ST. VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. SVGHCV104 / 2003

BETWEEN:

CABLE & WIRELESS (WEST INDIES) LIMITED

Claimant

and

THE NATIONAL TELECOMMUNICATIONS REGULATORY COMMISSION

Respondent

Appearances:

Mr. Derek Jones and Mr. Samuel Commissiong, instructed by Commissiong & Commissiong for the claimant
Mr. Anthony Astaphan, SC, Mr. Grahame Bollers and Mr. Joseph Delves, instructed by Mr. Joseph Delves for the respondent.

2003:May 22, June 10.

JUDGMENT

ALLEYNE J.

[1] Cable & Wireless (West Indies) Ltd. (C&W) is a telecommunications company which was until the enactment of the Telecommunications Act 2001 (No. 1 of 2001) the holder of exclusive license rights to own and operate telecommunications facilities and to provide telecommunications services in St. Vincent & the Grenadines. Since the enactment of the Act, C&W has been granted a new license within a competitive telecommunications environment.

[2] The National Telecommunications Regulatory Commission (NTRC) is the regulatory body established under the Act to, among other things, regulate prices

for telecommunications services (section 10(1)(e) of the Act). The Eastern Caribbean Telecommunications Authority (ECTEL) is an intergovernmental body set up by a treaty signed at St. Georges, Grenada on the 4th day of May 2000 to enable the fair, efficient and transparent regulation of the telecommunications industry in the States Party to the treaty. St. Vincent & the Grenadines is a State Party to the treaty.

[3] In the exercise of the powers conferred on him by section 72 of the Act, the Minister made The Telecommunications (Tariff) Regulations 2002. Clause 3 of the Regulations provides;

> "(a) where there is effective competition in the market for a telecommunications service, licensees may set tariffs for that service;
>
> (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 for 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.

[4] The word "dominant" is defined in Clause 2 of the Regulations as meaning

> "in respect of a telecommunications provider in a market, the ability to operate without constraints imposed by competitors, or potential competitors of the telecommunications provider or persons to whom, or from whom, the telecommunications provider supplies or acquires goods or services".

[5] It follows from Regulation 3 that whereas in the case where there is effective competition in the market for a particular telecommunications service, tariffs for that service are not liable to governmental regulation, but are determined by the market, where, on the other hand, a telecommunications service has been

declared dominant, tariffs for that service are officially regulated, either by incentive-based regulations, or by other regulations imposed as a condition of the license.

[6] Clause 4 of the Regulations, as amended by the Minister on 7th February 2003 and Gazetted on 11th February 2003, provides;

> "4. The Commission shall, acting on the recommendation of ECTEL, by notice published in the Gazette, designate a telecommunications provider as a dominant telecommunications provider in respect of a particular telecommunications market or markets in Saint Vincent and the Grenadines,
>
> (a) where the Commission has determined that, after a public consultation process, with respect to that telecommunications provider:
>
> (i) there is not effective competition with respect to the market or markets for telecommunications services in Saint Vincent and the Grenadines; and
>
> (ii) it is in the long-term interest of consumers of telecommunications services in Saint Vincent and the Grenadines that the telecommunications provider is so designated.
>
> (b) where the provider consents in writing to such designation; and
>
> (c) where the provider is the sole provider in a particular telecommunications market or markets in Saint Vincent and the Grenadines.

[7] By notice published in the Gazette of the 7th March 2003, NTRC purported to designate Cable & Wireless as a dominant telecommunications provider in the following telecommunications markets in St. Vincent and the Grenadines:

1. Monthly line rental;

2. Local and fixed to mobile telephone calls wholly on the Licensee's own network;

3. Network connection; and

4. Network re-connection.

[8] It is agreed by both parties that an interpretation of Regulation 4 is an essential first step towards a decision in this matter.

[9] Regulation 4 provides alternative grounds for designation of a provider as dominant. Regulation 4(a) is a separate and distinct ground which, for reasons that are clear from the context, requires a public consultation process. Under that paragraph, the NTRC must determine, not only that there is no effective competition with respect to that particular market or markets, but also that it is in the long term interests of consumers that the provider be so designated. The explicit requirement for a public consultation process clearly, from the words of the statute, applies only to paragraph (a). Paragraph (b) deals with the situation where the provider has consented in writing to be designated a dominant provider. Paragraph (c) makes provision for the situation where the provider is the "sole provider" in a particular telecommunications market or markets.

[10] Paragraphs (b) and (c) are joined, or separated, by the word "and". A principal issue in this case is whether these paragraphs are to be read conjunctively, or disjunctively. Whether "and" is to be read as meaning "and", or as meaning "or".

[11] Mr. Jones for Cable & Wireless submitted that the paragraphs must be read conjunctively, as written. In effect, that the provider must first consent in writing to being designated dominant, and it must in fact be the sole provider of the particular service or services, before it can be so designated, except under paragraph (a), after public consultations. That issue is crucial because it is clear that Cable & Wireless had not consented in writing to be designated a dominant provider, that the designation was not made under Regulation 4(a), and that therefore the designation could only have been validly made if made under Regulation 4(c) read disjunctively, as a separate option. This indeed conforms with ECTEL's opinion conveyed to NTRC in its letter of February 19th, 2003. It is also in conformity with the NTRC's declared intention to act on the basis that Cable & Wireless "is the sole provider" of the particular markets, conveyed to Cable & Wireless in its letter informing Cable & Wireless of its intention to designate it dominant, dated February 26th, 2003.

[12] Prior to sending this last letter, in a letter dated February 19th, 2003, NTRC had solicited Cable & Wireless's consent to be so designated. Having failed to receive such consent, NTRC proceeded to designate Cable & Wireless dominant in the particular telecommunications markets. It is this designation that is contested by these proceedings for judicial review.

[13] Learned counsel for Cable & Wireless argued that the starting point in statutory interpretation must always be the ordinary linguistic meaning of the words used. He submitted that to read paragraphs (b) and (c) disjunctively would be contrary to the plain meaning of the provision.

[14] On the other hand, counsel for NTRC submits that the Regulations must be construed in a manner which makes sense and gives effect to the intention of the authority which made the Regulations. Counsel cited **Halsbury's Laws of England** 4th edition volume 44 at paragraph 860. This text posits that "if it is possible, the words of a statute must be construed so as to give them a sensible meaning." If the statute is open to more than one meaning, even if there is little to

choose between them, the court must decide what meaning the statute is to bear. The learned author argues that "where the main object and intention of a statute are clear, it should not be reduced to a nullity by a literal following of language, which may be due to want of skill or knowledge on the part of a draftsman."

[15] Is Regulation 4 (b) and (c) capable of more than one interpretation? Broken down to its simplest terms, the Regulation provides that the NTRC shall (I read this to mean may) designate a provider dominant where;

> "(b) the provider consents in writing to such designation; and
>
> (c) the provider is the sole provider in a particular telecommunications market or markets."

[16] Unquestionably, the subparagraphs could be read either conjunctively or disjunctively without, in either case, making the provision a nullity. It would be true to say, however, that the intention of the legislation is obscure in terms of whether the paragraphs should be read conjunctively or disjunctively. The court must therefore seek to ascertain from the statute as a whole what was the legislative intention. **Maxwell on the Interpretation of Statutes** 12th edition page 232 *ff.*

[17] It seems to me that in making the Regulations, the Minister must have intended that the unconditional consent in writing of the provider to be designated dominant would provide the NTRC with adequate grounds to do so, subject only to the overriding condition of the prior recommendation of ECTEL, which I address later. It hardly makes sense to suggest, in the context in which the Regulations have been made and are intended to operate, that a provider could challenge a designation to which he had unconditionally consented in writing, on the ground that he is not the sole provider in the particular market or markets in which he had unconditionally consented in writing to be so designated. It seems to me that, notwithstanding the use of the conjunctive "and", the subparagraphs ought to be interpreted disjunctively in order to give effect to what must clearly have been the

intention of the Minister in making the Regulations. This is not, in my view, a strained construction of the provision.

[18] Counsel also argued that a disjunctive interpretation would lead to absurd results. He illustrates that point by the proposition that in such a case, where a designation is made under paragraph (c), the moment there is an additional provider in that particular telecommunications market, the designation of the formerly sole provider automatically falls away, regardless of the new entrant's market share. That proposition does seem to be correct, but is such a result absurd? I think not.

[19] There is no reason to hold that if a particular action, the designation of dominance, would be automatically reversed by a possible future event, that the action, *viz* the designation, is absurd and cannot be rationally undertaken. If at the moment of designation the proposed action is justified, future possibilities or eventualities will not make it less so.

[20] While the Notice in the Gazette does not say so, and there is no minute of the NTRC's deliberations on the issue from which one can glean under which paragraph of Regulation 4 NTRC designated C&W a dominant provider (a very serious procedural defect if I may say so), nevertheless NTRC's letter to C&W dated February 26, 2003, giving notice of its intention to designate C&W a dominant provider, states clearly that "the designation is based on the fact that your company is the sole provider of the aforesaid … markets." There could have been no doubt in the mind of C&W as to the basis of the NTRC's proposed action. Cable & Wireless were given 7 days within which to respond and to raise any objections.

[21] Cable & Wireless responded by letter dated March 4th, 2003. In its response C&W did not address the issue of being the sole provider in the particular markets, but instead took objection to the period of time given by NTRC for its response. In this C&W relied on NTRC's consultative document dated January 31, 2003, and ECTEL's recommendation in its document on a proposed price cap regime as the

basis for its position that it was entitled to a period of 28 days for public consultations.

[22] Learned Senior Counsel for NTRC contended that C&W had no legal or other enforceable right, and no legitimate expectation, to public consultations, or to consultation over a period of 28 days. I agree. Regulation 4 provides for public consultations only where paragraph (a) of the Regulation is applied. The Regulations make no reference to consultations in paragraphs (b) and (c).

[23] In **CCSU v Minister of the Civil Service** [1984] 3 All ER 935 at page 944 Lord Fraser of Tullybelton says that legitimate expectation may arise

> "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

In the instant case the claimant C&W has not alleged or established either an express promise or a regular practice. They rely rather on proposals developed by ECTEL relating to future conduct. That, according to authority, is not sufficient to create a legitimate expectation to which the courts would give effect.

[24] It seems to me, however, that Regulation 4 clearly establishes the recommendation of ECTEL on the question of designation as a statutory condition precedent to action by the NTRC under that Regulation. NTRC must act in compliance with the provisions of the Regulations by which it is governed. The Regulation is not specific on the nature of the recommendation that is required. However, the decision which the Commission is called on to make is the designation of a provider as dominant, and it seems to me to be the clear implication of the language of the Regulation that it is on that question that a recommendation is required.

[25] That designation, as is apparent from the definition section (Regulation 2), concerns the ability of the provider to operate without constraints imposed by

competitors or potential competitors, or by persons to whom or from whom the provider supplies or acquires goods or services. That question is wider than the question proposed by learned Senior Counsel for NTRC Mr. Astaphan, namely that the provider is the sole provider of the service or services on the market, notwithstanding that that is the ground on which the designation is made. It does not seem to be the intention that whenever a provider is the sole provider in a particular market, that that provider should, *ipso facto,* be designated dominant.

[26] I am of the view that it is on the question of dominance that ECTEL's recommendation is required. Dominance involves the ability to operate without constraints imposed by competitors ***or potential competitors, or persons to whom or from whom the provider supplies or acquires goods or services.*** That is not to say that ECTEL must recommend whether or not the provider is dominant, or that NTRC must act in accordance with the advice. The advice given by ECTEL may involve an analysis of the pros and cons of a declaration of dominance, in general or in the particular circumstances. It is not, in my view, within the contemplation of the Regulation that the recommendation be limited to, although it may include, advice on the options available under the Regulations and the steps to be taken in pursuance thereof.

[27] It seems to me that the letter from ECTEL to NTRC dated February 19th 2003 (Ex.FW3) is not, and was not intended by ECTEL to be, the recommendation required by Regulation 4. It is by its terms a response to a request for advice on the issue of declaration of dominance, in general, taking into account the recent amendment to the Regulations, which introduced the new Regulation 4. It offers an interpretation of Regulation 4, and advice on steps to be taken under the three options provided for by the Regulation. The recommendations in the letter are that NTRC first determine what are its objectives in terms of time frame and select the option that best suits that objective, and that NTRC consider soliciting the consent in writing of the provider for the proposed declaration of dominance.

[28] It is clear from the letter that ECTEL did not address its mind to the issues identified in the Regulations concerning the definition of dominance, and apparently was not even aware of the particular services in respect of which the declaration was contemplated. ECTEL could not, therefore, have advised on the proposed declaration of dominance.

[29] In making the declaration of dominance, NTRC failed to obtain, and therefore did not act on, the recommendation of ECTEL. The declaration of dominance was therefore *ultra vires*, null and void and is ordered to be removed into the High Court and quashed. It is further ordered that the matter be remitted to the NTRC to be reconsidered in accordance with the findings of this court, pursuant to CPR Rule 56.14(2)(b).

[30] The claimant will have its costs, to be agreed or assessed in accordance with Rule 65.12.

Brian G.K. Alleyne
High Court Judge