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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M030 OF 2002

BETWEEN	WEB COMMUNICATIONS LIMITED	APPLICANT
AND	OFFICE OF UTILITIES REGULATION	RESPONDENT

Mr. Paul A. Beswick and Mr. T. Ballantyne instructed by Ballantyne, Beswick and Company for Applicant.

Mr. M. Manning and Mrs. G. Gibson-Henlin instructed by Nunes, Scholefield, Deleon and Company for the Respondent.

HEARD: 16th, 17th, 18th & 25th September 2002
and 3rd December, 2003.

G. SMITH, J.

The Applicant Web Communications Limited pursuant to an Order of the Supreme Court made on the 7th day of March 2000 was granted leave to apply for Orders of Prohibition and Declarations by way of Judicial Review. These are set out in detail in the Application for leave to apply for Orders of Declaration and Prohibition dated the 7th day of March 2000 at paragraphs 2 (a) (i) to (vii).

At the commencement of this hearing the Respondent, Office of Utilities Regulation took a preliminary objection to these applications on the basis that they are premature and are usurping the Statutory scheme that is set up in relation to the administrative tribunal in issue, the Office of Utilities Regulations.

The Respondent asserted that the Applicant is engaged in the selling of the Yap Jack device. This device is bundled with minutes when sold to the consumer. The sale of the bundled minutes they argue raises a prima facie rebuttable presumption that the vendor is providing an international service within Jamaica or is providing a Telecommunications service as is provided by Section 2 (1) of the Telecommunications Act, 2000.

They argued that these services required a licence under the Telecommunications Act 2000, and that the Applicant Web Communications Limited has no such licence to provide these services. It was in those circumstances that a 'Cease and Desist' Enforcement Notice dated the 21st day of January 2002 was served on the Applicant, on the 28th day of January 2002.

The Respondent submitted as follows:-

(1) That the Respondent is a Statutory Tribunal set up under the Office of Utilities Regulation Act;

(2) That the Telecommunications Act 2000 sets out the responsibilities

for regulating the Telecommunications Industry in Jamaica;

(3) That the Telecommunications Act sets out the Statutory frame work for the carrying out of its function.

They argued that the relevant provisions for consideration in this matter are:-

(A) Section 4 (a) of the Telecommunications Act which requires the OUR to regulate specified services.

(B) Section 4 (b) which requires the OUR to receive and process applications for licences under the Act and make recommendations to the Minister as they consider necessary.

(C) Section 4 (d) which requires the OUR to carry out on its own initiative or at the request of any person investigations in relation to a person's conduct as will enable it to determine whether or to what extent is that person acting in contravention of the Act.

(D) Section 4 (2) invokes the procedural fairness doctrine and the rules of natural justice and without limiting these doctrines the OUR is required to;

(i) consult in good faith with persons who are or are likely to be affected by the decision;

(ii) Give to such person an opportunity to make submissions to and be heard by the OUR.

(iii) Have regard to any evidence adduced at any such hearing and to the matters contained in any such submissions;

(iv) Give reasons in writing for each decision;

(v) Give notice of each decision in the prescribed manner.

These they contended are the general procedures which are to be adopted by the OUR in the performance of its functions.

They also submitted that the Statutory Scheme for enforcement is contained in the following sections:-

(i) Section 4(d) an investigative function;

(ii) Section 63(4) Notice to be given to the subject of the investigation after the investigation has been concluded;

(iii) Sections 63 (2) (a) and (c) a finding that the relevant conduct is being engaged in;

(iv) Section 63 (4) a show cause hearing;

(v) Section 63 (4) reconsideration - Appeal;

(vi) Section 61 an Appeal Tribunal;

(vii) Judicial Review.

The Respondents further argued that in their view the issues that the

Court should consider are:

(1) Is the Applicant entitled to an Order of Prohibition by way of - Judicial Review on the grounds alleged or at all;

(a) Prior to the hearing being convened.

(b) Prior to a decision being made.

(c) Without reference to the statutory scheme which provides adequate alternative mechanisms for remedying any complaint that the applicant may have.

(2) Whether declarations are available in the face of alternative remedies or without reference to the statutory scheme.

In consideration of these issues they ask the Court to look firstly at:

THE FUNCTION OF THE COURT ON JUDICIAL REVIEW

The Respondent submitted that on Judicial Review the Court cannot substitute its own decision for that of the tribunal. It is not a hearing "de novo" or a consideration of the matter on its merits. Instead it must focus on the decision making procedure itself. They cited from the learned author of **Halsbury's Law's of England 4th Edition 2001, Re-issue Volume 1 (I) paragraph 59** as setting out the purposes of Judicial Review:

> "The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by

> the authority to which it has been subjected; it is no part of that purpose to substitute the opinion of judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. Unless that restriction on the power of the Court is observed, the Court will, under the guise of preventing the abuse of power, be itself guilty of usurping power. That is so whether there is a right of appeal against the decision on the merits. The duty of the Court is to confine itself to the question of legality. It's concern is with whether a decision making authority exceeded its powers, committed an error of law, committed a breach of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers."

Secondly that there are only four (4) grounds on which Judicial Review can be invoked in relation to administrative action.

(a) Illegality which relates to the decision maker's ability to understand and apply the law that regulates its decision making power.

(b) Irrationality – unreasonableness.

(c) Procedural Impropriety – Failure to observe the procedural rules that are set out in the legislative instrument by which jurisdiction is conferred on the tribunal or breach of the rules of natural justice.

(d) Constitutionality.

On the issue of Prematurity the following questions were posed by the Respondent:

1 (a) **Is the Applicant entitled to Judicial Review prior to the hearing being convened?**

They submitted that the Applicant is entitled to Judicial Review prior to the hearing being convened only where the tribunal acts in excess of its jurisdiction or contrary to law.

This statement of the law was accepted by the Applicant. However they contended there was a departure from this principle on the further submission by the Respondent that there has been no allegation or assertion on the facts that the Respondent has exceeded its jurisdiction, as ipso facto, a claim of bias is a claim that the tribunal has exceeded its jurisdiction. They stated that the Respondents incorrectly attempted to apply an otherwise unobjectionable principle of law to the current set of circumstances by ignoring the claim of the Applicant that the Respondent had deprived itself of jurisdiction to proceed because of the manner of its proceedings.

The phrase "lack of jurisdiction" is a term of general application which is intended to convey the idea that the panel or tribunal is either improperly constituted or is assuming a right which in the particular circumstances of the case is improper or unwarranted. The application of the phrase is not confined to simple circumstances, for example want of jurisdiction in the technical sense of having no power to the conduct a hearing. They submitted further

that there is no distinction in cases in which prohibition lies because of a want of jurisdiction arising from a procedural defect and one which arises from some other cause e.g. bias. In **R v Crown Court at Exeter, Ex-parte Beattie [1974] 1 ALL ER 1183 Lord Widgery C.J**. stated...

> "There is authority in the books for the proposition that a trial conducted in denial of natural justice is a trial conducted without jurisdiction..."

In the present case it is submitted by the Applicant that the Respondent had predetermined the outcome of the hearing proposed under the "Cease and Desist Enforcement Notice" dated the 21st day of January, 2002 and therefore exhibited bias against the applicant; OR that the likelihood of the Respondent exhibiting bias against the applicant is of such a degree that in either case the holding of the said hearing in such circumstances would constitute a breach of Natural Justice.

In addition the Respondent has failed to observe both its statutory duties and the standards of procedural fairness and natural justice required of it pursuant to Section 4(3) of the Telecommunications Act 2000.

1 (b) Is the Applicant entitled to Judicial Review prior to a decision being made?

The Respondent contended that preliminary investigations do not involve the rules of natural justice so as to result in an excess of jurisdiction.

This is so because no final decision had been made which affected the rights and interests of the applicant.

On the other hand the Applicant submitted that the Respondent's decision to proceed with the hearing in circumstances where:

(i) The notice gave an unqualified indication that the Respondent had pre-determined the outcome of the hearing;

(ii) The Respondent steadfastly refused to provide the applicant with the interrogatories, evidence, and exhibits which were required by the applicant to mount its defence;

(iii) The Respondent's behaviour at the proposed hearing on the 8th day of March 2002 in refusing to provide any evidence on which it intended to rely and instead calling on the Applicant to present its defence, was clear and unmistakable evidence that the Respondent's action and decision were not of such a character as to be deemed a preliminary decision but were intended to culminate in a final decision against the applicant. The applicant contended that the Respondent was not engaged in any form of preliminary investigation or decision but had predetermined the outcome of the hearing under the notice and that the Respondent had no intention of holding a fair and unbiased hearing at

which it would have produced any evidence whatsoever of the allegations against the Applicant.

1 (c) **Should the Applicant be allowed to proceed to Judicial Review without reference to alternative mechanism or statutory scheme?**

The Respondent contended that courts in their discretion will not normally make the remedy of Judicial Review available where there is an alternative remedy by way of appeal. **They cited R v Chief Constable of Merseyside Police ex-parte Cawley [1986] 1 ALL ER 257 and Halsbury's Laws of England Volume 1 (1) paragraph 67 4th Edition 2001 Re-issue** in support of that proposition of law.

The alternative mechanism must however be adequate. Judicial Review may be granted where the alternative statutory remedy is "nowhere so convenient, beneficial and effectual" or "where there is no other equally effective or convenient remedy …"

In R v Huntingdon District Council ex-parte Cowan [1984] 1 ALL ER 58 at P 63 Glidewell J said that "a major factor to be taken into account is whether Judicial Review or the alternative remedy available by way of appeal is the most effective and convenient in all the circumstances not merely for the applicant but in the public interest."

The Respondent further argued that factors to be taken into account by Court when deciding whether to grant relief by Judicial Review when an alternative remedy is available are:

(i) Whether the alternative statutory remedy will resolve the question at issue fully and directly;

(ii) Whether the statutory procedure will be quicker or slower than the procedure by Judicial Review; and

(iii) Whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body.

They further submitted that arising from the above were two important principles (a) the last resort doctrine and (b) the observance of the separation of powers. The Courts they say must not be seen to usurp the functions of the legislature by being too ready or eager to engage in Judicial Review - **In R v Industrial Disputes Tribunal and Half Moon Bay Limited (1979) 16 JLR 333** that principle was reiterated where the Court stated:

> "A close study of Section 25 of the [Jamaican] Constitution indicates that apart from incorporating the doctrine of last resort to which I have referred, the founding fathers have given an indication to the judges of the Supreme Court that they should not seek – unless absolutely necessary

> – a confrontation with the legislature or meddle with policies which parliament thinks are peculiar subjects of the political arena only."....

The Applicants responded that the principle in these cases clearly indicated that the main purpose of Judicial Review was a review of the procedure by which a tribunal operated as distinct from the decision which the tribunal arrived at. It was equally clear that where the complaint as in the instant case was that the procedure which the tribunal proposed to adopt was unlawful the Court will view this as the exceptional circumstances necessary to justify its intervention by way of Judicial Review.

In Preston v IRC [1985] 2 ALL E.R. 327 the dicta of Lord Templeton at 337 stated:

> "Judicial Review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers."...

In answer to the Respondent's submissions of the necessity for exceptional circumstances and a reference to last resort, the applicant submitted that these are inapplicable to the grant of a prohibitive order. It is the applicant's contention that the initiation of the proceedings under the notice constitutes an obviously exceptional set of circumstances indicating a serious procedural and jurisdictional error. In such circumstances the Court is

bound to intervene by way of Judicial Review to prevent an obvious breach of the principles of natural justice in relation to the Applicant.

THE STATUTORY SCHEME FOR ENFORCEMENT

The Respondents submitted that the Telecommunications Act 2000 provides an adequate alternative remedy for the Applicant.

This they say can be seen upon a close examination of the relevant sections of the Act.

1. Section 4(d) provides an Investigative Function which they argued was carried out by the OUR in accordance with the provisions of the Act.

2. Section 63(4) provides that a notice be given to the subject of the investigation after the investigation has been concluded and a belief formed that the relevant conduct under Sections 63(2)(a) – 63(2)(c) has been engaged in.

3. Section 63(4) provides for a show cause hearing. This hearing they contended was never held as the Applicant circumvented the process by going directly to the Court.

4. Section 60(4) provides for an appeal process. This provision it was submitted is premised on the existence of a decision of the OUR. In this case they argued there was no decision hence there was no appeal.

5. Sections 61 and 62 provide for an Appeal Tribunal. The composition of that Tribunal is set out in the Second Schedule of the Act. It was submitted that based on the composition of the Tribunal it would be an independent and broad based body.

6. There is no ouster clause to prevent the decision of the Appeal tribunal from being reviewed by the Court.

THE ISSUE OF THE HOLDING OF THE HEARING

It was contended by the Respondent that the obtaining of the Court order on the 7th March 2002 foreclosed the hearing so that it could not have commenced on the 8th March 2003. The Applicant responded that nothing in the general law or in the principles that guides Judicial Review suggest that a party is bound to submit to the jurisdiction of a tribunal which the party intends to challenge by way of prohibition. Indeed they argued that the principle is entirely to the contrary i.e. it is expected that the party will move to prohibit a tribunal before it makes its decision, thereby obviating the need for an order of certiorari to quash the tribunal's decision. Prohibition they submitted is a remedy intended to prevent a tribunal or executive body from taking a particular step. It would therefore defy the essential proposition of the prohibitive remedy and render entirely nugatory the purpose of the

prohibitive order if a party was on all occasions forced to submit to the jurisdiction of the tribunal which it sought to prohibit from proceeding with or commencing a hearing or administrative action which the applicant had reason to believe was ill-founded or based on an absence of proper jurisdiction. The case of **R v Tottenham and District Rent Tribunal Ex parte Northfield (Highgate) Limited [1956] 2 ALL E.R.** was cited in support of that proposition.

The Respondent on the other hand argued that the previously cited case is distinguishable and does not assist the Applicant's contention. It was submitted that the Court stated that " the application prior to a hearing would be entertained where there is a simple, short, and neat question of law ... not depending on particular facts ...."

In the present case they submitted that there was no clear question of law. There was a dispute of a material fact as to whether or not a hearing took place and whether the particulars complained of were in fact supplied. These factors they contended would take the present case out of the ambit of the principle in the case cited previously.

CONCLUSIONS

I have tried to highlight some of the many arguments, submissions and responses which were proffered by the Attorneys-at-law for my consideration and must thank them for their industry and erudition on the topic.

Upon careful consideration of the totality of these arguments and submissions I have made the following findings:-

1. That no hearing took place as prior to the commencement of the hearing the Applicant served on the Respondent the order of the Court dated the 7th day of March 2002, which order included a stay of the proposed hearing. It is my view that even if a hearing was convened the Court's order would have had the effect of making anything done at such a hearing a nullity.

2. That the Applicant is only entitled to Judicial Review prior to the hearing being convened where the tribunal acts in excess of its jurisdiction or contrary to law. In this case, I am of the opinion that the tribunal at no time exceeded its jurisdiction by being biased as alleged by the applicant in predetermining the outcome of the hearing proposed under the "Cease and Desist Notice" dated the 21st day of January 2002. The Court accepted the Respondent's submission, that what took place were preliminary investigations which did not involve the rules of

natural justice so as to result in an excess of jurisdiction. No final decision had been taken which affected the rights and interests of the Applicant. Having so concluded the Applicant is not entitled to Judicial Review in those circumstances.

3. On the issue of whether the Applicant should be allowed to proceed to Judicial Review without reference to alternative mechanisms or statutory scheme it is my opinion that the Courts must never be too anxious or too eager to engage in Judicial Review, unless it is absolutely necessary. Where Parliament legislates and proper procedures are put in place for the implementation of those provisions the Court should have due regard for the legislation. It should bear in mind what was the intent and purpose of that legislation. In this case the Telecommunications Act 2000 sets out the framework for the carrying out of the functions of the Office of Utilities Regulation. If it is to operate to its optimum and carry out its functions as envisaged, then it ought not to be fettered by whimsical challenges to its authority. If Judicial Review were to be granted in all such circumstances then the Office of Utilities Regulation would be rendered ineffective and powerless and this to my mind would certainly defeat the whole purpose and intent of the Act.

4. On the issue of leave having been granted for Judicial Review by another court, there is authority which states that a Judge of the Supreme Court has the discretion to vary OR revoke an ex-parte order which has been made by another Judge of the Supreme Court. This was enunciated by the Privy Council in the case of **The Ministry of Foreign Affairs, Trade and Industry v Vehicles and Supplies Limited and another 1991 28 JLR 198.**

5. Finally, I rule that the preliminary objections are upheld on the basis that the applications for Declaration and Prohibition are premature and bypass the statutory scheme that is set up for the proper functioning of the OUR.