ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 13 OF 2001

BETWEEN:

CABLE & WIRELESS (WEST INDIES) LIMITED

Appellant

and

[1] WINSTON DERRICK
[2] VENTURE CAPITAL LIMITED

Respondents

Before:

The Hon. Mr. Satrohan Singh — Justice of Appeal
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr Joseph Archibald — Justice of Appeal (Ag.)

Appearances:

Mr Russell Martineau Q.C. and Mr Justin Simon for the Appellant
Mr Dane Hamilton for the Respondent

2001: July 18; 19;
September 17

JUDGMENT

[1] REDHEAD J.A: This is an appeal from the refusal of Georges J. to grant an injunctive relief against the respondents on an ex parte summons filed by the appellant.

[2] On a summons filed by the appellant on 16th May, 2001 the appellant sought the following injunctive reliefs:

1. An injunction restraining the respondents whether by themselves their servants or agents or otherwise howsoever from operating or procuring the operation of the telecommunications facilities within Antigua and Barbuda and/or from providing or procuring the provision of the telecommunications

services to any person in Antigua and Barbuda save and to the extent permitted by any licence granted by the relevant minister under the Telecommunications Act Chapter 423 of the Laws of Antigua and Barbuda.

2. An injunction restraining the respondents……from committing or procuring the commission of any breaches of section 3 of the Telecommunications (Prevention and Prohibition of Unauthorised Use and Service) Act 1994 (No. 16 of 1994); and

3. An injunction restraining the respondents…… from operating or procuring the provision of "call back service" in Antigua and Barbuda.

[3] The learned trial Judge in refusing the appellant's application for an injunction, after referring to Lord Diplock's judgment in-

Lonrho Ltd and Another v Shell Petroleum Co. Ltd and Another AC.1982 173-

Where at page 185 Lord Diplock quoting Lord Tenterden C.J. in Doe & Murray v Bridges (1831) 1B and Ad 847,859 where he said…….

> "The general rule…… where an Act creates an obligation, and enforces the performance in a specified manner…… that performance cannot be enforced in any other manner…….where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform that statutory obligation or for contravening the statutory prohibition which the Act creates, there are two classes of exception to the general rule……"
>
> These exceptions are:-
>
> (1) "where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Act and similar legislation.
> (2) Where the statute creates a public right (one enjoyed by all members of the public) and a particular member of the public suffers "particular, direct and substantial damage" other and different from that which was common to all the rest of the public".

[4] The learned trial Judge then held that:-

> "It is plain from the plaintiff's statement of claim and the matters set out in their (sic) affidavit that the instant case does not fall within either of those exceptions….. The only loss suffered by the plaintiff is economic."

[5] The appellant's case as advanced before the learned trial judge is that it has a licence which gives it the exclusive right to provide telecommunications in Antigua and Barbuda for a period of 25 years from 22nd June, 1987.

[6] In June 2000 the Minister responsible for telecommunications granted the second-named respondent two licences to operate and maintain a very small Aperture Terminal (VSAT) Satellite dish for call center type service and data and to operate as an internet service provider limited to internet data service only.

[7] The appellant alleged that they have discovered that the respondents in breach of their licences and also in breach of the appellant's exclusive licence, the respondents have been allowing international voice traffic to pass through their VASAT transmitted and facilitate access of general public to those calls to the appellant's detriment and loss. This the respondents vehemently deny.

[8] It was the appellant's case before the court below and this court that telecommunications Act 1951 chapter 423 and Telecommunications (Prevention and Prohibition of Unauthorised Use and Services) Act 1994 give it a cause of auction.

[9] In Lonhro (supra) Lord Diplock said at page 183:

> "……..it is well settled law by authority of this House in Cutler v Wandsworth Stadium Ltd. A.C 1949 398 that the question whether legislation which makes the doing or omitting to do a particular act a criminal offence render the person guilty of such offence liable also to a civil action for damages at the suit of any person who thereby suffers loss or damage is a question of construction of the legislation."

[10] I turn now to examine the legislation in question.

Section 4 of the Telecommunications Act 1951 (on which the appellant relies) states:-

> "No person shall establish any telecommunications station or install, work or operate any telecommunications apparatus in any place in Antigua and Barbuda or on board any ship or aircraft registered in Antigua and Barbuda except under and in accordance with a licence granted in that behalf under the provisions of this Act and subject to such conditions and restrictions as may be prescribed by the rules made under this Act."

6(3)- "Any person who contravenes the provisions of subsection (1) shall be guilty of an offence under this Act and on conviction the court, in addition to any penalty provided by the Act, may order that any telecommunications apparatus in connection with which the offence was committed be forfeited to Her majesty."

[11] In my opinion this section merely forbids one from establishing any telecommunication station or operating any telecommunication apparatus etc. and provides a penalty by subsection 3 for breach thereof.

[12] I now examine the Telecommunications (Prevention and Prohibition of Unauthorised Use and Services) Act 1994 No. 16 of 1994-

Section 3- "No person shall use or permit or suffer to be used any telecommunication system apparatus in connection with the provision of a call back service or do anything so as to facilitate the use of any telecommunication system or apparatus in connection with the provision operation or use of such service."

Section 4- "Subject to section 5 the telecommunication authority or any person authorised by the authority may take all necessary steps to track any unauthorised use of the telecommunication apparatus."

5(1) "The telecommunications authority may, by writing, authorise a licensee or any other person to use any technical or other monitoring device to carry out any examination and test to ascertain whether section 3 is being contravened.

(2) For the purpose of subsection (1) the telecommunications authority or any person authorised by the telecommunication authority may, upon giving reasonable prior written notice to the user of such services, or on leaving such notice, at such premises, enter upon any premises to which telecommunications services have been supplied by the telecommunication authority, or the licence in

order to examine and test the telecommunication apparatus located at such premises."

"6(1) If the telecommunication authority or a licensee is satisfied that the telephone service is being used to transmit voice or data services from a point in Antigua and Barbuda by a route other than a route established by the licensee and approved by the telecommunication authority for such transmission, the telecommunications authority or the licensee may take any step it considers necessary to-

(a) block transmission over that other route or call attempts which contravenes the provision of this Act; or

(b) suspend the provision of telecommunication services to such user; or

(c) modify its terms and conditions of service to such user; or

(d) withdraw the telecommunication services supplied to any such user.

(2) Any licensee who blocks transmission over any route or withdraws telecommunication services under subsection (1) shall immediately make a report of the action taken to the telecommunications authority.

(3) Where telecommunication services to any user have been suspended or withdrawn under this section, such services shall not be restored unless the user has paid a restoration fee of five thousand dollars to the telecommunication authority.

7. Any person who contravenes the provisions of section 3 is guilty of an offence and is liable on summary conviction to a fine of fifty thousand dollars or to a term of imprisonment of two (2) years."

[13] Mr. Martineau, Learned Queen's Counsel, has placed great emphasis on section 6, among other things, as clothing the appellant with a cause of auction. He argued that the words in section 6(1) "may take any such step it considers necessary" must include the bringing of injunctive relief.

[14] I do not agree as these words are at large. They are limited by the words that follow "may take any such step it considers necessary to:-"

(a) block transmission etc.,

(b) suspend the provision of telecommunication services to such user; or

(c) modify its terms and conditions of services to such user; or

(d) withdraw the telecommunication services supplied for any such user.

[15] Moreover the actions that can be taken by the licencee or the telecommunication authority are spelt out and do not include the bringing of injunctive relief.

[16] Learned Queen's Counsel, Mr. Martineau, also argued, that the legislature by investing the appellant, as licensee, with the power to block transmission, clearly indicates an intention on the part of Parliament that the legislation was for the benefit of the appellant. Mr. Martineau contended that the power to block transmission includes the right to sue for an injunction. Again I do not agree.

[17] In my judgment, as Mr. Hamilton has submitted the Act must be read as a whole and when one looks at the act in that light, it is, in my view, regulatory, merely because the licensee is given power under section 6(1)(a) to block transmission cannot mean that the Act was passed for the benefit of the appellant or for a class of person and that the appellant belongs to one of those class of persons.

[18] I am confirmed in my view that the Act is merely regulatory and that Parliament recognises that the telecommunications authority may not have the necessary technical know how to police and monitor the operation or any breaches that may occur under the Act hence it places the powers under section 6 to the licensee.

[19] In my opinion section 4 bears this out:-

> "……the telecommunications authority or any person authorized by the telecommunications authority may take all necessary steps to track any unauthorised use of the telecommunication system or telecommunication apparatus."

[20] By this section it is beyond doubt that Parliament intended to put into the hands persons other than the licencee the power to "track" monitor the use of the telecommunication system.

[21] It follows therefore that the argument advanced by learned Queen's Counsel, under section 6 of the Act that because Parliament has given the licencee the powers there under it was for the benefit of the appellant, that argument has lost its lustre.

[22] The appellant argued in the court below and this court that his case falls within the two exceptions in Lonhro (supra).

[23] I have dealt, almost exhaustively, with the first exception. However, Mr. Martineau Queen's Counsel, on behalf of the appellant, in support of the appellant's case under the first limb referred to-

> Reckless and Others v United Artists Corporation and Others 1988 Q.B. 40
> This case involved the analysis of the Dramatic and Musical protection Act, 1958 in determining whether that Act gave performers a civil right of action.
> Section 2 of the Act provides:-
> "Subject to the provisions of this Act if a person knowingly –
>
> (a) makes a cinematograph film, directly or indirectly, from or by means of the performance of a dramatic or musical work without the consent in writing of the performers or
> (b) sells or lets for hire, or distributes for the purposes of trade, or by way of trade exposes or offers for sale or hire, a cinematograph film made in contravention of this Act, or
> (c) Uses for the purposes of exhibition to the public a cinematograph so made;
>
> he shall be guilty of an offence under this Act, and shall be liable on summary conviction to a fine not exceeding (fifty) pounds."

[24] Sir Nicholes Browne-Wilkinson in analysing the Act asked this question among other things.

> (a) Does the Act give a performer a civil right of action or does it only create a criminal liability?……

At page 50 of the judgment he said:-

> "The section on its face, only creates a criminal offence. However in certain circumstances such a statutory provision can confer private rights of action enforceable under the civil law. Whether any particular statute does give rise to such private rights of action depends on a consideration of the whole Act and the circumstances including the pre- existing law in which it was enacted."

[25] After referring to the general rule as enunciated in Lonhro (supra)

Lord Browne Wilkinson at page 51 said:-

> "I will first consider the matter apart from authority. Does the Act of 1958, upon its true construction in light of the pre-existing law disclose an intention to create private rights of action? First and foremost, it is apparent from the short titles of both the Act of 1925 and the Act of 1958 that they were passed for the protection of performers. This is a very strong point in favour of the Act creating private rights as being within the first exception to the general rule."

[26] Lord Browne-Wilkinson then went on to examine factors which demonstrate that Parliament did not intend to create private rights. He examined four factors which in his opinion, point strongly against the Act creating anything other than a criminal offence. Among these factors was that the wording of section 2 which points in that direction.

[27] Lord Browne-Wilkinson explained –

> "The Act of 1958 does not declare the doing of an Act to be unlawful and then separately provide a criminal penalty for breach. The form of both sections is that the doing of an Act is simply made a criminal offence."

[28] Mr. Martineau, learned Queen's Counsel, seemed to have found quite a lot of solace in this dictum and support for his argument therein. In my opinion I do not think that what Browne Wilkinson said lends support to Mr. Martineau's argument.

[29] Because having regard to the Acts which call for interpretation in relation to the case at Bar, in my opinion, it is an Act (1994 Act) which does declare by section 3 the doing of an act to be unlawful and by section 7 separately provides for a criminal penalty for the breach.

[30] That is under Act 6 of 1994. Similarly under the Telecommunications Act 1951 Chapter 423 Section 4 declares the doing of an act to be unlawful (the estalishment of any telecommunications stations etc……. without a licence). Section 4(3) separately provides for a criminal sanction.

[31] I am therefore of the view that this is the opposite to what Lord Browne Wilkinson said. It does not point in that way. But points to the legislature creating only a criminal offence. After referring to the four factors which point strongly against the Act creating anything other than a criminal offence. He said:-

> "These are formidable arguments against the Act conferring private rights of action. But the fact remains that the Act, is in its terms for the protection of performers i.e. it falls squarely within that exceptional class of case in which the statute has held to confer private rights. Moreover, under the International Convention for the protection of Performers, Producers of Phonograms and Broadcasting organisations……("the Rome Convention") the contracting states (of which the United Kingdom was one) undertook to protect, inter alia the rights of performers on records. Article 7(1) of the Convention provides that "the protection provided for performers by this convention shall include the probability of preventing the broadcasting……without the consent of the performers. Two things seem to be clear. First, under the convention the performer himself seem to have "rights". Secondly, the performer's rights were to include something which in some circumstances, would make it possible to prevent unauthorised reproduction i.e. a quia timet injunction. Therefore, compliance with the Rome Convention required that there should be an English Act of Parliament which enabled the performers to obtain an injunction to prevent the unauthorised reproduction on records. The performers' protection Act 1963 was passed expressly "to enable effect to be given to" the Rome Convention."

[32] Learned Counsel, Mr. Hamilton for the respondent placed a lot of emphasis on this provision in order to indicate that the Reckless case has no relevance with the matter.

[33] Continuing Lord Browne-Wilkinson at page 52 said:-

> "The Act of 1963 merely altered the class of Acts which infringe sections 1 and 2 of the Act i.e. the Act continued on its face as one imposing criminal sanctions only. In my judgment Parliament must have considered that the performers' Protection Act 1963 gave rise to civil rights to obtain an injunction, since otherwise Parliament would not have been carrying out its declared intention of giving effect to the convention.
> Therefore in my judgment, it has been demonstrated that Parliament did have the necessary intention that the limited class of persons for whose protection the Act

> of 1958 was passed (i.e. performers) were to have private rights, and were it not for authority I would reach the conclusion that performers do not have a civil right of action under the Act of 1958."

[34] I make the observation that while it is clear on the face of the Dramatic and Musical Performers Protection Act 1958 that this Act was for the benefit of the Performers. Yet Lord Browne-Wilkinson went into examination in order to determine whether or not this Act gave the Performers a civil right of auction.

[35] In the case at Bar there is not the slightest indication that the 1951 and 1994 Acts were passed for the benefit of the appellant. In fact in my opinion the intention of Parliament when one undertakes an analysis both the 1951 and 1994 Acts, is quite clear in my mind that the purpose of both Acts are regulatory.

[36] The 1951 and 1994 Acts are in my opinion different in scope, purpose and character from the Dramatic and Musical Performers Protection Act 1958.

[37] In Cutler v Wandsworth Stadium Ltd 1949 A.C. 398

Lord Normand at page 413 said:-

> "If there is no penalty and no other special means of enforcement provided by the statute it may be presumed that those who have an interest to enforce one of the statutory duties have an individual right of action. Otherwise the duty might never be performed. But it there is a penalty clause the right to a civil action must be established by a consideration of the scope and purpose of the statute as a whole."

[38] In the 1994 Act not only is there a penalty but there are also special means of enforcement under the Act as provided by section 6. So in my view it cannot be presumed in the absence of clear statutory pronouncement that a civil remedy exists, nor can it be inferred that Parliament intended that the appellant would have an interest.

[39] Finally, learned Counsel argued on behalf of the appellant that the Acts create a public right ("i.e. a right enjoyed by all of Her Majesty's subjects who wish to avail themselves of it") and if a particular member of the public suffers……" any "particular direct and

substantial damage other and different from that which was common to all the rest of the public".

[40] I do not see that either the 1994 Act nor the 1951 Act creating "a public right to be enjoyed by all……"

[41] The principal sections of both Acts begin with the words "No person". Section 4 of the 1951 Act "No person shall establish any telecommunications station……"

[42] Section 6 of the 1994 Act "No person shall use or permit or suffer to be used any telecommunication system or telecommunication apparatus…"

[43] The Acts far from creating a public right to be enjoyed by all those of Her Majesty subject who wish to avail themselves of it, in my opinion, the Acts hinder the general public in availing themselves of establishing any telecommunication station or operating any telecommunication apparatus or using telecommunication in connection with the provision of a call back service without a licence if they wanted to avail themselves of any of these services.

[44] Finally in Michaels v. Taylor Woodrow Developments Ltd and Others 2000 4 ALL ER 645

At page 663 Laddie J. said:-

> "What the House of Lords was rejecting was the cause of auction of unlawful interference with business which is the corner stone of this part of Mr. Mowbray's submission. It appears to me that this accords with the logical development of this area of law where the legislative intent, as discerned by applying the Cutler v Wandsworth Stadium approach, is not to make available a civil right of action under the head of breach of statutory duty, it is difficult to see how it could have been the intention to create a cause of action simply because the breach of statute causes damage to a business of the victim"

[45] I gratefully adopt the above. As it is my view that in the instant case this was the underlying thrust of the appellant's case. The respondents, they alleged, did not have a licence to operate telecommunications services and by the use of the call back system

they were providing international calls to customers thereby causing damage to the appellant's business.

[46] For the foregoing reasons I would dismiss this appeal with costs to the respondents to be taxed, if not agreed.

Albert Redhead
Justice of Appeal

[47] ARCHIBALD, J.A. [AG.]: I concur in the judgment of Redhead J.A. as to its conclusion, reasons and order. However, as I respectfully differ from the presiding Justice Satrohan Singh J.A., I would add something of my own.

[48] Learned Queen's Counsel Mr. Martineau, QC conceded at the outset to this Court that in this case it was not disputed that in order to obtain an interlocutory injunction, the Applicant/Appellant must first show that it has a reasonable cause of action known to the law. He then contended that the Respondents' conduct as alleged in the Statement of Claim amounts to (a) breach of statutory duty for which the Appellant is entitled to a civil remedy, and (b) an unlawful interference with the Appellant's business also giving rise to a civil remedy. He also contended that paragraphs 19, 20 and 21 of the Statement of Claim demonstrated the activities of the Respondents which constituted a breach of section 4 of the 1951 Telecommunications Act, Cap 423 ("Cap 423") and Section 3 of the Telecommunications (Prevention and Prohibition of Unauthorised Use and Services) Act, 1994 (No.16 of 1994) ("the 1994 Act"), and conferred upon the Appellant as a licensee a civil cause of action. He further contended that paragraph 22 of the Statement of Claim prima facie established the tort of unlawful interference giving rise to an additional or alternative cause of action, but that the Judge did not refer to this head of claim at all, and that there is at least an arguable case for the Plaintiff/Appellant on its pleading and on the Affidavit of Colin Shewry in support of the application.

[49] Learned Counsel Mr. Martineau, QC furthermore contended that an analysis of sections 4(1), 4(3), 20 and 22 of Cap 423, and of the Long Title, section 3 and 7 of the 1994 Act within the context of Cutler v Wandsworth Stadium Ltd (1949) A.C. 398 should lead to a conclusion that the Appellant as a sufferer of loss and damage due to the breach by the Respondents of these cited sections was intended to have a civil remedy; that Cap 423 and the 1994 Act did not merely or only provide a criminal penalty for breach of their prohibitions; and that the Appellant's case falls within either or both of the two exceptions to the general rule as explained by Lord Diplock in Lonrho Ltd v Shell Petroleum Co. Ltd. (No.2) (1982) A.C. 173.

[50] Learned Counsel Mr. Martineau, QC strongly contended that the 1994 Act was intended to give certain rights to the Appellant in particular, and that the provision in its Section 6(1) that the licensee "may take any step it considers necessary" in the stipulated four respects at (a), (b) and (c) and (d) of this section must therefore include a step for injunctive relief.

[51] Learned Counsel Mr. Martineau, QC also relied on a number of other cited cases and authorities including Ex Parte Island Records (1978) Ch 122, Warner Brothers Records Inc v Parr (1982) 1 W.L.R. 993, the Dramatic and Musical Performer's Protection Act 1958 of the UK, Rickless v United Artists Corporation (1988) 1 Q.B. 40 and Lonrho v Fayed (1990) 2 Q.B.

[52] On the other hand, learned Counsel Mr. Hamilton argued on behalf of the Respondents that the Respondents' opposing affidavit denied each and every allegation of wrongdoing alleged in the affidavit in support of the Plaintiff's application for injunction; countered every legal contention advanced by Mr. Martineau, QC; and urged that Cap 423 and the 1994 Act merely created criminal sanctions without conferring any civil remedy on the Plaintiff or any other person; and in particular that it was farfetched to include injunctive relief as a remedy within the meaning of "step" in Section 6(1) of the 1994 Act on any manner of construction.

[53] Learned Counsel Mr. Hamilton referred to the cases and authorities cited by Mr. Martineau, QC but also relied on several other cases and authorities including Observer Publications Limited v Campbell "Mikey" Matthew – Privy Council Appeal No.3 of 2000; Phillips v Britiannia Hygenic Laundry Company Ltd (1923) 2 K.B. 832; C.B.S. Songs Ltd v Amstrad Consumer Electronic PLC (1988) 1 Ch 61; Hague v Deputy Governor of Parkhurst Prison (1991) 3 All E.R. 733; Michaels Taylor Woodrow Developments Ltd (2000) 4 All E.R. 645; and McCall v Abelesze (1976) 1 All E.R. 727.

[54] Learned Counsel Mr. Martineau, QC replied.

[55] At the close of the arguments and on short time for consideration the several judgments with brief reasons were orally pronounced with promise by the presiding Judge to have the judgments reduced into writing as soon as practicable. I pronounced my concurrence with the oral judgment of Redhead J.A. for dismissal of the appeal with costs to the Respondents for the reasons he gave; and I stated my own view that I was unable to accept the submissions of learned Counsel Mr. Martineau, QC that there was a cause of action in the Plaintiff and that injunctive relief was included within the meaning of the word "step" in Section 6(1) of the 1994 Act; and I considered that the Judge was right to dismiss the application for injunctive relief.

[56] I now repeat that judgment which I pronounced, and elaborate that I was unable to accept the contentions of learned Counsel, Mr. Martineau, QC on the basis of my reading of the pleadings and affidavits, my assessment of the rival legal contentions in the skeleton arguments and at the Bar, and upon my understanding of the cited principles of law, cases and authorities. At the end of the day I was convinced that the Judge was right to refuse injunctive relief for the reasons he gave and on the merits of the case.

Joseph Archibald, QC
Justice of Appeal [Ag.]

[57] SINGH, J.A.: The center of gravity of this appeal was, whether a sole licensee of voice communication under the Telecommunications Laws of Antigua and Barbuda, had a civil cause of action against a non licensee or alleged trespasser of that exclusive right, when that sole licensee allegedly suffered and continued to suffer severe losses as a result of the alleged criminal act of the non licensee, when such law had already provided a penalty for such a crime.

[58] That issue arose for determination when the appellant applied to the High Court for an interlocutory injunction against the respondents, to stop them from operating a non licensed 'call back" service in Antigua and Barbuda.

[59] A "call back service" is said in the relevant law to include:

> "(i) any means which enables calls to be made from Antigua and Barbuda to a destination outside Antigua and Barbuda without such calls being recorded on the exchange of a licensee in Antigua and Barbuda as outgoing calls from Antigua and Barbuda and any of the means specified in Schedule 1.
>
> (ii) Any means for making of calls from Antigua and Barbuda through a toll free number, but does not include a call or a call attempt which concludes with either:
>
> (a) that toll free number; or
>
> (b) any number that terminates on the same private telecommunication system as that toll free number; and
>
> (C) any of the means specified in Schedule 2.

[60] Georges J heard the application and on May 31, 2001, refused the injunction with costs, on the ground that the appellant's Writ of Summons disclosed no cause of action.

[61] On July 19, 2001, this Court by a majority decision agreed with Georges J and dismissed the appeal with costs. I dissented and granted the injunction in the terms prayed for. We promised to put our reasons in writing. These were my reasons.

The Factual Matrix

[62] By licence dated June 22, 1987, granted by the Government of Antigua and Barbuda under the Telecommunications Act Cap. 423, the appellant has enjoyed, and continued to enjoy, inter alia, the exclusive right to provide and maintain domestic voice communication in Antigua as well as permission to provide, install, maintain, operate and improve telecommunication services between Antigua and Barbuda and the outside world.

[63] By two licences dated June 19, 2000, the Government of Antigua and Barbuda granted permission to the second-named respondent, to operate and maintain a Very Small Aperture Terminal (VSAT) satellite dish for call center type services and data and to operate as an internet service provider limited to internet data services only. The respondents were not licensed to operate a 'call back' service.

[64] The gravamen of the appellant's complaint (which was denied by the respondents) was that they discovered that the respondents, in breach of their licences, and further breach of the appellant's exclusive licence, have been allowing international voice traffic to pass through their VSAT transmitter, and facilitate access of the general public to those calls, to the appellant's detriment and loss.

[65] In their affidavit in support, sworn by the General Manager Colin Shewry and filed on 16th May 2001, the appellant averred that following investigations carried out by their Fraud and Asset Recovery Group, in conjunction with the Antigua Public Utility Authority (APUA), they had irrefutable evidence that the respondents had been operating a call-back service from their facility, in contravention of Section 3 of the Telecommunications (Prevention and Prohibition of Unauthorized Use and Services) Act which prohibited the use of the telecommunication system and apparatus from unauthorized use and in violation of Section 4(1) of the Telecommunications Act.

The Suit

[66] On May 11, 2001, the appellant brought suit against the respondents claiming:

> "1. A declaration that the first and second-named defendants are not entitled by reason of their VSAT Licence and/or their ISP Licence or otherwise to engage in the operation of international voice telecommunications service in Antigua and Barbuda whether by a "*call back service"* or otherwise.
>
> 2. An injunction restraining the first and second-named defendants from engaging in any telecommunication activity contrary to Section 4 of the Telecommunications Act Cap. 423 and Section 3 of the Telecommunications (Prevention and Prohibition of Unauthorized Use and Services) Act 1944 (No. 16 of 1994) and in particular the delivery of international voice telecommunications traffic to the public in Antigua and Barbuda whether by a "*call back service"* or otherwise.
>
> 3. Damages."
>
> "Further or alternatively, the first and/or second defendants in engaging in the activities set out in paragraphs 16(a) and 16(b) above have used unlawful means (as particularized above) with the object and effect of causing damage to the business of the plaintiff, in that the first and/or second defendants have deliberately and intentionally attracted and continue to attract customers and/or business to their service who were and/or would otherwise be customers of and /or would otherwise have provided business to the plaintiff.
>
> By reason of the breaches of statutory duty referred to in paragraph 21 above and/or the tortuous conduct referred to in paragraph 22 above, the plaintiff has suffered and continues to suffer loss and damage."

The Interlocutory Injunction

[67] On May 16, 2001, the appellant applied for an interlocutory injunction and sought the following orders:

> 1. An injunction restraining the defendants whether by themselves their servants or agents or otherwise howsoever from operating or procuring the operation of telecommunication facilities within Antigua and Barbuda and/or from providing or procuring the provision of telecommunications services to any person in Antigua and Barbuda save to the extent permitted by a licence granted by the relevant Minister under the Telecommunications Act Cap. 423 of the Laws of Antigua and Barbuda.

2. An injunction restraining the defendants whether by themselves their servants or agents or otherwise howsoever from committing or procuring the commission of any breaches of Section 3 of the Telecommunications (Prevention And Prohibition of Unauthorized Use and Services) Act 1994 (No. 16 of 1994): and

3. An injunction restraining the defendants whether by themselves their servants or agents or otherwise howsoever from operation or procuring the operation of a voice telecommunications service in Antigua and Barbuda and/or providing or procuring the provision of a "call back service" in Antigua and Barbuda.

[68] In that application, the appellant contended that a result of the respondents' unlawful and unauthorized activities, they suffered severe financial loss, because no payments were or will be made to them in respect of international telephone calls which the respondents facilitate to the general public by operation of the call-back service. The provision of a call-back service, they maintained, was expressly prohibited by law, and a restraining order was accordingly sought to prevent the respondents from providing any form of voice traffic on their VSAT transmitter and on or through the T1 lines which were leased from APUA and for which they had no licence or authorization.

The Appeal

[69] It was accepted by both sides that a right to obtain an interlocutory injunction was not a cause of action, and it could not stand on its own. This was in consonance with what Lord Diplock said in The Siskina (1977) 3 ALL ER 803, at p 824:

> "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action."

[70] The nub of the appeal therefore was, the determination by this Court, of the purpose and intent of the Telecommunications (Prevention and Prohibition of Unauthorized Use and Services) Act 1994 [The 1994 Act].

[71] Mr Hamilton for the respondent contended that this Act was regulatory and penal only. Queen's Counsel Mr Martineau, on the other hand, contended that it was not only regulatory and penal but that it was created also to protect its bona fide licensees.

[72] In order to determine this purpose and intent, it was necessary to look historically at the matter.

[73] Numerous authorities were referred to us by way of assistance in the determination of this issue. Whilst I was minded to agree with both sides, that the English Courts in those decisions, appeared to have created a minefield of confusion as to what the law was on the issue, I am of the view that this apparent confusion should only be linked to the interpretation of the individual relevant legislations that were considered, and not to the accepted rules governing such interpretation. I say this because, the golden thread that ran through all the decisions, was that such interpretation, could only be correct, if the scope, purpose and intention of the legislation and in particular for whose benefit it was intended, were ascertained. [See Butler or Black –v- Fife Coal Co. Ltd. (1912) AC 149]. It was a matter of a proper construction of the relevant statutory provision and then to do, as Lord Denning puts it, "therein what to justice shall appertain" [See Ex. p. Island Records Ltd. (C.A.) 1978 p 135].

[74] It was settled in the House of Lords in Cutler –v- Wandsworth Stadium Ltd. (1949) AC 398, that the question whether legislation, which makes the doing or omitting to do a particular act a criminal offence, renders the person guilty of such offence liable also in a civil action for damages at the suit of any person who thereby suffers loss or damages, is a question of construction of the legislation. The whole Act must be considered together with the circumstances, including the pre-existing law, in which it was enacted. The legislative intent on a proper construction of the statute was paramount [Hague –v- Deputy Governor of Parkhurst Prison (1991) 3 ALL ER 733].

[75] In Lonrho Ltd. –v- Shell Petroleum Co. Ltd. (1982) AC 173: Lord Diplock at p 185 explained that:

> "Where an Act creates an obligation, and enforces the performance in a special manner….that performance cannot be enforced in any other manner….Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence for failure to perform the statutory obligation or for contravening the statutory prohibition which the Act creates, there are two classes of exception to this general rule.

These exceptions are:-

(i) Where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Act and similar legislation.

(ii) Where the statute creates a public right (one enjoyed by all members of the public) and a particular member of the public suffers "particular, direct and substantial damage" other and different from that which was common to all the rest of the public."

[See Also Hague (Supra), and Michael –v- Taylor Woodrow Developments Ltd. (2000) 4 All Er P 645].

[76] In Pyx Granite Co. Ltd. and Ministry of Housing and Local Government and Others (1960) AC 260 Viscount Simonds, who delivered the leading judgment, declared that where a statute created a new right which had no existence apart from the statute creating it, and the statute creating the right at the same time prescribed a particular method of enforcing it, then the right and the remedy were given uno flatu and the one could not be dissociated from the other. I do not interpret this opinion as limiting such a statute to that prescribed remedy, if the intent behind the legislation showed otherwise.

[77] The lawyers in this matter have given me immeasurable assistance in determining this matter. So, it is not out of disrespect that I do not refer to all the authorities submitted to this Court. I do so simply because they reflect the same principles of construction despite the different conclusions arrived at. They demonstrate what Denning L J said in Ex. p. Island Records Ltd. (Supra) at 134:

> "The truth is that in many of these statues the legislature has left the point open. It has ignored the plea of Lord du Parcq in Cutler's case [1949] A.C. 398, 410. So it has left the courts with a guess-work puzzle. The dividing line between the pro-cases and the contra-cases is so blurred and so ill-defined that you might as well toss a coin to decide it. I decline to indulge in such a game of chance. To my mind, we should seek for other ways to do "therein what to justice shall appertain."

The Instant Matter

[78] Before the Telecommunication Legislations relevant to this matter came into existence, the alleged "call back" activity of the respondents, if it existed, could have been described as "a free for all" of which the appellant may have had no cause of action for any loss suffered.

[79] The Telecommunications Act Cap 423 then came into existence in 1951 [The 1951 Act]. Section 4(1) of this Act provided as follows:

> "No person shall establish any telecommunications station or install, work or operate any telecommunications apparatus in any place in Antigua and Barbuda or on board any ship or aircraft registered in Antigua and Barbuda except under and in accordance with a licence granted in that behalf under the provisions of this Act and subject to such conditions and restrictions as may be prescribed by rules made under this Act."

Section 4(3) states:

> "Any person who contravenes the provisions of subsection (1) shall be guilty of an offence under this Act and on conviction the Court, in addition to any penalty provided by this Act, may order that any telecommunications apparatus in connection with which the offence was committed be forfeited to Her Majesty.

And Section 20 states:

> "Any person guilty of an offence under this Act shall, where no penalty is expressly provided, be liable on summary conviction to a penalty not exceeding three thousand dollars or to imprisonment with or without hard labour, for a term not exceeding six months, or to both such imprisonment and fine."

[80] Then came the 1994 Act. Whereas the 1951 Act did not spell out its purpose or intent on its face, the 1994 Act did so as follows:

> "This Act may be cited as the Telecommunications (Prevention and Prohibition of Unauthorized Use and Services) Act, 1994.
>
> An Act to prevent and prohibit the unauthorized use of the telecommunications system of Antigua and Barbuda; to take appropriate measures to deal with those who abuse the telecommunication services provided by or authorized by the Government; and for those matters connected therewith."

[81] Section 3 of the 1994 Act provides:

> "No person, shall use or permit or suffer to be used any telecommunication system or telecommunication apparatus in connection with the provision of a call back service or do anything so as to facilitate the use of any telecommunication system or telecommunication apparatus in connection with the provision, operation or use of such a service."

Section 4 states:

> "Subject to section 5 the telecommunication authority or any person authorized by the telecommunication authority may take all necessary steps to track any unauthorized use of the telecommunication system or telecommunication apparatus."

Section 5 (1) provides:

> "The telecommunications authority may, by writing, authorize a licensee or any other person to use any technical or other monitoring devise to carry out any examination and test to ascertain whether section 3 is being contravened."

Section 6 states:

> "1. If the telecommunications authority or a licensee is satisfied that the telephone service is being used to transmit voice or data services from a point in Antigua and Barbuda to a destination outside Antigua and Barbuda by a route other than a route established by the licensee and approved by the telecommunications authority for such transmission, the telecommunications authority or the licensee may take any step it considers necessary to –
>
> (a) block transmission over that other route or call attempts which contravene the provision of this Act; or

(b) suspend the provision of telecommunication services to such user; or

(c) modify its terms and conditions of service to such user; or

(d) withdraw the telecommunication services supplied to any such user.

(2) Any licensee who blocks transmission over any route or withdraws telecommunication services under subsection (1) shall immediately make a report of the action taken to the telecommunications authority"

Section 7 states:

> "Any person who contravenes the provisions of section 3 is guilty of an offence and is liable on summary conviction to a fine of fifty thousand dollars or to a term of imprisonment of two (2) years.

[82] Addressing these provisions cumulatively, in order to determine their true intent and purpose, I am of the view that they were intended to be more than prohibitive. In my opinion, whilst I would concede that they were regulatory and prohibitive in their effort at controlling the free for all nature of the voice communication business that existed before this legislation, they were also meant to be revenue earners for the Government not only from licence fees but also from the massive fine to be imposed in the event of a breach of that law.

[83] I am also of the view, that having regard to the wide active participation afforded a licensee to take any step he considered necessary to police and halt the illegal act, that it must have been in the contemplation of the legislature that the legislation carried with it the right, of exclusion of all others without licence to exploit a licensee for profit. In this context, I do not accept the submission of Mr Hamilton that the only role contemplated by Section 3 of the 1994 Act to be played by the licensee was technical or advisory.

[84] In this context also, I shared the view of Mr Martineau for the appellant, that when S 6 (1) of the 1994 Act, gave the licensee authority to take any step it considered necessary to block the transmission over the outlawed route, that the words "any step" therein were wide enough to cover the remedy of an injunction. I do not accept that subsection 2 could have any limited effect on such an interpretation so as to exclude a right to an injunction, as submitted by Mr Hamilton for the respondents. If injunction was the route chosen by

the licensee to block the illegal transmission, then that would be the report the licensee would make to the telecommunication authority.

[85] I am also of the opinion that the aforementioned statutory provisions were made for the benefit of licensed telecommunication providers in Antigua who, in my view, were a particular class of individuals in the context and contemplation of the 1994 Act and that the appellant was a member of that particular class: [See Lonrho's case supra]. Also, when the long title of the 1994 Act spoke of "telecommunications system," that had to be read to include the appellant's system, the appellant having the exclusive right as per its license.

[86] In my view, these statutory provisions were intended to prevent unauthorized activities, to enable the licensed telecommunications providers in Antigua to pursue their legitimate business aims without fear of interference or interruption from unauthorized entities. They were intended to terminate the ante legislation "free for all" environment. Given these circumstances, I conclude they were intended to impose a duty which was not a public duty only but a duty enforceable by an aggrieved individual [Lonrho].

[87] It is my opinion therefore, that the appellant's case also fell within the second exception to the general rule referred to by Lord Diplock in Lonrho. I share the view of Mr Martineau, that both Section 4 of the 1951 Act and Section 3 of the 1994 Act created "rights" to be enjoyed by the public at large, in that it was in everyone's interest that the telecommunications system in Antigua be controlled and monitored, and that service was provided by a licensed entity. In this context, the appellant has alleged that it has suffered damage "other and different from that which was common to all the rest of the public" in that the appellant, as a licensed telecommunications provider, pleaded that it has suffered a loss of profits, a loss of customers and damage to its reputation.

Conclusion

[88] In my judgment therefore, I regret that I cannot share the view of my brothers Redhead and Archibald that the appellant's claim disclosed no cause of action. I hold that the

appellant's claim disclosed a substantive cause of action for an alleged breach by the respondents of a statutory duty as well as an alternative cause of action of the Tort of Unlawful Interference. In Lonrho, the Court of Appeal reasoned, that a desire to injure was not required for that Tort, but that deliberate action appreciating the probable consequences was sufficient.

[89] The application for the injunction having been argued and decided on the one point only of "no cause of action", I should now grant the injunction because of my disagreement with the Learned Trial Judge on that issue.

[90] Before doing so however I propose to examine the application to ensure that it merited such an order. In this context, I am satisfied that the appellant's case on both limbs has surmounted the level of arguability required for the granting of such an injunction. I am also of the view from the evidence disclosed in the affidavits, that damages would not be an adequate remedy, and that the balance of convenience favoured the appellant, the respondents having denied that they operated the alleged call back service.

[91] For all these reasons, I ordered that the appeal be allowed. That the judgment of the Trial Judge be set aside. And upon an undertaking as to damages to be given by the appellant, I granted the interlocutory injunction in terms of the application. The appellant will have its costs of the appeal to be taxed if not agreed certified fit for two counsel. In arriving at this conclusion, I felt that to refuse the injunction in this matter, would be to deprive the law of judicial hygiene.

Satrohan Singh
Justice of Appeal