

ST. VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. SVGHCV92 / 2003

BETWEEN:

THE NATIONAL TELECOMMUNICATIONS REGULATORY COMMISSION

Claimant

and

CABLE AND WIRELESS (WEST INDIES) LIMITED

Defendant

Appearances: Mr. Anthony Astaphan, SC, Mr. Grahame Bollers, and Mr. Joseph Delves, instructed by Mr. Joseph Delves for the claimant.

Mr. Derek Jones and Mr. Samuel Commissiong, instructed by Commissiong & Commissiong for the defendant.

2003: March 28, 31

JUDGMENT

ALLEYNE J.

[1] The claimant, NTRC, is the regulatory authority established under the Telecommunications Act of 2001 mandated to regulate prices for telecommunications services and to advise government on telecommunications matters, in accordance with the terms of the law, in a newly liberalised national telecommunications environment. The defendant Cable & Wireless is a telecommunications company which, until very recently, was the monopoly telecommunications provider in St. Vincent and the Grenadines.

- [2] On the 6th March 2003 NTRC, on an application made without notice, and relying on the affidavit of Apollo Knights, Director of Telecommunications sworn and filed on the same day, the court granted an injunction whereby it was ordered that the rates set out in the pricing table of an agreement dated 20th May 2002 be continued, and restraining Cable & Wireless from implementing amended prices, until 28th March 2003 or until further order.
- [3] In accordance with its terms, the order came up for further consideration, along with an application by NTRC for the continuation of the injunction on amended terms, to restrain Cable & Wireless from implementing rate increases in respect of monthly line rentals, local and fixed mobile telephone calls wholly on its own telecommunications network, network connection and network re-connection. This application is supported by a second affidavit of Apollo Knights and an affidavit of Martin Taschdjian, Telecommunications Consultant. Also for consideration was an application by Cable & Wireless for an order to discharge the order, and that the claim for a permanent injunction be dismissed. This application is supported by the affidavit of Jonathan Daniels. Both parties submitted extensive and helpful skeleton arguments.
- [4] Cable & Wireless bases its claim to discharge the injunction on the ground of material non-disclosure. It submits that NTRC failed to disclose
- (i) That, as a precondition to its power to regulate rates chargeable by Cable & Wireless, Cable & Wireless must first be designated a dominant provider of telecommunications services.
 - (ii) That the rate amendments include significant decreases to rates for certain services, but represented the amendments as rate increases.
 - (iii) That NTRC are solely responsible for the fact that a price cap regime was not implemented by March 1st, 2003.

- (iv) The existence of a document entitled “Conducting Public Consultations” released by NTRC for comment, with certain timelines which have not been observed by NTRC.
- (v) The impact of the temporary injunction on Cable & Wireless.
- (vi) A number of other (unspecified) material facts which allegedly were not disclosed or were misrepresented.

[5] For its part, NTRC says that its case “has its genesis” in the agreement between the contracting States of Dominica, Grenada, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines dated 20th May 2002, which, according to Mr. Astaphan, Senior Counsel, for NTRC, must be read subject to the Telecommunications Act No. 1 of 2001. He argues that the case has nothing to do with the Regulations made under the Act, or with any other matter. In consequence, Mr. Astaphan submitted, such non-disclosures as there were (and he concedes that there were non-disclosures), were not material or relevant to the issues. He says they do not concern the agreement, its matrix or its proper interpretation.

[6] NTRC contends that the Act conferred upon it the statutory duty to regulate prices of telecommunication services in St. Vincent and the Grenadines, under section 10(1)(e), and that the agreement cannot override or abrogate the Act, but must be read subject to the Act.

[7] Counsel submits, and I do not think that Cable & Wireless disputes, that the agreement was intended to be an interim measure until a price cap regime is introduced by NTRC. This has not yet been done. The agreement provided a formula which was intended to enable Cable & Wireless to amend its rates after the expiration of 9 months from 1st June 2002, that is, 1st March 2003. Counsel contends that the agreement did not exclude or abrogate the duty of NTRC under the Act to regulate prices.

[8] NTRC submits that it filed the case and sought the injunction because Cable & Wireless failed to comply with its obligation under the agreement by giving notice of intended amendments to the existing rates prior to the expiration of the 9 month period, and that Cable & Wireless could not rely on NTRC's admitted failure to implement a price cap regime prior to the expiration of the 9 months as it had contributed to NTRC's failure when it failed or refused to supply the information requested expeditiously.

[9] NTRC also argues that Cable & Wireless was obliged by law to submit its intended amendments to NTRC for approval before it could publish the notice of amended rates, which it did not.

Non-disclosure:

[10] In his affidavit filed in support of the application Apollo Knights, Director of Telecommunications of NTRC deposed that there is a "general requirement" that Cable & Wireless obtain the prior permission of NTRC before amending rates. He failed to disclose that Cable & Wireless disputes the existence of such a general requirement.

[11] Mr. Knights deposed to rate increases and failed to disclose that the amendments to the rates included also rate reductions. He failed to disclose that the granting of the injunction was likely to have a serious negative financial impact on Cable & Wireless.

[12] Mr. Knights deposed that the failure to establish a new price cap within 9 months of 1st June 2002, that is to say on or before 1st March 2003, under the terms of the agreement of 20th May 2002, was due in part to delays by Cable & Wireless in providing "certain vital information". Cable & Wireless has demonstrated that only on January 30th, 2003, NTRC sent Cable & Wireless ECTEL's price cap proposals, and requested comments by February 13th, 2003. By letter dated February 13th 2003, Cable & Wireless provided its "initial comments on the preliminary report."

On 18th February 2003, NTRC wrote further to Cable & Wireless requesting costing and other information, and indicating that that information should be provided within 2 weeks, that is, by 4th March 2003. It is difficult to see how NTRC can, in the circumstances, hold Cable & Wireless responsible, even in part, for the delay. In any event, it would have been necessary for NTRC to disclose all the relevant facts when seeking to persuade the court that Cable & Wireless was to blame, in part, for the delay.

[13] Mr. Jones, counsel for Cable & Wireless, drew attention to the NTRC's Consultative Document dated January 2003, on Conducting Public Consultations, which provides at Table 1 for various periods for consultations, on which basis he argues that Cable & Wireless were entitled to assume, as it did correctly, that a price cap regime would not be in place by March 1st, 2003. The court was entitled to disclosure of this document and its implications.

[14] Clearly, NTRC failed to disclose a number of material matters to the court upon its application without notice for an interlocutory injunction and on that ground the injunction is discharged.

Application to continue amended injunction:

[15] Senior counsel for NTRC submits that the Act confers on NTRC the statutory duty to regulate prices of telecommunications services, and that the agreement of 20th May 2002 does not abrogate that power. Counsel for Cable & wireless does not dispute this general statement. Section 10(1)(e) of the Act states as one of the functions of the NTRC to regulate prices for telecommunications services. At subsection (2) of the same section the Act provides that in the performance of its functions the NTRC shall consult and liaise with ECTEL. Section 72 provides that the Minister may make regulations to give effect to the provisions of the Act. At subsection (2)(j) the procedure and standards relating to the submission, review and approval by the Commission of telecommunications tariffs is one of the particular matters in respect of which the Minister is mandated to make

regulations. Cost studies and pricing models is another particular area, provided for in paragraph (v).

[16] Pursuant to section 72, the Minister made the Telecommunications (Tariff) Regulations 2002. Regulation 3. (b) provides;

3. In setting a tariff for a telecommunications service, licensees shall act in accordance with the following principles:

(b) where the commission has determined that one or more operators are dominant in the market for a telecommunications service, licensees shall set their tariff or that service in accordance with

(i) if applicable, any incentive based regulations; and

(ii) any regulation imposed as a condition of that licensee's license.

[17] It is clear that it is a condition precedent to the NTRC setting a tariff for Cable & Wireless that NTRC has determined that Cable & Wireless is, at the time of the setting of the tariff, dominant in the market for a telecommunications service. The designation of a telecommunications provider as a dominant provider is governed by regulation 4, and requires the recommendation of ECTEL and publication in the *Gazette*. The evidence is clear that on the 1st of March 2003 Cable & Wireless had not been designated a dominant provider, and its service was therefore at that date not a regulated service as defined in regulation 2. It seems to me that that is so whether regulation 3(b)(i) and (ii) are read conjunctively or disjunctively, a point on which counsel for NTRC made much, but which I refrain from deciding. Cable & Wireless did not therefore, at the date of the injunction, fall within Part IV of the Regulations.

[18] There is no suggestion that the rate increases proposed are beyond the limits allowed by the agreement of May 20th, 2002, and by now the period of 9 months

plus one which NTRC argues is required before the increases could be implemented has passed.

[19] If the injunction applied for were to be granted, Cable & Wireless would suffer significant loss of profit to which it would be entitled should it succeed in the action, and for which it would have no remedy against the NTRC or anyone else. Cable & Wireless is a commercial enterprise operating in a competitive environment, and the making of profit is its principal *raison d'être*. On the other hand, while counsel for NTRC has argued that this is a matter of great public interest, and while it is evident that the public would have to pay increased fees for some telecommunications services, at least until the matter is resolved, I have come to the conclusion that the balance of convenience falls against granting the injunction sought, and I so rule.

[20] Cable & Wireless is entitled to its costs of these proceedings, to be agreed or assessed.

[21] I thank counsel on both sides for their considerable assistance to the court.

Brian G.K. Alleyne
High Court Judge