



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2017: No. 269

**BETWEEN:-**

**BERMUDA TELEPHONE COMPANY LIMITED**

**Plaintiff**

**-and-**

**REGULATORY AUTHORITY**

**Defendant**

### **JUDGMENT**

**(In Court)**

*Application for judicial review – Regulatory Authority Act 2011, section 93 – purpose of notice initiating enforcement proceedings – whether notice required to set out the alleged facts in sufficient detail for the recipient to rebut the case against it*

Date of hearing: 22<sup>nd</sup> November 2017

Date of judgment: 8<sup>th</sup> December 2017

Mr Jeffrey Elkinson and Mr Rhys Williams, Conyers Dill & Pearman, for the Plaintiff

Mr Alex Potts and Mr Neil Thomson, Kennedys Chudleigh Ltd, for the Defendant

## **Introduction**

1. This judgment is concerned with three legislative instruments: the Regulatory Authority Act 2011 (“the Act”); the Regulatory Authority (Adjudication Rules) General Determination 2014 (“the Rules”); and the Schedule to the Rules (“the Schedule”).
2. The Regulatory Authority (“the Authority”), which is the Defendant in this action, was established under section 11 of the Act. It is responsible for regulating what the Act describes as “*regulated industry sectors*”. These include electronic communications other than broadcasting. The Plaintiff, Bermuda Telephone Company Limited (“BTC”), is a telecommunications company carrying on business within this sector. Thus BTC is regulated by the Authority.
3. By a notice of motion dated 6<sup>th</sup> September 2017, BTC applies for judicial review of a notice dated 6<sup>th</sup> July 2017 issued by the Authority under section 93(2) of the Act (“the Notice”). The purpose of the Notice was to initiate enforcement proceedings in relation to an alleged contravention of the Act. BTC alleges that the Notice was defective in that it fails to set out the alleged facts on which the contravention was based. BTC seeks an order quashing the Notice and a declaration that as the Notice was invalid the Regulator may not proceed to take enforcement action.
4. Kawaley CJ refused leave to apply for judicial review on the papers on 24<sup>th</sup> July 2017, but on 29<sup>th</sup> August 2017 I granted a renewed application at an *ex parte* hearing where I had the benefit of further evidence from BTC and oral submissions from its counsel Mr Elkinson.

5. The Authority issued a summons dated 18<sup>th</sup> October 2017 seeking to set aside the grant of leave, or alternatively to strike out the application, on the grounds that the renewed application was filed 6 days out of time and that on the hearing of the application BTC failed to make full and frank disclosure or to give a fair presentation of the facts.

### **The Authority's summons**

6. I shall deal with the Authority's summons as a preliminary issue.
7. Mr Elkinson candidly admitted that his firm had made a mistake as to the calculation of the 10 day period. They overlooked the fact that under Order 3, rule 2(5) of the Rules of the Supreme Court 1985 ("RSC"), Saturdays and public holidays are only excluded from the computation of time where the period in question is seven days or less. Mr Elkinson did not draw the mistake to my attention at the *ex parte* hearing because at the time he was unaware of it.
8. However RSC Order 2, rule 1(1) provides that a failure to comply with the requirements of the RSC shall not nullify any step taken in the proceedings or any order therein. RSC Order 3, rule 5(1) provides that the Court may extend the time within which a person is required to do any act in any proceedings. Although BTC, or, more accurately, its attorneys, were at fault, this was not a hanging offence. The delay of less than a week is in my judgment not a good reason to set aside the grant of leave.
9. As to the allegation that BTC failed to make full and frank disclosure on the *ex parte* hearing or give a fair presentation of the facts, I agree that the obligation to make frank disclosure of all relevant facts applies to an applicant for leave to apply for judicial review no less than to an applicant for any other form of *ex parte* relief. Eg see Cocks v Thanet District Council [1983] 2 AC 286 per Lord Bridge at 294 G.

10. The Authority complained of three specific examples of material non-disclosure in addition to the non-disclosure of the 10 day time limit. First, BTC's failure to draw to the Court's attention the availability of alternative remedies, and in particular a right of appeal to the Supreme Court under section 96(3) of the Act against the imposition of an enforcement action pursuant to section 93 by way of a rehearing of all disputed matters of fact and law. BTC replied that the Act did not provide an alternative remedy as it conferred no right of appeal against the decision to initiate enforcement proceedings. In my judgment that was a position which BTC could properly have taken.
11. Second, the Authority alleged that at the hearing BTC misrepresented to the Court that the Act made no provision for particulars of the Authority's case to be given at the adjudication when in fact in section 78 it does. That allegation is correct but misleading because, as BTC's note of the *ex parte* hearing makes clear, the Court identified this point and drew it to BTC's attention, observing that the powers of the presiding officer for the adjudication must include putting the respondent in the position of knowing the case it has to meet.
12. Third, the Authority alleged that in response to a judicial question as to whether there were any relevant regulations, BTC failed to draw the Court's attention to the Rules or the Schedule. BTC replied that this was because the Court already had a copy of the Rules. That is correct, although to the best of my recollection I did not also have a copy of the Schedule. It would have been helpful if I had. However the point of my question was to ascertain whether there were any regulations relating to the requirements for a section 93(2) notice. There were not.
13. In the premises, there was nothing about the conduct of the *ex parte* hearing which would justify me in setting aside the order granting BTC leave to apply for judicial review or to strike out the application. The Authority's summons is dismissed.

## The legislative scheme

14. I shall start with the regulated entities. Part 7 of the Act (sections 84 – 88) sets out the duties of “*sectoral providers*”. “*Sectoral provider*” means a person who provides a good or service in a regulated industry sector. Section 84(2) provides that in any case in which the Authority has reason to believe that a sectoral provider has contravened one of the requirements or prohibitions in that Part, the Authority may conduct an investigation pursuant to section 89 of the Act. If appropriate, it may initiate an “*enforcement action*” pursuant to section 93.
15. “*Enforcement action*” may be a drafting error for “*enforcement proceeding*”. Although “*enforcement proceeding*” is not a defined term, it connotes an adjudication, mediation or arbitration. Section 74(1) provides that the Authority shall proceed by means of an adjudication when conducting an enforcement proceeding. However section 93(4) provides that in lieu of an adjudication the Authority may, with the consent of the sectoral participant, refer the matter to either voluntary mediation or binding arbitration. The outcome of the enforcement proceeding may involve the Authority taking an “*enforcement action*”, which is defined in section 2 as meaning any of the actions specified in section 93(5).
16. It will be helpful to set out section 93, which deals with enforcement, in full:

“(1) *The Authority, at the direction of the Chief Executive, may initiate enforcement proceedings in any case in which there is reason to believe that a sectoral participant has contravened any or all of the following—*

  - (a) *this Act;*
  - (b) *sectoral legislation;*
  - (c) *any regulations;*
  - (d) *any administrative determination;*
  - (e) *any adjudicative decision and order; or*
  - (f) *a condition contained in any authorization.*

(2) *The Authority shall initiate the enforcement proceedings by sending a written notice to the sectoral participant that the Authority believes committed the contravention, which shall—*

- (a) set out the alleged facts;*
- (b) state the statutory, administrative or authorization provisions that the person allegedly contravened; and*
- (c) state the time frame and procedures by which the person must respond.*

(3) *The Authority shall determine whether a contravention has occurred by conducting an adjudication, whether formal or informal, which shall be conducted by an independent presiding officer appointed in the manner specified in section 76.*

(4) *In lieu of initiating an adjudication, the Authority, with the consent of the affected sectoral participant may refer the matter to—*

- (a) voluntary mediation; or*
- (b) binding arbitration.*

(5) *If the Authority determines that a sectoral participant has committed a contravention, the Authority may take one or more of the following actions—*

- (a) issue a warning;*
- (b) direct the sectoral participant to take such actions as may be necessary to remedy the violation;*
- (c) impose financial penalties in accordance with section 94;*
- (d) require the sectoral participant to make restitution to any person directly injured as a result of the contravention; or*
- (e) issue a decision and order modifying, suspending or revoking any authorization held by the sectoral participant.*

(6) *In lieu of imposing financial penalties, the Authority may refer a matter that involves an offence specified in this Act, or sectoral legislation, to the Director of Public Prosecutions for prosecution of an offence.*

(7) *As used in this section, the term “sectoral participant”, shall be deemed to be any person that the Authority has reason to believe has contravened any of the prohibitions contained in section 85 or 86.”*

17. The Act contains detailed provisions governing the conduct of an adjudication. Section 76(2) provides that it is conducted by an independent presiding officer. Section 78(2) provides that the presiding officer shall have the power to issue orders necessary for the conduct of the proceedings, including orders summoning witnesses and requiring their examination, and compelling the production of any document, record or thing relevant to the subject matter of the proceeding. Section 78(4), which by a drafting error is duplicated as section 78(5), provides that the presiding officer shall give all parties full opportunity to submit and respond to pleadings, motions, objections and offers of settlement.
18. Section 80(1) provides that the presiding officer shall prepare a preliminary adjudicative decision and order, which shall be submitted to the Board of Commissioners of the Authority (“the Board” or “the Commissioners”) and provided to the parties. Section 80(2) provides that this shall contain a summary of the positions of the parties; proposed findings of fact and conclusions of law; and the proposed disposition of the matter, including any enforcement action to be taken or damages to be awarded. Section 80(3) provides that it may also make a proposal requiring the payment of costs. Section 80(4) provides that the Board shall provide the parties to the proceeding with an opportunity to respond to the preliminary adjudicative decision and order. Section 80(5) provides that after the Commissioners have made any revisions to the preliminary adjudicative decision and order that they conclude are appropriate, they shall adopt a final adjudicative decision and order which shall be served on the parties and published on the authority’s official website. Section 80(5) provides for the publication of any formal statement issued by a concurring or dissenting Commissioner.
19. Section 81 provides that, unless the Act or any sectoral legislation requires an adjudicative hearing, the Authority may conduct an informal adjudication where the preliminary adjudicative decision and order is based solely on the written pleadings filed by the parties.

20. Section 82 contains a procedure by which any party to an adjudication may petition the Board for reconsideration of the adjudicative decision. The grounds on which reconsideration may be sought are that the decision or order are inconsistent with the Act or with any applicable sectoral legislation, regulations or general determination; procedurally improper; or not supported by the administrative record.
21. Section 96(1) read in conjunction with section 96(3) provides a right of appeal from the imposition of an enforcement action to the Supreme Court. The appeal is by way of a rehearing on all disputed matters of fact and law.
22. The Schedule provides detailed adjudication rules. Rule 3 provides that an adjudication commences when the presiding officer gives notice to the parties that a pre-hearing conference or initial hearing will be conducted. The notice must contain a concise statement of the purpose for which the Authority has commenced the adjudication.
23. Rule 6 provides that the topics which may be discussed at a prehearing conference include identification and simplification of the issues; the necessity or desirability of amendments to the pleadings; and resolution of pending motions.
24. Rule 14 provides that a party may move to dismiss another party's complaint (in whole or in part) on the grounds that the opposing party's complaint fails to state a claim on which the Authority may grant relief.
25. Rule 15 provides that a party may move for summary determination of one or more issues if the pleadings together with the admissible evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.



## **The Notice**

26. The Notice runs to three pages. The section dealing with the alleged facts begins:

*“In October 2016, the Authority became aware of BTC’s commercial customers being charged for calls exceeding their monthly allowance between October 2015 and October 2016 (the ‘Relevant Time Period’). The Authority received multiple complaints regarding the Matter and made inquiries to BTC as to the nature and extent of the issue.”*

27. The section goes on to give a narrative account of BTC’s response and the Authority’s subsequent investigation. BTC explained that as a result of a software error it had not billed 2,418 of its business customers for calls for which they should have been billed (“overcalls”). BTC billed them when it discovered the error. Thus the complaints related to calls which had in fact supposedly been made, but which were billed late. The Authority’s investigation suggested that were ongoing problems with BTC’s billing system.
28. The next section, which deals with the provisions allegedly contravened, states that as a result of its investigations the Authority has reason to believe that BTC may be in contravention of its licence and sets out the sections of the licence which have allegedly been breached. Taken together, they provide that BTC must submit accurate bills; must not submit inaccurate bills; and must maintain accurate records.
29. The section states that BTC may have breached these sections by:
- (i) Misstating the number of overcalls made by customers on their bills when trying to recover the unbilled revenues;
  - (ii) Misstating the amount due on bills in relation to those overcalls when trying to recover the unbilled revenues;
  - (iii) Charging customers for overcalls they did not make and holding them liable for those calls;

- (iv) Charging late fees and disconnecting service as a result of late or non-payment in relation to the retrospective charges caused by the error; and
- (v) Maintaining an inaccurate billing system thereby causing inaccurate bills and charges to customers.

30. The section concludes:

*“In general, the authority believes that BTC’s billing practices and controls are not operating at a standard that ensures that consumers are receiving accurate bills for the Electronic Communications Services they are using. As such the Authority finds it imperative to initiate enforcement for an independent presiding officer to decide whether BTC has contravened the provisions of its [licence], as well as the general principles of the [licence] and the [Act], by continuing to carry on billing practices that puts BTC at risk of misinforming and applying undue charges on its customers.”*

31. In the next section, the Notice required a written response within 10 business days.

32. By a letter dated 10<sup>th</sup> July 2017, BTC sought a raft of information about the Authority’s case, including particulars of allegations (i) to (iv) (misstating the number of overcalls etc). The Authority replied by a letter dated 11<sup>th</sup> July 2017 in which it declined to provide any further information and repeated the information contained in its previous letter. The Authority noted that section 93(4) of the Act allowed the Authority, with the consent of BTC, to refer the matter to voluntary mediation or binding arbitration. The letter invited BTC to provide any requests or opinions for the Authority to consider in relation to these options.

33. BTC replied by a letter dated 12<sup>th</sup> July 2017 in which it repeated its request for further particulars of allegations (i) to (iv). The letter noted:

*“These are incredibly serious allegations and yet nowhere in your letter of 6 July 2017 or in your letter of 11 July 2017 do you set out any factual basis on which such allegations could be founded.”*

34. BTC proposed that in lieu of adjudication the parties entered into voluntary mediation, but attached conditions to the mediation, eg that the existence of the mediation and all facts and matters relating to it remain confidential, that were not acceptable to the Authority.

## **Discussion**

### ***Introduction***

35. There are at least two and possibly three questions before the Court. (i) What is the purpose of a notice sent under section 93(2)? This is a question of statutory construction. (ii) Did the Notice satisfy that purpose? This involves construing the Notice in the context of the Act. If the Court concludes that the Notice did not satisfy its statutory purpose, it will have to consider a third question. (iii) What did the Legislature intend should be the legal consequences if the Notice does not comply with the requirements of section 93(2)?

### ***BTC's case***

36. Mr Elkinson submits that an important purpose of the Notice is to allow the recipient to make informed representations about whether the matter should proceed to adjudication. Thus it must know the allegations it has to meet in order to answer them. If he is correct, then I agree that the Notice was manifestly inadequate. Most of the information in the section purportedly dealing with the alleged facts is merely background. The facts alleged to constitute contraventions are summarised in the allegations numbered (i) to (v) in the section dealing with the provisions allegedly contravened. The material in the section purportedly dealing with alleged facts includes sufficient particulars of allegation (v) but not, on Mr Elkinson's case, of allegations (i) to (iv). The Notice does not enable BTC to address those

allegations, Mr Elkinson submits, because it does not include particulars of any of the invoices which are said to contain incorrect billing information.

37. Mr Elkinson referred me to R v Commission for Racial Equality, Ex p Hillingdon LBC [1982] 1 QB 276 EWCA. The Court of Appeal unanimously granted the respondent council's application to quash the Commission for Racial Equality's decision to embark upon a formal investigation under section 48 of the Race Relations Act 1976 ("the 1976 Act"). The Commission appealed to the House of Lords but its appeal was dismissed. See [1982] AC 779.
38. Section 48 gave the Commission power to commence formal investigations. Section 49 required that before commencing an investigation the Commission hold a preliminary inquiry. The Commission was required to draw up terms of reference for the investigation. Where the terms of reference were confined to the activities of named persons and the Commission proposed to investigate any act made unlawful by the 1976 Act which the Commission believed that a person so named may have done, the Commission was required to inform those persons of their belief and of their proposal to investigate the act in question, and to offer him an opportunity to make oral and/or written representations with regard to it.
39. Section 50 governed the conduct of a formal investigation. The Commission had powers to require the person under investigation to provide written information and to attend upon the Commission to give oral information and produce documents. Under section 58, the Commission had power at the conclusion of an investigation to serve the person concerned with a non-discrimination notice.
40. Mr Elkinson relies upon some observations by Griffiths LJ, as he then was, as to the right to make representations at the preliminary inquiry in an investigation of this kind under the 1976 Act, which the judge termed "*a belief investigation*":

*“It is obvious that a ‘belief investigation’ is a very serious matter for the person at whom it is aimed. The formal investigation points the finger of suspicion at him; for to say that ‘I believe you may have committed an act of racial discrimination’ is but another way of saying ‘I suspect you have committed an act of racial discrimination.’ Unless he considers himself guilty, the person named will be likely to wish to defend himself as vigorously as his resources will allow against such a serious slur on his reputation. Even if at the end of the day he shows that the suspicion was entirely unfounded, there will be those who remember the suspicion and not the fact that he was exonerated. Furthermore, bearing in mind the commission's wide powers as to discovery and the examination of witnesses, it is likely that the investigation will involve a serious degree of disruption of his affairs and may prove to be a most costly business both for him and the public purse [293 B – D].*

.....

*... I can fully understand Parliament wishing to ensure that anyone faced with such a potentially damaging inquiry should have the clearest warning of what was alleged against him [295 B] ...*

.....

*Naturally I would not expect the commission to start upon a formal investigation on the basis of a complaint of racial discrimination without first giving the accused person an opportunity to give the commission his answer to the accusation. Common sense and fairness require that the commission should consider both sides of the story before deciding whether they have reasonable grounds for suspicion [295 E – F].”*

41. Mr Elkinson submits that by parity of reasoning those observations are equally applicable to the Act. BTC faces serious allegations of overcharging which may well cause it reputational damage whatever the outcome of the adjudication or any subsequent appeal. It is concerned that the Authority will publicise the decision to refer the matter to adjudication, a concern which the Authority has done nothing to dispel. Mr Elkinson submits that vindication for BTC in the adjudicative decision or on appeal would be no substitute for a fair chance to dissuade the Authority from initiating enforcement proceedings in the first place, given that such proceedings will likely prove costly and time consuming, and may prove unmeritorious.

*Authority's case*

42. Mr Potts, who appears for the Authority, submits that the purpose of the Notice is confined to the terms of the Act. It is to initiate enforcement proceedings, pursuant to section 93(2). He accepts that by reason of section 93(4) the Notice should impliedly contain sufficient information to enable the recipient to make an informed representation as to whether the matter should be referred to voluntary mediation or binding arbitration rather than adjudication. However, he submits that section 93 does not provide, whether expressly or impliedly, for the recipient to make representations to the Authority that enforcement proceedings should not take place. Facilitating such representations, he therefore submits, forms no part of the purpose of the Notice.
43. Mr Potts submits that for the Notice to achieve its statutory purpose, the statement of alleged facts, read in conjunction with the statement of the alleged contraventions, need do no more than communicate the gist of the allegations against BTC. The statements in the Notice, he submits, did just that. Eg they were sufficient to allow BTC to make informed representations about the options in section 93(4), as demonstrated by BTC's letter of 12<sup>th</sup> July 2017 proposing voluntary mediation. Whereas BTC stated in the letter that they would require the information requested in their letter of 10<sup>th</sup> July 2017 as a precondition for the mediation, they did not suggest that the absence of that information had compromised their ability to decide that mediation was in principle the right way to proceed.
44. Mr Potts further submits that Griffiths LJ's observations in the Hillingdon LBC case are of no assistance as they relate to a different statutory scheme. Whereas the 1976 Act required that a preliminary inquiry be held before a decision was taken to commence a formal investigation, there is no analogous provision under the Act requiring the Authority to consider representations from the alleged contravener regarding a decision to commence enforcement proceedings.

45. Mr Potts accepts that BTC is entitled to full particulars of the Authority's case and an opportunity to submit that there is no case for them to answer, but argues that under the statutory scheme the adjudication is the appropriate forum for these points to be taken. Once the adjudication has commenced, section 78 and rule 6 enable the presiding officer to make orders ensuring that the Authority's case is adequately pleaded; and BTC to seek further and better particulars of the Authority's pleaded case if they believe that it is not. Rules 14 and 15 enable BTC to apply for dismissal or summary determination of the allegations if, once they have been supplied with full particulars, they conclude that such a course is justified.
46. Mr Potts submits that if the Notice had the statutory purpose for which Mr Elkinson contends, that would be an invitation for well resourced sectoral providers to bog down enforcement proceedings in expensive and time consuming satellite litigation as to the validity of the notice and the reasonableness of the Authority's decision to proceed with enforcement proceedings notwithstanding the sectoral provider's representations that they should not.
47. As to adverse publicity, the logic of Mr Potts' argument is that if that is a consequence of the legislative scheme then it is a consequence which the Legislature has accepted. He submits that, on the facts of this particular case, the impact of any public announcement about the enforcement proceedings will be blunted as the allegations of overcharging against BTC have been widely reported in the local media and are already public knowledge.

### ***Conclusion***

48. In my judgment the main purpose of the Notice is to initiate enforcement proceedings. It should also give the recipient sufficient information about the enforcement proceedings to make representations to the Authority as to whether, in lieu of adjudication, it should refer the matter to voluntary

mediation or binding arbitration. The purpose of the Notice is not to give BTC an opportunity to make representations that the enforcement proceedings should not go ahead.

49. To accomplish these purposes the Notice must set out the alleged facts and state the provisions allegedly contravened. The statement of alleged facts need only contain the gist of the allegations and may therefore be drafted succinctly and in general terms. It need not set out the allegations against the recipient in sufficient detail for the recipient to give a detailed rebuttal.
50. In so finding, I have been guided by the language of section 93 and by the statutory scheme as a whole. As the Hillingdon LBC case concerned the construction of a materially different statutory scheme it was of little assistance. I am mindful that at an early stage in the adjudication the Authority will be required to produce a pleaded case and that BTC will be able to request further particulars of that case and apply to strike it out if they form the view that there is no case to answer. I have not been influenced by policy considerations, eg the prospect of satellite litigation if I found for BTC and the possibility of adverse publicity for BTC upon the referral to adjudication if I did not.
51. In my judgment the Notice complies with the requirements of section 93, even though much of the narrative in the section of the Notice intended to deal with the alleged facts is superfluous. The application for judicial review is therefore dismissed. It is unnecessary for me to consider what the consequences of non-compliance with the requirements of section 93 would have been, or to address the cases on that point to which I was referred.
52. I shall hear the parties as to costs.

DATED this 8<sup>th</sup> day of December, 2017

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Hellman J