In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2015 No: 12

BERMUDA DIGITAL COMMUNICATIONS LIMITED

Appellant

-v-

REGULATORY AUTHORITY

Respondent

JUDGMENT

(In Chambers)

Date of hearing: March 2, 2015
Date of Ruling: March 9, 2015

Mr. John Wasty, Appleby Global (Bermuda) Limited, for the Appellant
Mr. David Kessaram and Ms. Louise Charleson, Cox Hallett Wilkinson Limited, for the Respondent

Introductory

1. This is the first appeal under section 96 of the Regulatory Authority Act 2011 ("the Act"). The Appellant appealed by Notice of Originating Motion dated January 13, 2015 ("the Notice of Appeal"). The final decision of the Respondent dated December 23, 2014 not to renew half of the Appellant's licensed 850MHz spectrum is challenged on 16 grounds. Paragraph 3.2 of the Notice of Appeal seeks "*a stay of the RA's order seizing the spectrum and refusal to renew BDC's spectrum license…pursuant to Section 96(8) of the RAA 2011*". The impugned decision was made under the transitional provisions of section 78 of the Electronic Communications Act 2011 ("the ECA").

2. On the hearing of the stay application, issue was joined on the appropriate test for granting a stay pending appeal under the somewhat distinctive provisions of section 96 of the Act. Irrespective of the appropriate test, the merits of the principal grounds of appeal were also hotly disputed.

Legal test for granting a stay under section 96(8)

Section 96(8) in its statutory context

3. The Respondent was established as a statutory corporation by section 11 of the Act. The only currently regulated industry sector which it is responsible for is "*1. Electronic communications (other than broadcasting)*" (Schedule). Its principal functions (section 12) are:

> "(a) *to promote and preserve competition;*
>
> *(b) to promote the interests of the residents and consumers of Bermuda;*
>
> *(c) to promote the development of the Bermudian economy, Bermudian employment and Bermudian ownership;*
>
> *(d) to promote innovation; and*
>
> *(e)to fulfil any additional functions specified by sectoral legislation.*"

4. The regulatory principles prescribed by the Act for the Respondent to follow are set out in section 16. The Respondent must:

> "(a) *act in a timely manner;*
>
> *(b) rely on market forces, where practicable;*
>
> *(c) rely on self-regulation and co-regulation, where practicable;*
>
> *(d) act in a reasonable, proportionate and consistent manner;*
>
> *(e) act only in cases in which action is needed;*
>
> *(f) operate transparently, to the full extent practicable;*
>
> *(g) engage in reasoned decision-making, based on the administrative record;*
>
> *(h) act without favouritism to any sectoral participant, including any sectoral participant in which the Government has a direct or indirect financial interest;*
>
> *(i)not act in an unreasonably discriminatory manner; and*
>
> *(j)act free from political interference.*

5. The ECA is the primary sectoral legislation. Certain of this Act's provisions are relevant to assessing the merits of the appeal and will be considered below. However, the key provision for present purposes is section 96 itself:

> "96. (1) *Any person aggrieved by a final Authority action may appeal on that account to the Supreme Court.*
>
> *(2)Except as provided in subsection (3), any appeal shall be limited to points of law or mixed fact and law.*
>
> *(3)In any case in which a sectoral participant appeals from the imposition of an enforcement action pursuant to section 93, the appellant may seek a rehearing regarding all disputed matters of fact and law before the Court.*
>
> *(4)An appeal under subsection (1) or (3) shall be lodged in the Registry within 21 days after the effective date of any final Authority action, or such longer period as the Court may allow.*
>
> *(5)On any such appeal the Court may make such order, including an order for costs, as it thinks fit, provided that the Court may not issue an order requiring the Authority to pay compensatory or punitive damages for actions taken in the performance of its official duties.*
>
> *(6)When requested by the Authority, the Attorney-General shall represent the Authority in any matter before the Supreme Court, at no cost to the Authority, unless—*
>
> > *(a) the matter involves a dispute between the Authority and a Minister; or*
> > *(b) the Attorney-General notifies the Authority, in writing, that a conflict exists that precludes the Attorney-General from providing the requested representation.*
>
> *(7)Section 62 of the Supreme Court Act 1905 shall be deemed to extend to the making of rules to regulate the practice and procedure on an appeal under this section.*
>
> *(8)An appeal under subsection (1) shall not result in a stay of the administrative determination of the Authority appealed from, unless the party seeking the stay can demonstrate to the court that it—*
>
> > *(a) is likely to prevail on the merits; and*
> > *(b) will suffer irreparable harm if the stay is not granted.*" [Emphasis added]

Meaning of "is likely to prevail on the merits"

6. Mr. Wasty submitted that "likely" meant something less than likely on a balance of probabilities. Firstly, he referred the Court to the *dictum* of Chadwick LJ expressed in the context of construing the discovery provisions of CPR paragraph 31.17(3)(a), that likely simply meant "*may well*": *Three Rivers District Council et al-v-Bank of England (No.4)* [2002] 2 All ER 881 at 895 (paragraph 32). He submitted that a more appropriate test was the test for granting a stay pending a judicial review application, a modified *American Cyanamid* test. All that was required was for the stay applicant to demonstrate a 'real prospect of success', at most, or that he 'may well' succeed at least.

7. Mr Kessaram relied primarily on two authorities. Firstly, he relied upon the decision of Bell J (as he then was) in *Miller-v-Bermuda Hospitals Board* [2005] Bda LR 30. That was another statutory appeal, apparently governed only by the general stay power contained in Order 55 rule 3 of the Rules of the Supreme Court. Bell J did not accept that this power could be exercised in respect of a decision which had been "*made and implemented*". However, he accepted the judicial review test for a stay, holding (at page 5):

   (a) "*the jurisdiction to grant a stay after the decision of a tribunal had been fully implemented was a jurisdiction which should be exercised sparingly, and where it was exercised, the court should decide the judicial review application, if possible, within days of the order for a stay*";

   (b) "*for the exercise of the jurisdiction to grant a stay after the decision of the tribunal had been fully implemented, the court had to be satisfied that there was a strong case that the tribunal's decision was unlawful.*"

8. The second authority referred to the Court considered the test for interim relief under section 78 of the Employment Act 1978, which was available where the applicant could show that it was "*likely*" that he would prove that he had been unlawfully dismissed: *Taplin-v-C Shippam Ltd.* [1978] IRLR 450. Slynn J (as he then was) held that the threshold required to be met was higher than demonstrating reasonable grounds for success (at paragraph 21). He further held (at paragraph 23) that:

   "*The Tribunal should ask itself whether the applicant has established that he has a 'pretty good' chance of succeeding…*"

9. I find that the latter test is most apposite for the purposes of an application under section 96(8) of the Act where, as I find to be case here based on the material before me at this stage, the decision has not yet been fully implemented in that the Respondent has yet to take any meaningful steps to reassign the relevant spectrum. The more onerous test articulated by Bell J in *Miller-v-Bermuda Hospitals Board* [2005] Bda LR 30 would apply to decisions which have in a real sense been not only made but also implemented. The impugned decision in the present case does not fall into this category.

10. Whilst it is almost invariably instructive to look at tests adopted in other cases, courts must equally also beware of allowing themselves to be distracted from the central task of construing the applicable statutory provision in the case before them. The approach adopted in other cases may light the way to be followed in later cases, but usually only serve as an historical road map for the specific judicial route which the previous courts were required to travel. No cases construing a provision substantially similar to the distinctive statutory stay provision at play in the present case were referred to the Court. It appears that the relevant provisions are expressed in original terms.

11. Against this background, I find that section 96 (8) is a provision designed to fetter the Court's general discretion under Order 55 rule (3) to grant a stay for the following principal reasons:

    (1) section 96 limits appeals, save against enforcement action where a rehearing may be sought, to points of law or mixed law and fact. This restricts the Court's jurisdiction to review the merits of the Authority's decision, in contrast with statutory appeals generally which are ordinarily by way of rehearing under Order 55 rule 3(1). It manifests a legislative intent that this Court should give due deference to the primary factual and/or policy findings of the Authority;

    (2) the Authority is required to, *inter alia*, "*act in a timely manner*", to "*rely on market forces*" (section 16(a), (b)) and "*to promote the interests of the residents and consumers*" (section 12(b)). Delays in implementing decisions adverse to the private commercial interests of a regulated entity through a liberal approach to staying the Authority's decisions would be inconsistent with these broad public policy objectives expressed in the Act;

    (3) section 96(8) itself is unambiguously expressed in terms which manifest Parliament's intention to restrict the circumstances in which a stay may be granted by the Court pending appeal, by requiring the stay applicant to meet two conditions which are not mandated in statutory form in most general stay provisions.

12. For these reasons the term "*likely to prevail on the merits*" in section 96(8)(a) must be read as imposing a higher threshold than that contended for by the Appellant in the present case. It requires an applicant for a stay to demonstrate 'pretty good' prospects of success.

Meaning of "irreparable harm"

13. The term "irreparable harm" is clearly borrowed from the language of interim injunctions, and connotes damage which is unlikely to be able to be compensated for adequately by an award of damages. No controversy turned on what this phrase meant. The threshold for demonstrating "irreparable harm" is somewhat lower than in the injunction context of ordinary civil litigation. This is because section 96 (5) precludes the Court from compensating a regulated entity for any damage caused by the actions of the Authority in the context of appeal proceedings, by providing that "*the Court may not issue an order requiring the Authority to pay compensatory or punitive damages for actions taken in the performance of its official duties.*" More broadly and pertinently still, section 32 of the Act provides:

> "*(1) No action, suit, prosecution or other proceedings shall lie against any member of the Board, any member of the staff or any person acting on behalf of the Authority in respect of any act done, or any omission made, in good faith in the execution or intended execution of any function under this Act.*"

14. In most cases, stay applicants will simply have to show that they will suffer damage, the starting assumption being that any damage flowing from the impugned decision will not be capable of being compensated for by an award of damages.

Summary: general approach to applying the test for granting a stay

15. The Court will generally be required to refuse a stay unless the applicant can demonstrate "pretty good" prospects of a winning the appeal and commercial damage flowing from permitting the decision to be implemented before the appeal is heard. Ultimately, the Court is required to ensure that the relevant appeal is not rendered nugatory depriving the applicant of effective access to the Court.

16. How high a "merits" bar the applicant is required to meet cannot be completely inflexible, and the threshold may potentially be altered depending on the particular circumstances of each case. Section 96(8) cannot sensibly be read as purporting to deprive the Court of its constitutional duty of affording a fair hearing to civil litigants or as abrogating altogether the inherent jurisdiction of this Court to manage its processes. Factors which are likely to be relevant to precisely where the bar is set will include, amongst others:

    (a) the apparent public detriment from delaying implementation of the impugned decision;

    (b) how easy it is for the Court to form a realistic preliminary view of the merits; and

    (c) the extent of irreparable harm which may be suffered by the applicant if a stay is refused.

Findings: has the Appellant demonstrated that it is likely to prevail on the merits?

Grounds of appeal in overview

17. The 16 grounds of appeal can be distilled into the following principal complaints:

    (1) the Respondent erred in law in its interpretation and application of section 78 of the ECA in relation to the facts of the Appellant's case;

    (2) the Respondent acted unfairly in its decision-making process by treating a competitor, Digicel, in a procedurally preferential manner and/or by permitting an appearance of bias towards Digicel to arise;

    (3) the Respondent failed to take sufficient time to reach a sound decision contrary to section 16(g) of the Act;

    (4) the Respondent "apparently" breached the Appellant's confidentiality rights contrary to section 34 of the Act;

    (5) the Respondent deprived the Appellant of property without compensation in violation of section 13 of the Bermuda Constitution;

    (6) the Respondent erred in law by basing its decision on the Minister's Spectrum Policy Statement which the Appellant, in concurrent judicial review proceedings, is seeking to have declared invalid.

18. The substantive relief sought by the Appellant is described as follows in the Notice of Appeal:

> "*3.1 The Final Decision and Order is set aside and the matter remitted to the regulatory Authority for reconsideration according to law with a direction that the Appellant's Transitional Spectrum License for Commercial Mobile Radio Services (003-CMR-01T) (Spectrum License) be renewed until the earlier of :*
>
> (a) *29 October 2024;*
> (b) *the date on which BDC surrenders the Spectrum License; or*
> (c) *the date on which the Spectrum License is revoked pursuant to Section 93(5) of the RAA2011.*"

19. It is somewhat unclear what matters would be remitted for reconsideration to the Respondent if the substantive direction sought was to be coupled with an order setting the decision aside. It seems highly improbable on the face of it that this Court would properly be entitled to not only set aside the impugned decision on legal grounds but also to decide the conditions subject to which the relevant Spectrum Licence should be renewed, a decision which would turn on heavily policy-laden considerations. It does not follow that the same terms applicable to 50% of the relevant spectrum already renewed would apply by analogy to the remaining 50%.

20. At this stage it seems most likely that if the Appellant prevailed and the Final decision was set aside, the Court would also either:

    (a) remit the matter for reconsideration solely as to the terms on which the relevant renewal should take place; or

    (b) remit the matter for reconsideration altogether based on procedural flaws which undermined the factual findings which underpin the decision to such an extent that a full rehearing is required.

21. I am unable to find for present purposes that the Appellant has 'pretty good' prospects of prevailing based on the following (distilled) grounds of appeal:

    (a) complaint is made that the Respondent failed to take sufficient time to reach its decision in breach of section 16(g) of the Act. It is this statutory provision which requires the Authority to "*engage in reasoned decision-making*", and it is a breach of this requirement which is supported in the First Frank Amaral Affidavit (at paragraphs 36-39). A cursory review of the Respondent's 27 page Final Decision forms the basis of this preliminary assessment of the merits of this ground of appeal;

    (b) the complaint that a breach of confidentiality has occurred ("FA-1", page 450) is impossible to assess as a freestanding complaint separate and apart from the broader procedural unfairness complaints with which it is very closely connected;

    (c) the complaint that the "seizure" of the relevant portion of spectrum constituted a constitutionally impermissible acquisition of property in breach of section 13 of the Constitution seems barely sustainable in relation to a decision not to renew a temporary permit;

    (d) the complaint that reliance was placed on a Ministerial Policy which may be successfully challenged by way of judicial review can best be assessed by reference to the reasons that I gave for granting leave which made it clear that I did not consider that application's prospects for success to be obviously strong. Nothing was drawn to my attention in the context of the present stay application which caused me to modify the guarded views of the merits of this specific point which I expressed when granting leave to judicially review the Policy.[1]

Misapplication of section 78 and procedural unfairness complaints

22. The strongest grounds of appeal appear to me to be the broad complaint that section 37 of the ECA was misapplied linked to the broader complaint that the decision-making procedure was unfair to the Appellant which was required to meet ex parte procedural requirements in a discriminatory manner.

[1] Ruling on the papers in Civil Jurisdiction 2015: 13, January 15, 2015.

23. The starting point in this analysis is the concession, upon which Mr. Wasty placed considerable reliance, that *ex parte* procedures applied to the Applicant were now not regarded as not having been strictly required (First Kyle Masters, paragraphs 68-70, Second Frank Amaral, paragraphs 15-16). On the face of the evidence, however, no admission of differential treatment is made. And the suggestion of the appearance of bias because of the involvement of someone connected to a senior Digicel figure being involved in the decision-making process is roundly rejected in straightforward plausible terms. I am unable to find <u>at this stage</u> that these complaints viewed individually or collectively either:

    (a) evidence grounds with 'pretty good' prospects of success in their own right; or

    (b) are sufficiently cogent to warrant heightened scrutiny of the legal basis for the substantive decision under section 37 of the Act.

24. The 'guts' of the Final Decision is summarised in paragraph 10:

> "*The Authority has…concluded that BDC is not efficiently using …half…of its assignments in the 850 MHz band. Its 850 MHz band assignment constitutes 100 percent of the commercially usable spectrum in this high-value band. The Authority considers that BDC has failed to demonstrate a reasonable need for this spectrum, and that reclamation is a necessary measure to ensure efficient use of spectrum pursuant to ECA Section 78.*"[2]

25. Issue is joined on the technical meaning of terms such as "*are being used efficiently*" and "*reasonable need*" in section 78. The Appellant has respectable arguments that these terms potentially merit a somewhat more nuanced interpretation than they may have been given by the Respondent. On the other hand, the proper interpretation of the provisions of the statute as applied to the facts of the Appellant's case is complicated by the public policy imperatives of the ECA, which Mr. Kessaram submitted the Respondent was primarily required to have regard to. For instance, section 5(1) of the ECA provides (in part) as follows:

> "*(1) The purposes of this Act shall be to-*
>
> *(a) ensure that the people of Bermuda are provided with reliable and affordable access to quality electronic communications services;*
>
> *(b) enhance Bermuda's competitiveness in the area of electronic communications so that Bermuda is well-positioned to compete in the international business and global tourism markets;*
>
> *(c) encourage the development of an electronic communications sector that is responsive to the requirements of users (both individuals and businesses) and provides them with choice, innovation, efficiency and affordability…*"

[2] 'FA-1", page 576.

26. Section 37 ("***Spectrum management***") further provides in salient part as follows:

> "*(1)In performing their functions under this Part, the Minister and the Authority shall ensure that radio spectrum is managed in a manner that—*
>
> *(a) is objective, transparent and non-discriminatory;*
>
> *(b) is economically and technically efficient;*
>
> *(c) facilitates the introduction and evolution of new technologies and innovative electronic communications services;*
>
> *(d) gives due recognition to the level of investment in existing equipment configured for specific frequencies and the cost of migrating to other frequencies;*
>
> (e) *preserves or promotes effective and sustainable competition in the provision of electronic communications services subject to this Act…*"

27. The Minister's Spectrum Policy Statement prescribed a 50% cap on any one entity being assigned spectrum in a particular HDS band, which the Respondent partially relied upon (at paragraph 104) in justifying the Final Decision. While the validity of the Policy itself is subject to collateral challenge by the Appellant, the public policy underpinnings of the impugned decision constitute a serious impediment to forming a decisive preliminary view of the merits of the present appeal, which is the first under the relevant legislation.

28. In these circumstances the Appellant has been unable to demonstrate that it is likely to prevail on the merits of the appeal in the sense that it has 'pretty good' prospects of prevailing. This conclusion should not be construed as indicating even a provisional view that the appeal as a whole is not an arguable one.

29. For reasons which I next come to, there are no other relevant considerations which justify the Court in lowering the merits bar in order to prevent any compelling risk of serious injustice.

Irreparable harm

30. On the facts of the present case, in part for the reasons articulated by Mr. Wasty himself[3], the Respondent is not likely in any event to be in a position to actually reassign the relevant portion of the spectrum before the substantive appeal is finally determined by this Court.

[3] Counsel identified the various procedural steps which would have to be taken before the segment of spectrum in question could be reassigned. The Respondent conceded that these steps would not be pursued and/or completed before the appeal was expected to be finally heard at first instance.

31. No tangible practical need for an interim stay has accordingly been made out in any event.

Conclusion

32. For the above reasons, the application for a stay is refused.

33. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, the costs of the present application shall be awarded to the Respondent in any event, to be taxed if not agreed.

Dated this 9th day of March, 2015 _____

IAN R.C. KAWALEY CJ