IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2016: No. 409

IN THE MATTER OF SECTION 96 OF THE REGULATORY AUTHORITY ACT, 2011

AND IN THE MATTER OF ORDER 55 OF THE RULES OF THE SUPREME COURT OF BERMUDA, 1985

AND IN THE MATTER OF A DECISION RENDERED BY THE REGULATORY AUTHORITY ON THE 26th OF OCTOBER 2016

BETWEEN:

TELECOMMUNICATIONS NETWORKS LTD.

Appellant

- v -

THE REGULATORY AUTHORITY OF BERMUDA

Respondent

- and –

(1) BERMUDA DIGITAL COMMUNICATIONS LTD.
(TRADING AS "CELLULAR ONE" OR "CELLONE")

(2) TELECOMMUNICATIONS (BERMUDA & WEST INDIES) LTD.
(TRADING AS "DIGICEL")

Interested Parties

RULING

(in Chambers)

Appeal under section 96 of the Regulatory Authority Act 2011-application for stay pending appeal-application to strike-out appeal-application for spectrum lots-Electronic Communications Act 2011-whether statutory scheme permits or requires positive discrimination to promote competition-waiver of right to object to procedural aspects of 'request for application' process

Date of hearing: November 7, 2016
Date of Ruling: November 14, 2016

Mr Allan Doughty, Beesmont Law Limited, for the Appellant
Mr Alex Potts, Sedgwick Chudleigh Ltd, for the Respondent (the "Authority")
Mr John Wasty, Appleby (Bermuda) Limited for Cellular One
Mr Ben Adamson, Conyers Dill & Pearman Limited, for Digicel

Introductory

1. By an Originating Notice of Motion dated October 28, 2016, the Appellant appealed against the decision of the Authority dated October 26, 2016 granting an "HDS-1" award of radio bandwidth to Cellular One ("Cellone") and Digicel ("the Decision") with a view to setting it aside. The Appellant unsuccessfully applied for a share of the bandwidth in question, complains that the disqualification of its application was flawed and seeks a rehearing of its application. The present matter is by common accord of considerable urgency. The Interested Parties were agreed that various preparatory steps need to be taken by them as soon as possible to be able to utilize the relevant bandwidth in time for the forthcoming America's Cup.

2. Following an initial *ex parte* hearing on October 31, 2016 of an *ex parte* Stay Summons, the Appellant on November 4, 2016 issued an *inter partes* Summons seeking a stay pending appeal pursuant to section 96 of the Regulatory Authority Act 2011 ("the RAA"). That Summons was issued returnable for November 7, 2016. Meanwhile, by Summons dated November 3, 2016, the Authority applied to strike-out the appeal. That Summons was also issued returnable for November 7, 2016.

3. On November 7, 2016 I refused the Appellant's application for a stay and reserved judgment on the Respondent's strike-out application. I now give reasons for the decision made on the Appellant's stay application and deliver the judgment which was reserved on the Respondent's strike-out application.

The Grounds of Appeal

4. The eight grounds of appeal may conveniently be summarised as follows:

    (1) The Respondent erred in law by designing a Request for Applications ("RFA") which was unreasonably discriminatory to the Appellant as a

Bermudian new entrant to the cellular market by reference to (a) a six week time limit, (b) the imposition of a page limit, and (c) by failing to take into consideration the requirements of section 12 of the RAA in relation to the promotion of competition and Bermudian ownership (Grounds 1-3);

(2) The Respondent erred in law and fact by failing to request further information to meet its technical concerns (Grounds 4);

(3) The Respondent erred in fact by finding the Appellant did not qualify on the grounds of (a) its finances, (b) its business plan, (c) its technical plan, and (d) its technical capacity (Grounds 5-8).

Reasons for refusing the Stay Application

Principles governing the grant of stays pending appeal under section 96(8) of the Regulatory Authority Act 2011

5. Section 96 of the RAA provides as follows:

> "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]

6. The appellate jurisdiction of this Court is limited to questions of law and mixed fact and law except as regards challenges to enforcement action by the Authority. The scheme of the Act is clearly to allow the merits policy and technical judgments to be made by the regulatory body (and the Minister).

7. In *Bermuda Digital Communications Limited-v-Regulatory Authority* [2015] Bda LR 22, I summarised the legal principles governing the jurisdiction to grant a stay pending appeal under section 96(8) of the RAA in the following way:

"*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.*"

Merits of stay application

8. In the present case on the face of the Appellant's grounds of appeal and based on a cursory review of the evidence (in particular taking note of the apparent depth and quality of the Decision itself), it was not difficult to form a preliminary view that the merits of the appeal were not "pretty good". I was further assisted in assessing the merits by the concurrent hearing of the Authority's strike-out application.

9. The Appellant was unable to formulate a convincing argument, which was not internally inconsistent, on irreparable prejudice either. Mr Doughty rightly argued that since the Act precluded damages awards against the Authority, any loss the Appellant suffered from the Interested Parties being permitted to proceed to exploit their disputed bandwidth allocation, would be irreparable. However, I found it difficult to understand in practical terms how this loss would be suffered.

10. It seemed improbable that Cell-One and Digicel would be likely to generate income in the short period of time between the application for a stay and the effective determination of the appeal, assuming it was not struck out. It seemed more likely that they would, if anything, be investing in preparatory work assuming the risk that, if the Appellant's appeal succeeded and a rehearing was ordered and, further, if the rehearing reduced their allocation, some of their preparatory effort might be wasted.

11. The Appellant's counsel then suggested that the Court would have difficulty in unwinding matters if a stay was not granted. This was an internally inconsistent argument. It assumed that the appeal could not yield an effective remedy for the Appellant when a stay could only properly be granted if the Appellant had good prospects of achieving real success. If the appeal had merit, there were real prospects of a rehearing before the Authority being ordered and a real risk (for Cell-One and Digicel) that their existing allocation might be reduced. It would be a matter for those parties' commercial judgment (and risk assessment) whether or not to commence preparations for exploiting their new bandwidth allocation or whether or not to await the outcome of the appeal. If they elected to act to their own potential detriment pending the determination of the appeal, they could not plausibly invite the Court or the Authority to refrain from making an appropriate decision according to law.

12. It was difficult to avoid the impression that the main purpose of the stay application was tactical; to create pressure through delaying an important product development exercise in the hope of salvaging a negotiated solution for an unsuccessful application for commercially valuable bandwidth. On the other hand, I did not doubt the sincerity of the sense of grievance felt by the Appellant and its principals, as small players who

had lost out in a commercial battle against larger adversaries under rules which they found disadvantageous.

13. Bearing in mind the high hurdle that an applicant for a stay under section 96(8) has to meet, I felt bound to refuse the Appellant's application.

Summary on Stay

14. For the above reasons on November 7, 2016 I refused the Appellant's application for a stay pending appeal.

Strike-out application

Overview

15. Mr Potts submitted that the two main planks of the appeal were misconceived. Firstly, the implicit argument that the Authority was legally required to, in effect, apply policies of affirmative action in the Appellant's favour was misconceived (Grounds 1-4). And, secondly, the complaints about errors of fact were unarguable on their face (Grounds 5-8). The umbrella legal policy principle which he invited the Court to apply was to accord considerable deference in a 'polycentric' context to the policy and technical assessments and determinations made by the statutory policymakers.

16. While the Authority's counsel embarked upon a detailed analysis of the scheme of the RAA and the related Electronic Communications Act 2011 (the "ECA"), with a view to demonstrating that the statutory scheme required the adoption of uniform procedural rules, the Appellant's counsel relied upon elevated general human rights principles. Most significantly, Mr Doughty referred the Court to the Canadian Supreme Court decision of *Andrews-v-Law Society of British Columbia* [1989] 1 S.C.R 143 at 164 where McIntyre J quoted with approval the following dictum of Frankfurter J in *Dennis-v-United States*, 339 US 162 (1950) at page 184:

> "*It was a wise man who said there is no greater inequality than the equal treatment of unequals.*"

17. Mr Potts sought to extinguish Mr Doughty's torch of justice by retorting that positive discrimination was probably not permissible under the Bermuda Constitution. Rather than exhaustively exploring these interesting jurisprudential nooks and crannies, in my judgment the strike-out application must be resolved on a more prosaic analysis of the statutory scheme and the merits of the appeal in real world terms. Is it plain and obvious that the Appellant's complaints of discriminatory treatment are legally and/or factually misconceived?

The Decision

18. On May 13, 2016, the Authority issued an advance copy of the RFA "*to enable ICOL Holders to have as much advance information as possible.*" The RFA ran to 65 pages and set out a comprehensive road map as to the process the Authority would adopt. This included a timeline and the appointment of an Advisory Panel to review applications. It also included provisions designed to ensure the integrity and transparency of the application process. Matthew Copeland, Chief Executive of the Authority, deposed that in selecting international experts to serve on the Advisory Panel, he explicitly ensured that the Panel was not dominated by persons with backgrounds *from "Large established mobile operators" only*. He also deposed, without apparent contradiction, that far from being a "late entrant" into a process which gave established carriers an unfair head-start, the Appellant could have engaged with a public consultation process which preceded the final RFA by more than one year.

19. The Advisory Panel appointed on July 20, 2016 recommended that the Appellant's application be refused. In submitting its application, the Appellant expressly represented that it "*irrevocably and unconditionally…waives any objections it may have to the terms of the RFA, including but not limited to the Mandatory License Conditions, the RFA procedures or any interim actions taken by the Authority to complete the HDS-1 process.*"

20. The Decision runs to 24 pages and is crafted with a degree of clarity and care which at first blush makes complaints of an unfair process seem implausible. The introductory paragraphs acknowledge an imbalance between the quality of the spectrum currently being utilized by each of the two Interested Parties. It then states:

> "*11. The Authority has taken great care to conduct the HDS-1 Comparative Selection Process on a fair, objective and non-discriminatory basis. The process has entailed a comprehensive assessment of the information and documentation provided by all three of the Applicants across a wide range of technical and commercial requirements. The Authority has done its utmost to ensure a fair outcome, including by giving all Applicants the opportunity to identify any inaccuracies or omissions in its assessment of their respective Applications before issuing this Final Decision. The Authority is confident that the outcome of HDS-1 is fully supported by the evidence and will advance the interests of the people of Bermuda and the competitiveness of the country.*
>
> *12. The Final Decision has been taken following consideration by the Authority of the Recommendations of the Advisory Panel…The Authority is grateful to the Advisory Panel for members for thorough review and*

assessment they conducted, together with the well-reasoned set of Recommendations that the Advisory Panel has provided…

14. In this Final Decision, the Authority:

(a) ….;

(b) …;

(c) *Disqualifies the Third HDS-1 Participant for Failure to achieve a Passing Score in the Baseline Review of the three Alternative Requests included in its Application…*"

21. The Decision then proceeds to explain that the consultative process began on August 12, 2015, and entailed making available a draft of the proposed RFA. Cell-One and Digicel provided comments in September 2015 and participated in a technical workshop held by the Authority in October 2015. A Second Consultation Document was issued in January 2016 and interested parties were encouraged to begin preparing their applications in advance of the formal RFA. Cell-One, Digicel and two other interested parties responded to the Second Consultation Document. An advance copy of the final RFA was circulated on May 13, 2016 and the official launch of the RFA with its final timetable took place on May 31, 2016.

22. Requests for clarification were received and answered within the specified timetable and three applications were received on July 15, 2016. The applications were referred to the Advisory Panel, which met in Bermuda during the period August 15-19, 2016. The Panel consisted of the Authority's Chief Executive Matthew Copeland and Chief Technical Officer Michael Wells, and two eminent Professors (Dennis Roberson and William Webb). Applications were assessed against the following baseline criteria:

(a) Financial Position;

(b) Technical Capability and Experience;

(c) Technical Solution; and

(d) Business Plan.

23. The Decision then pertinently notes:

"*34. The Advisory Panel also recommended that the Third HDS-1 Participant be found to have failed to meet, by a significant margin, the*

minimum requirements established for the Baseline Review under Section 14.3.1 of the RFA and not be considered for the award of HDS-1 spectrum…"

24. On August 23, 2016, the RFA was modified on the advice of the Advisory Panel in certain respects including introducing the "*America's Cup Condition*". This was informed by the Minister's Spectrum Policy Statement and the Authority's view that "*Bermuda's ability to deliver levels of mobile coverage and speeds that are close to those available in the United States and Europe will be important for Bermuda's reputation in hosting such events and, more broadly, to the people of Bermuda, the wider tourist community and international business*" (paragraph 40). All three Applicants sought and were granted more time to respond to the Notice of Additional or Modified Licensing Conditions. The Authority, taking into account initial comments received, issued a revised Further Notice on August 31, 2016. Following subsequent meetings, each Applicant agreed to the revised conditions and submitted updated Eligibility Documentation.

25. The Decision then proceeds to explain, before reaching its Final Decision, that the Authority considered input from its own Finance team, reports from Plum Consulting and KPMG Advisory Limited as well as the Advisory Panel's Recommendations. It then issued the Preliminary Decision to Disqualify the Third HDS Participant and a Proposed Final Decision. The Decision to Disqualify, annexed to the Decision itself, is a 21 page document in its own right. From this document it is clear that the Appellant was afforded an opportunity to comment on both the Decision to disqualify and the Final Decision, because its objections are noted and rejected on reasoned grounds. Combining the Disqualification Decision and the Final Decision was an accommodation to the Appellant which did not have to be made.

26. The complaints about time limits were rejected on the grounds that the Appellant had for reasons of its own elected not to participate in the consultation process and entered the fray late. The complaints about page limits were also rejected on factual grounds- the Appellant was afforded more space than any other Applicant. The Decision in relation to the Appellant identified the broad complaint made about the proposed Decision to Disqualify and the proposed Final Decision as follows:

> "*55. Telecom's overarching position appears to be that the Authority should have made special accommodations to effectively set aside at least one HDS-1 Lot for a new entrant...promotion of mobile competition was included among the RFA selection criteria…however, the Spectrum Policy Statement does not provide for preferential treatment of new entrants in the award of HDS Frequencies. Any such preference would have to be objectively justified in line with the non-discrimination requirements of Section 37(1)(a).*"

The strike-out issues

27. It is accordingly apparent that three main issues require determination to resolve the strike-out application:

    (1) whether it is plain and obvious that the Authority correctly concluded that it had no jurisdiction to positively discriminate in favour of new market entrants;

    (2) whether it is plain and obvious that the Appellant has waived the right to complain of procedural defects in the RFA process;

    (3) whether it is plain and obvious that Grounds 5-8 should be struck-out because they disclose no arguable grounds of appeal on their face.

28. In approaching these issues and reminding myself of the exceptional nature of the jurisdiction to strike-out proceedings generally before they are fully heard, it is important to reiterate the observations made above in relation to the statutory scheme under which the present appeal is brought. The right of access to the Court is expressly restricted with a view to affording deference to the policy and technical judgments of the Authority. It seems self-evident that these restrictions serve a legitimate public policy goal of achieving expert adjudication in a highly technical field in which the public interest requires speed of action in a fast moving segment of the private sector economy. Mr Potts helpfully referred the Court to the observations of Ground CJ in *Bermuda Telephone Company Limited v Minister of Telecommunications and Commerce* [2008] Bda LR 58, at paragraphs 14 and 15, which are relevant in the present regard:

> "*…the extent of appellate review is restricted … to points of law or mixed fact and law … the Court should give due deference to the original decision maker and only intervene if the decision is plainly wrong*."

Positive Discrimination and the Statutory Scheme

29. The reliance Mr Doughty placed on general principles of non-discrimination law was a strong indicator that he could find little support for his main complaint in the governing statutory scheme. Mr Potts welcomed the opportunity to point out this legal vacuum in the Appellant's case. I have little difficulty in summarily concluding that there is no express statutory support for the proposition that the Authority is required to give special preference to new market entrants in aid of promoting competition, be it under the ECA or the RAA. However, the crucial question is whether the Authority erred in fact and/or in law by concluding that no such preferential measures were

required not generally, but in the Appellant's case for the purposes of the particular RFA under present consideration.

30. The objectives of spectrum management under section 37 of the ECA require the Minister and the Authority to adopt an approach which "*(a) is objective, transparent and non-discriminatory*", and which "*(e) preserves or promotes effective and sustainable competition in the provision of electronic communications services subject to this Act*". Under the RAA, the Authority's counsel heavily relied on the following portions of section 16 of the RAA ("*Regulatory principles*") to which emphasis has been added:

> "*16. In performing its duties under this Act, the Authority shall—*
>
> *(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.*"

31. It is not necessary for me to decide the more difficult question of whether or not the Authority and/or the Minister may lawfully positively discriminate in favour of new sector entrants in the interests of promoting competition, which is a principle referenced in the preamble to the RAA and substantively embodied in the ECA. In my judgment it is seriously arguable that, as Mr Doughty contended, special procedural measures can potentially be adopted to promote competition, provided that they are reasonable and implemented in a transparent and consistent manner.

32. The Appellant complains that the procedures adopted in relation to the RFA in the present case unreasonably discriminated against it as a new entrant in the factual circumstances of the present case, a mixed question of law and fact. In my judgment this complaint is quite obviously hopeless on the undisputed (or indisputable) facts of the present case where the Appellant:

    (a) failed to participate in the RFA process during the consultation phase which afforded an opportunity to suggest that the process be designed from the outset with special features to favour new entrants;

    (b) expressly waived the right to raise procedural objections when entering the RFA process;

    (c) first raised any or any formal complaints about the fairness of the process when the Authority had already reached a provisional decision that the Appellant was not qualified to apply for the spectrum allocation in question. This was clearly too late.

33. Grounds 1-3 of the appeal are liable to be struck-out to the extent that they rely on the broad complaint that the RFA process unreasonably discriminated against the Appellant as a new entrant because it is plain and obvious that these grounds are bound to fail.

Waiver of procedural objections

34. Having regard to the fact that I have found that the RFA procedure and the Decision were not unlawfully implemented and/or reached, and as regards Ground 4 as a discrete ground of appeal in any event, I am bound to find that it is also plain and obvious that the Appellant waived the right to raise the procedural complaints set out in Grounds 1-4 of the Originating Notice of Motion.

35. The waiver wording contained in the RFA does not completely immunize the processes of the Authority from judicial review. It simply means that an Appellant (or judicial review applicant) has a higher bar to meet to support a judicial finding that the impugned procedures were even arguably unfair.

Grounds 5-8 and questions of fact

36. I further find that Grounds 5-8 are plainly unarguable on their face. They plead errors of facts. No potential curative amendments were placed before the Court by counsel. Having regard to the decisive nature of the Decision under appeal, I decline in my discretion to afford the Appellant the opportunity to seek to formulate alternative grounds of appeal which, unless wholly new, would only vainly seek to challenge the underlying policy and technical merits of the Decision.

Summary on strike-out application

37. The appeal is accordingly struck-out. Unless any party applies within 21 days by letter to the Registrar to be heard as to costs, (a) the Appellant shall pay the Respondent's costs of the appeal to be taxed if not agreed, and (b) no Order shall be made as to the costs of the Interested Parties.

Dated this 14th day of November, 2016 _____

IAN RC KAWALEY CJ