Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 00036 of 2009

BETWEEN	CABLE AND WIRELESS JAMAICA LTD. (t/a LIME)	CLAIMANT
AND	MOSSEL JAMAICA LTD. (t/a DIGICEL JA. LTD)	DEFENDANT

Ms. Hilary Phillips and Ms. Denise Kitson instructed by Grant Stewart Phillips and Co. for the Claimant.

Ms. Helga McIntyre appeared with Mr. Paul Beswick, instructed by Ballantyne Beswick and Co. for the Defendant.

Heard 3rd and 5th February 2009

Campbell J,

An Application for Extension of an Ex parte Interim Injunction

(1) On 8th January 2009, the Claimant filed an ex parte notice of application for Court Orders, seeking the following Orders:

> An injunction restraining the Defendant whether by itself or by its servants and or agents from disrupting, reducing, decommissioning or otherwise entering with the interconnectivity access capacity provided for under the Interconnection Agreement between the parties.
>
> An order requiring the Defendant to restore the interconnectivity capacity to 100% of the interconnect capacity in the interconnection trunk between the claimant and the Defendant and in particular those trunks and or circuits which the Defendant has disrupted, reduced or otherwise interfered contrary to the terms of the aforesaid Interconnection Agreement.

(2) The Grounds on which the application was made was the Interconnection Agreement that was entered into between the parties on or about the 18th April 2001, which authorized the Claimant to convey the international telephone traffic from overseas to be terminated on the

Defendant's network. The Claimant alleges that the Defendant on or about the 19th December 2008 unlawfully blocked or decommissioned the Claimant's circuits thus preventing international calls from being conveyed to the Defendant's network. The complaint stated that the circuits were blocked for between 2 -3 hours and were restored after communication between the parties and the Office of the Utilities Regulation (OUR) wrote the Defendant, indicating that the Defendant's actions were contrary to the Telecommunication Act. Nevertheless, the Defendant again on the 7th January 2009 in breach of the Interconnection Agreement blocked the Claimant's circuits.

(3) The Claimant particularly alleged that the arrangement between the parties had continued unabated from the implementation of the Interconnection Agreement, until the Defendant, in a letter dated 2nd December 2008, informed them that they would be required to deliver incoming international traffic to the Defendant's network, via a transit service "at an incremental charge" from the Defendant's international switch to its domestic mobile switch.

(4) The Claimants were advised that any other routing would be deemed to be "bypass operations" by the Defendants. This latter term is used to describe international traffic which circumvents the billing process by masking as domestic calls and constitute a major concern in the industry.

(5) The Claimant refuted this action, relying on Clause 1.1.1 of the Interconnection Agreement, which the Claimant contended gives them the absolute legal right to provide this international call service without reference to the Defendant's international switch.

(6) On the 19th December, the Claimant's circuits were blocked. A report by the Claimant to the OUR elicited the response of the Acting Director General, George Wilson, that "the actions of Digicel would be disruptive and contrary to the intention of the statute and the present

workings of the regime, for, it is the Office's view that once an operator is licensed to carry international traffic, then traffic appropriately terminated by that carrier or Digicel's PLMN network may not be considered bypass in light of the fact that the terminating carriers own network may not be considered bypass as "the international network of a licensed international voice carrier" pursuant to the definition as set out in the Act.

(7) The Claimant further particularized that the Defendant advised certain carriers with whom the Claimant enjoyed business relationships, that the Claimant's illegal network would be blocked. As a result ATT ceased sending international calls destined for termination on the Defendant's network via the Claimant's circuits.

(8) The Claimant also alleged that the Defendant abused their dominant position in the market in breach of the Fair Competition Act, and reject the contention of the Defendants, that the change which they had effected was a change of system, provided for by the terms of the Interconnection Agreement. According to the Claimant, a change of system requires reasonable notice and that the letter of 2nd December 2008 cannot constitute such a notice. On the 8th January 2009, Mr. Justice D. McIntosh, on the Claimant's ex-parte application for injunctive relief, granted the application sought on the Claimant, giving the usual undertaking in damages.

(9) The Defendant, on the 15th January 2009 filed an Amended notice of application for Court Orders, seeking inter alia;

An order pursuant to rule 11-16(a) of the Civil Procedure Rules, 2002, setting aside the Order numbered 1 in the formal order;

(10) The grounds noted in the application were:

(a) the material non disclosure by the Claimant of correspondence between the Claimant and the Defendant on the 2nd December 2008, that the Defendant had warned the Claimant not to initiate any legal proceedings ex parte, and had indicated

to the claimant that its attorneys-at-law were authorized to receive legal process and to settle an inter partes hearing date in the event that the Claimant desired to commence litigation on the issues raised in this action.

(b) That the order sought could only be granted ex parte in the circumstances set out in Rule 17.4 (4) of the Civil Procedure Rules, 2002, which states,

(a) in case of urgency, no notice is possible: or
(b) that to give notice would defeat the purpose of the application

The Claimant contends that there are no circumstances justifying either of the requirements provided for in Rule 17.4 (4)

(11) (c) The order sought and obtained is irregular, defective, and void for the following reasons;

9a) The said order has failed to specify a date for the expiry of the injunctions as required by r.17.4 (5) (b) of the CPR, 2002

b) The said order has failed to comply with the requirements of r.11 16(3) of the Civil Procedure Rules, 2002, in that it does not contain a statement telling the defendant of the right to make application under rule 11-16;

(12) There was no contest that there were serious issues to be tried. Prior to 1st April 2003, Digicel was not licensed or allowed to operate its own international gateway for both incoming and outgoing international calls; therefore it did not have an international switch. Digicel had constructed its own fixed international switch which delivers international calls via fibre routes and a satellite earth station to receive satellite telecommunication data. Digicel claims that the existing system prevents it from exercising proper operational control over international traffic and over its own network.

(13) Currently, international traffic does not go through Digicel fixed international switch and therefore Digicel is of the view that this constitutes bypass; a view that is firmly rejected by the Claimant and the OUR. Digicel expert advises that Digicel's actions can be regarded as an

upgrade to the system and refutes the construction placed on Clause 1.1.1 in the Services Description of the ICA by the Claimant, which, according to Digicel, would prevent it from taking advantage of "Improved efficiency in hardware and software, and new telecommunications system".

Urgency

(14) The making of Orders behind the backs of parties who may be adversely affected by them is always a strong course, Rule 17 - 4 of the Civil Procedure Rules 2002, restricts the grant of an interim injunction without notice to two sets of circumstances; if the court is satisfied that;

(a) In a case of urgency, no notice of application is possible; or
(b) that to give notice would defeat the purpose of the application

(15) Was there anything in what was transpiring between these entities that demanded such immediate intervention that would make service on the Defendants impossible. The chronology outlined in the affidavit of Lawrence McNaughton, Executive Vice President of the Carrier Services of the Claimant would not support such urgency. It speaks of a series of events unfolding over a period in excess of a month. From the 2nd December 2008 through the "blocking" of the Claimant's circuits on the 19th December 2008, the letter to the OUR on the 22nd December 2008, the subsequent responses, the restoration of the circuits, the actions of the Claimants again on the 7th January 2009, which blocked 90% of incoming international traffic, and the e-mails and other correspondence that followed on that action. The blocking of the Claimant's calls, if blocking it be, had already taken place, at the time of the application.

(16) It is argued on behalf of the Defendant that given the communication between the parties and the national and international visibility of the Defendant, urgency could not be a sustainable ground for application for the ex parte order. Further, what the Claimants must have urged

before Mr. Justice McIntosh was the second limb of Rule 17.4 "that to give notice of the application *would defeat the purpose of the application*". The Claimants contend, and I agree, that any such submission *would* constitute a material non-disclosure. I had little assistance as to what transpired at the ex parte hearing. Where urgency is a factor, in the absence of the Defendant, the court must be able to rely even more than it usually does on the *scrupulous and meticulous assistance of the advocate in deciding whether or not to make extreme orders of this kind in the circumstances of the particular case.* (See Memory Corporation plc v Sidhu (2000) 1 WLR 1443 Mummery L.J at p 1460).

(17) Digicel, through its counsel, had requested in a letter dated 9th January 2009, answers to questions concerning submissions made at the ex-parte hearing. The response of the Claimant of the 12th January 2009 is inadequate to meet the queries raised by the Claimant. I would think that full notes of the without notice hearing should be provided to the Defendant (Interoute Telecommunications UK Ltd. v Fashion Group Ltd. The Times November 10, 1999). It may very well be fatal to an application for extension of an ex parte injunction to refuse the reasonable request of the Defendant for notes of the hearing without notice.

(18) Digicel had made arrangements with external counsel, to remain on standby to facilitate any request for a hearing the Claimant may make, and had communicated that fact to the Claimant. The counsel for Digicel submitted that it would be misleading to submit that to give Digicel notice would defeat the purpose of the application when the Claimant ought to have known that Digicel was prepared to abide by any court order because they had invited Cable and Wireless to alert them if proceedings would be filed.

(19) It was further submitted that the second of the Orders sought was in the nature of a mandatory injunction and as such, different principles from those that attach to the grant of a

prohibitory injunction were applicable. See Megarry J. at page 411, Shepherd Homes Limited v Sandham (170) 3 All ER 402. The test for the grant of the mandatory injunction is more stringent. If this application is in the nature of a mandatory interlocutory injunction, what are the principles applicable? In Shepherd Homes, the Defendant, a purchaser of lands in a housing development, had built a fence in breach of a covenant, to protect his home garden from marauding sheep. The developer sought a mandatory injunction that he demolished the fence. At page 409;

> "Nevertheless, it is plain that in most circumstances, a mandatory injunction is likely other things being equal, to prove more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires, *but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think that the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought to enforce a contractual obligation.*" (Emphasis mine)

(20) This court has no duty to resolve conflicts on the evidence, but of the arguments presented by the parties at this hearing, it is sufficient to say that none clearly and obviously overwhelms the other. I would hesitate to describe either as being unusually strong and clear. Each case relies on the construction of legislation and various clauses in the Interconnection Agreement and is ably supported by the opinion of experts.

It has not been demonstrated before me that damages is not an adequate remedy. The injuries likely to be done to the Claimant, should he succeed, can be estimated and sufficiently compensated by a pecuniary sum (Isenberg v East India Estate Co. Ltd. (1863) 3 De G.J. & Sm 263). I would refuse the application for an extension of the interim injunction.