, when it has to be executed, whether prior to or after interconnection.

2. Whether or not Transact Ltd., since 1st September, 2011 has only ever provided internet service to residential, small office and business market segments in Bermuda.

3. Whether or not, respecting all services offered by TBWL and Transact Ltd., since 1st September, 2011, such services have continued to be available

separately to all customers; and, whether or not TBWL has bundled services offered by itself and Transact Ltd.

4. Whether or not TBWL, whether acting alone or in conjunction with Transact or any other party, has operated in breach of its Class 'B' telecommunications licence; and whether or not Transact Ltd., whether acting alone of in conjunction with TBWL or any other party has acted in breach of its Class 'C' telecommunications licence."

The letter then concluded with a recognition that this would considerably expand the scope of the inquiry and hence the time needed for it, and expressed the hope that it be concluded as "expeditiously as humanly possible."

30. The plaintiffs take the position that they were not complaining about the terms of reference, but simply flagging-up its limitations to the Commission. Once the Minister made the second reference, which contained the issues relating to the section 114B licence, the plaintiffs objected and applied for leave to bring proceedings, by way of Judicial Review, for orders of certiorari to quash the two references. In summary the grounds are that the decisions to refer were voidable for various reasons –

A. For want of natural justice and bad faith because the Minister had made the referrals notwithstanding that the Department had expressly approved the plaintiffs' new service as permissible under both licences, but in his affidavit the Permanent Secretary had then reneged on that. It is then said that because of the alleged approval the Minister ought to have known that the objections made by the Permanent Secretary in his affidavit were groundless and ones which he was precluded from advancing in the proceedings or referring to the Commission. It is also said that the Minister had already taken an adverse position in the Permanent Secretary's affidavit and could not act without bias on any report produced by the Commission, and had evinced an intention to instruct counsel to appear before the Commission to advance a position adverse to the plaintiffs.

B. Because they were made for the improper purpose of constituting the Minister as the judge of the merits of his own objections to the plaintiffs' service.

C. Because the plaintiffs had a reasonable expectation that the Minister would not object to their service arising out of the alleged approval of it at the September meeting.

D. Because the decisions to refer failed to take into account that the Minister could not act on any report of the Commission in a way adverse to the plaintiffs because of his bias arising from the Permanent Secretary's affidavit and because of the plaintiffs' reasonable expectation.

31. The plaintiffs' application for Judicial Review has now been partly overtaken by events, because while I was writing this judgment the Minister for Telecommunications, in response to the plaintiffs' protestations that it was not complaining about the limited scope of the original reference, has withdrawn the second reference. However, for the purposes of this ruling, that alters nothing.

CONCLUSIONS

32. On the application to lift the stay it was the plaintiffs' primary argument that the bias of the Minister of Telecommunications was a new circumstance, or at least a circumstance justifying my revisiting my decision to stay the matter, it being said that I could not have intended to refer the matter to a biased tribunal, and could only have intended to refer the matter to an independent and impartial tribunal as envisaged by section 6(8) of the Constitution. The point was not taken before me at the time, but one can see it evolving in the substantial correspondence since then.

33. It seems to me that that argument must necessarily fail because all the matters now relied upon to constitute bias were before me on 14 December, in the form of Dr. Binns's affidavit of 25 November 2011. If, therefore, I referred the matter to a biased tribunal it was an error I made at that time, and as such can only be corrected on appeal, and not by inviting me to change my mind on the issue. For reasons touched on briefly below, I do not in fact think that it was an error, but it is no more competent for me now to reconfirm my ruling than it is for me to change it.

34. It is also said to me that the action has changed it character, evolving from a private law action to a matter of public law. I think that that is right. The effect of the joinder of the governmental parties and the amendment I allowed to paragraph 1 of the Statement of Claim[4], when taken together, was that what had begun a private litigation between two service providers had mutated into a public law action over the plaintiffs' licences and the services they claimed to be able to provide under them. The action had become a public law action by the back-door. Had the governmental entities resisted that process at any stage, it may well have been that the public law aspect would have been stayed under the principles in O'Reilly v Mackman [1983] UKHL 1, [1983] 2 AC 237[5] in order to compel the plaintiffs to bring proceedings by way of Judicial Review. But the governmental entities did not resist, but instead insisted on the joinder.

35. When I stayed the proceedings on 14 December 2011 I regarded the issues as to the validity of the plaintiffs' licences as adequately subsumed in the interconnection dispute. That is what I said:

> "In particular, the Telecommunications Commission, in my view, have jurisdiction to determine the original interconnection dispute, and that dispute now, and the way that it has developed and grown, embraces the question of the validity of the section 114B licence. Those two issues – that issue can go with the interconnection dispute and they can all be decided together."

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[4] On 14 December, before imposing the stay, I gave the plaintiffs leave to amend the prayer to the statement of claim to add the following further claim for declaratory relief:

> "1A. A declaration that the Second Plaintiff is in possession of a valid licence issued pursuant to section 114B of the Companies Act 1981 and that accordingly the Second Plaintiff is lawfully entitled to do business in Bermuda in accordance with the terms of its Class C telecommunication licence as set out in paragraph B herein."

[5] "Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities."

Had the plaintiffs made their own reference under section 22(4) of the Act, or acquiesced in the Minister's second reference, those matters would be before the Commission. I do not think that they can rely on their own acts or omissions to constitute a change of circumstance sufficient to justify lifting the stay.

36. In any event I consider that it is now too late for me to revisit the decision on this ground either: whether it is regarded as strictly *res judicata*, as the defendants argue, or whether simply as a matter of good practice, I take it to be established beyond argument that the courts will not reopen even an interlocutory decision unless there has been a material change of circumstance: see e.g. London Underground Ltd. v N.U.R. [1989] IRLR 343. I must be taken to have been perfectly aware of the way the action had evolved when I made my decision on 14 December, and the fact that it had changed into a public law action was apparent at that stage.

37. The plaintiffs also invite me to look at how matters have evolved since 14 December 2011. They say that the circumstances have change sufficiently for me to reconsider the stay, without necessarily reopening the point of whether a stay was appropriate in the first place.

38. It is said that the Commission is failing to rise to the challenge posed by the inquiry and the issues. In particular it is pointed out that they do not regard their function as quasi-judicial and have therefore declined to entertain *viva voce* evidence. The plaintiffs have also raised an issue about the participation of members of the Department in the Commission's deliberation, as opposed to their simply appearing before the Commission as witnesses. The plaintiffs also object to Government being represented and appearing before the Commission. Mr. Lyon equates that to the Minister appearing as both judge and prosecutor, but frankly I think that mistaken. Certainly it is difficult to see how the Commission could enter upon a resolution of this dispute without hearing all sides, and that includes the departmental view. Moreover, as set out below, I think that there is a real and perfectly permissible distinction in such matters between the Minister exercising

a personal discretion on the one hand and the Ministry or one of the departments in the Ministry on the other.

39. However, for the purposes of the application to lift the stay, I do not think that any of that makes any difference. The legislature has entrusted the process to the Commission, and it is for it to set its own procedure. If it goes wrong then there is an appeal at the end of the day on law, or mixed fact and law, to the Supreme Court under section 60. That is the correct stage for this court to deal with any alleged procedural irregularities or deficiencies, not now.

40. I need now to return to the question of alleged ministerial bias, because it is the issue in the application for Judicial Review to quash the references. I regard that as before me on this application, and indeed the plaintiffs rely upon the fact of that application. They say to me that I should grant it; as a result I should recognize that the Commission is an inappropriate forum for the resolution of these disputes and lift the stay; and pending the trial of this matter I should stay the proceedings of the Commission under the power to do so on granting leave to bring proceedings for Judicial Review conferred by RSC Ord. 53, r. 3(10)(a)[6].

41. The plaintiffs also rely on the allegation of bias to explain their unwillingness to refer the interconnection dispute to the Commission. The bias is said to derive from Dr. Binns' affidavit, which was expressly filed on behalf of the third, fourth and fifth defendants. To the extent that it might be said that the Commission is tainted with that bias by reason of that affidavit, I think that that is resolved by its change of attorney and withdrawal from this action. I think that it has sufficiently distanced itself from Dr. Binns's position. Nor did the Chairman of the Commission, in the affidavit that he swore at the time of Government's initial participation in the proceedings, align himself with Dr. Binns.

[6] "(10) Where leave to apply for judicial review is granted, then –
(a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;".

42. As to the Ministers, I think that it is perfectly possible for the Department to have formed a view, without the Minister sharing in it. Indeed, on a strict analysis the Binns and other affidavits purported to be sworn and filed on behalf of the Ministries not the Ministers. On the face of it, therefore, I think it plain that they represent an objection from the officials rather than necessarily from the Minister in person. That is all the more so here, where I take judicial notice of the fact that the office holders of both Ministerial positions changed on 2 November 2011 during the course of these proceedings.

43. The possibility of a distinction between the departmental and ministerial view is well recognized in some fields, for instance Planning, and in such cases both the fact and appearance of impartiality is maintained by inserting a reference to an independent arbiter – whether it be a planning inspector or, as here, a statutory commission. Such a process is expressly contemplated under the Act in relation to the revocation of a licence. Section 13(6) provides –

> "(6) Where –
>
> > (a) the Minister is satisfied that there may be grounds for revoking a licence granted under this Act to operation a public telecommunications service . . .
>
> The Minister may request the Commission to enquire into the facts in accordance with its procedure and to report thereon to him and if after consideration of the report the Minister is satisfied that the licence should be revoked, he may revoke the licence."

44. I therefore accept Mr. Froomkin's submission that the application for Judicial Review is premature and that everyone should wait and see what the Commission finds and how the Minister in fact deals with it. Indeed, until then there is no real decision to challenge, merely the institution of a statutory process designed to achieve a decision. I consider that courts should be very slow indeed to intervene at such an early stage, because it is likely to result in delay and confusion, and except in the clearest of cases should as a matter of principle let the process run its course.

45. In the meantime I note, if only in passing, that neither Minister has yet taken steps to suspend or revoke the plaintiffs' licences. There has been pressure from TBI to do so in respect of the section 114B licence. They commenced proceedings for an order of mandamus on the grounds that having filed Dr. Binns's affidavit the relevant Minister was obliged to follow through and either revoke the licence or apply to wind-up Transact. I granted leave to apply, but subsequently adjourned those proceedings sine die. Despite that prodding the Minister has not revoked that licence. In the meantime Digicel has been offering its new service to the public since I discharged it from its undertaking not to do so (for which see paragraph 12 above) on 14 December.

SUMMARY

46. I do not think that I can revisit the Order I made on 14 December 2011. There has been no material change of circumstances to permit me to do so. In particular, all the matters concerning alleged ministerial bias were known to me at the time of making that decision. The plaintiffs' proper course is, therefore, to appeal that decision.

47. As to the plaintiffs' application for leave to seek judicial review of the Ministerial references, the second reference has now fallen away by virtue of its withdrawal by the Minister. As to the challenge to the first reference, I refuse leave on the grounds that it is premature and that a reference to the Commission is not a reviewable decision. It is but a step in a process which may lead to a decision. If that decision is adverse to the plaintiffs, then would be the time to seek redress either by way of Judicial Review or by the statutory appeals process as may be appropriate in view of all the circumstances at that time

48. I will hear the parties on costs.

Dated this 28th day of February 2012

Richard Ground
Chief Justice