In The Supreme Court of Bermuda

(COMMERCIAL COURT)

CIVIL JURISDICTION

2012: No. 59 and 125

BETWEEN:

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

(2)TRANSACT LIMITED

Applicants

-v-

(1) MINISTER OF THE ENVIRONMENT, PLANNING AND INFRASTRUCTURE STRATEGY

(2) MINISTRY OF THE ENVIRONMENT, PLANNING AND INFRASTRUCTURE STRATEGY

Respondents

RULING
(Chambers)

Date of Hearing: July 10, 2012
Date of Ruling: August 1, 2012

Mr. Victor Lyon QC and Mr. Nathanial Turner, Attride-Stirling & Woloniecki, for the Applicants

Mr. Saul Froomkin QC, Isis Law, and Ms. Venous Memari, Christopher E. Swan & Co, for the Respondents

Introductory

1. By an Amended Summons dated April 16, 2012, the Applicants applied for the following relief:

> "*(1) An injunction, until leave is granted under paragraph 2 below, restraining the Respondents, whether by their agents, servants or otherwise howsoever, from acting or otherwise acting or otherwise relying upon (i) any report (interim or otherwise) or other recommendation made by the Telecommunications Commission following the Reference in any manner contrary to the Legitimate expectation of the Applicants and/or Condition 3 of Transact's 114B licence (ii) the March 2012 Decision.*
>
> *(2)The Applicants be granted leave pursuant to section 64 of the Supreme Court Act and RSC Order 53, to issue judicial review proceedings on the grounds set out in the Applicants' Notice of Application for Leave to Apply for Judicial Review filed herein.*
>
> *(3) In the event leave is granted pursuant to paragraph 2 above, an injunction, until trial or further order, restraining the Respondents, whether by their agents, servants or otherwise howsoever, from acting or otherwise relying upon (i) any report (interim or otherwise) or other recommendation made by the Telecommunications Commission following the Original Reference in any manner contrary to the Legitimate Expectation of the Applicants and/or Condition 3 of Transact's s 114(B) license (ii) the March 2012 Decision.*
>
> *(4) In the event leave is granted pursuant to paragraph (2) above, an Order staying the Original Reference and the March 2012 decision pursuant to RSC Order 53 (10).*
>
> (5) *An Order consolidating these proceedings with Civil Jurisdiction 2012 No. 59 in the event that leave to issue those proceedings is given upon a re-newed application in Open Court.* "

2. On April 20, 2012, following an ex parte hearing on notice, I granted leave to amend the Summons, leave to seek judicial review in both matters No. 59 and 125 and directed that both applications be heard together. I adjourned the application for an injunction and/or a stay generally with liberty to restore by letter to the Registrar. By Summons dated April 24, 2012, the Respondents applied to set aside the April 20, 2012 Order as regards:

    (a) leave to amend and leave to seek judicial review (No.59);

    (b) leave to seek judicial review (No. 125).

3. On May 16, 2012, the Applicants filed a Composite Notice of Application for judicial review and the Second Caines Affidavit in support their renewed application for an interim injunction. This application was heard together with the Respondents' applications to side leave.

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4. The first application seeks to challenge the validity of the December 22, 2012 reference by the Minister under section 16 of the Telecommunications Act 1986 of the question of "*whether the ILD service that Digicel/Transact intends to provide or is providing, is in compliance with the terms and conditions of the telecommunications licenses issued to [Digicel] and Transact*". This challenge is asserted notwithstanding the fact that the Applicants participated in the Commission Enquiry over a period of months before making the challenge.

5. The trigger for the challenge was the discovery that on March 9, 2012 a letter had been written on behalf of the Minister to the Bermuda Telephone Company Limited ("the BTC Letter") which effectively indicated that the Minister was then of the view that the question referred to the Commission should be resolved against the Applicants. On the basis of this, combined with an asserted legitimate expectation that Transact would be able to do what the BTC letter stated it could not do, the institution of the Enquiry was vitiated by bad faith. This legitimate expectation was grounded on promises and/or representations made by the Respondent in a written memorandum dated September 16, 2011.

6. The Applicants first legal proceedings (Civil Jurisdiction (Commercial Court) 2011: 387-"the Civil Action") in relation to this matter were ordinary civil proceedings in which they sought declaratory relief in relation to the terms of the relevant license and an injunction compelling certain other providers to interconnect with them for the purposes of their new service. These proceedings were stayed by Ground CJ on December 14, 2011 for the specific purpose of permitting the Minister to refer the dispute to the Commission. This much is clear from the following passage in his

subsequent Judgment in *Telecommunications (Bermuda and West Indies) Limited (trading as Digicel) and Transact Ltd-v- Bermuda Digital Communications Ltd (trading as Cellone) et al* [2012] SC (Bda) 11 Civ (28 February 2012) :

> "*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."*

7. The application made in early February 2012 to lift the December 14, 2011 stay of the Applicants' civil action in relation to this dispute was heard over three days. When Ground CJ refused it, he gave a fully reasoned decision. He noted that although he had anticipated that the Applicants would refer the dispute to the Commission, in the event it was the Minister who did so under section 16 of the Act. The initial justification for the application to lift the stay was the expansion of the terms of reference of the Commission; but this expansion was withdrawn by the time the application was heard. In refusing the application Ground CJ also gave reasons for refusing (on paper, without a hearing) the application for judicial review against the reference to the Commission:

"*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."

8. This decision (as regards the stay and the finding that the appropriate remedy in respect of any Ministerial bias was to appeal the December 14, 2011 decision) was not itself appealed. Instead, the Applicants seized upon the BTC letter as fresh evidence of Ministerial bias which arguably justified impugning the validity of the original reference.

9. Mr Froomkin for the Respondents and Mr Diel for TeleBermuda International Ltd., a party affected, both emphasised the incongruity of the Applicants seeking to attack the validity of an Enquiry they had participated in having regard to the December 14, 2011 and February 28, 2012 Orders of this Court. At the ex parte hearing on April 20, 2012, Mr Lyon persuaded me with his typically elegant and forceful oratory that the appropriate threshold for leave was met in all the circumstances of the present case. Having had the benefit of full argument I reached the firm view that the leave which I granted to seek judicial review of the Minister's December 22, 2011 commencement of the Enquiry ought properly to be set aside for three main reasons.

10. Firstly, the application has to be looked at realistically in the context of a broad view of the dispute as a whole. The Civil Action was specifically stayed as long ago as December 14, 2011 on the grounds that the proper remedy for the Applicants was to have the issues in controversy resolved by the Commission despite their concerns about Ministerial bias. The Minister caused an enquiry to be commenced by the Commission which the Applicants have already participated in. On February 28, 2012 this Court ruled that if the Applicants wished to challenge this Court's determination as to the proper forum for adjudicating the dispute as to the terms of their license, the correct approach was to challenge December 14, 2011 Order by way of appeal. Neither the December 14, 2011 Order nor the February 28, 2012 Judgment have been appealed (although a Notice of Appeal has been filed).

11. Against this background, although it is understandable why the BTC letter may have seemed to the Applicants to amount to a 'smoking gun' in the Minister's hands, the only sensible analysis of the undisputed facts leads to the inevitable conclusion that the Applicants have more appropriate alternative remedies to pursue (or which they ought to have pursued) than the present judicial review application, namely:

    (a) appealing Ground CJ's December 14, 2011 Order staying the Civil Action alternatively the February 28, 2012 Judgment; and/or

    (b) appealing under section 60 of the Act any decision of the Minister to revoke or vary their license based on the report of the Commission.

12. Secondly, and looking at the first ground for setting aside leave in a slightly different light, it amounts to an abuse of process for the Applicants to raise the challenge to the Minister's reference in circumstances where the belated judicial review attack represents a thinly-veiled collateral attack on the December 14, 2011 and February 28, 2012 Orders of this Court. The Orders determined that the statutory scheme should be followed to resolve this dispute. Mr Froomkin relied in this regard on the following *dictum* of Lord Nicholls in *Autologic plc-v-IRC* [2006] 1AC 118 at 125H:

    "*The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal.*"

13. Thirdly, and in the further alternative, in my judgment it can fairly be determined summarily at this stage (having regard to Order 1A rule 4(2)(c) of the Rules) that the impugned December 22, 2011 decision is not amenable to judicial review. I do not wish to suggest that no reference under section 16 by the Minister can ever be amenable to judicial review; in exceptional cases it might be. One example might be where a matter was referred to the Commission in circumstances where all stakeholders concerned were agreed that the reference was wholly misconceived.

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14. The second judicial review application seeks to invalidate "the March Decision", which is set out in the BTC letter. The BTC letter, written at a time when the Commission was considering the terms and effect of Transact's license, was expressed to be written on behalf of the Minister and was signed by the Permanent Secretary. It provided in material respect as follows:

> "*Please be advised that Transact Limited holds a class "C" License under the Telecommunications Act 1986 which allows it to offer international long distance over VOIP only. Carriers who hold a Class 'B' License are required to route all long distance calls through circuits provided either by carriers who hold a Class 'A' License or by the 2020 service provided by the Class 'C' carriers.*"

15. This was (having regard to its unqualified terms and the failure to avert to the pending Commission report) an extraordinary letter to come to the Applicants' attention as it communicated as the status quo the very question which the Commission was asked to report on and had not yet reported on. They were understandably aggrieved because, putting aside the question of whether this amounted to a reviewable decision at all, they had what appeared to me to be an arguable case of legitimate expectation, based on the circumstances in which the relevant license was initially granted. On reflection however, the legitimate expectation argument can only get off the ground if the Minister, upon receipt of the Commission's report, resolves the scope of license question against the Applicants. Should this occur, there will still be much room for serious argument as to whether the legitimate expectation relied upon is consistent with the statutory scheme.

16. When proper attention is given to the previous orders made by Ground CJ in the Civil Action and the nature of the purported decision itself, it is impossible to avoid the conclusion that the leave which I granted to seek judicial review of the March Decision ought to be set aside for two broad reasons.

17. Firstly, as Mr Froomkin submitted (and assuming for present purposes that the BTC letter does constitute a reviewable decision at all), the application is premature having regard to:

    (a) the Applicants' alternative statutory remedies; and

    (b) the elementary fact that the Minister had yet to receive the Commission's Report and make a decision which explicitly affected the Applicants' rights.

18. Secondly, as Mr. Froomkin also submitted, the BTC letter does not constitute a decision at all for judicial review purposes. In highly contentious commercial litigation in a context such as the present, albeit arguably one where a wave of 21st century entrepreneurial energy is crashing against a 20th century regulatory wall, the Court must be astute to avoid a situation where the commercial litigation strategy "tail" is permitted to wag the merits "dog". The March Decision, sensibly construed (and again having regard to Order 1A rule 4(2)(c) of the Rules), is not a decision of the Applicants' rights which is amenable to judicial review at all.

Interim Injunction applications

19. No need to consider the injunction application in each case arises. Even if I had adopted a very low threshold for granting leave, however, I would have declined to exercise my discretion in favour of granting the injunctive relief sought on the grounds that the Applicants' case was too tenuous to justify the interim relief sought.

Conclusion

20. The April 20, 2012 Orders granting leave to seek judicial review to the Applicants are set aside.

21. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, the Respondents and TeleBermuda International Ltd. are granted their costs of the present applications to be taxed if not agreed.

Dated this 1st day of August 2012, _____

IAN RC KAWALEY, CJ