EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV2012/355

BETWEEN:

DAVID PENN

Claimant

and

[1] TELECOMMUNICATIONS REGULATORY AUTHORITY
[2] ATTORNEY GENERAL

Defendant

Appearances:

Claimant in person and unrepresented
Ms. Sinead Harris and Ms. Kamika Forbes for the First Defendant
Dr. Christopher Malcolm with him Ms. Natalie Sandiford, Senior Crown Counsel and Ms. Maya Barry, Crown Counsel for the Second Defendant

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2013: January 28th
- -

EX TEMPORE JUDGMENT

[1] ELLIS, J.: Under Part 26.3 of the Civil Procedure Rules, the court is empowered to dismiss an action in a summary way without a trial where the statement of claim discloses no cause of action, or is shown to be frivolous and vexatious or otherwise an abuse of the process of the court. Part 26.3 (1) provides that:

> "(1) … the court may strike out a statement of case or part of a statement of case if it appears to the court that –
>
> (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;"

[2] It is now well settled that the jurisdiction of the Court to strike out a claim pursuant to Part 26.3 is to be used sparingly and in plain and obvious cases when it can be clearly seen on the face of it that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. This narrow approach is premised on the fact that the exercise of this jurisdiction deprives a party of its right to a trial and of its ability to strengthen its case through amendment, disclosure and other court process.

[3] In the case at bar, both Defendants have filed applications seeking essentially the same relief. The Defendants applications to strike out the Claimant's claim were filed on 14th and 17th January, 2013 respectively and they have both filed written submissions in support. They seek to have the constitutional claim filed by the Claimant struck off on the basis that the it fails disclose a sustainable claim, is an abuse of process and is likely to obstruct the just disposal of the proceedings. The Claimant elected not to file affidavit evidence in reply or legal submissions in opposition to the Applications.

[4] Generally when dealing with such applications, a court's is restricted to the scrutiny of the statements of case. It is required to test the particulars which have been given in each averment to see whether they are sufficient to establish a reasonable cause of action which simply stated is "a factual situation, the existence of which entitles a party to obtain from a Court a remedy against another person." The court must also bear in mind that … "so long as the statement of claim or the particulars disclose some cause of action, or raises some question fit

to be decided by the judge of jury, the mere fact that the case is weak and not likely to succeed is no ground for striking out".[1]

[5] It follows that then that "A person who wishes to move the court must state a case that is known to, or created by law. The case as stated must disclose sufficient facts that are material to the issue to render the claim viable and which would permit the person who has to answer the case to know what case he has to meet; it must disclose a reasonable cause of action."[2] What then is the Claimant's Case?

Claimant's Case

[6] By Fixed Date Claim Form filed on 31 December 2012 the Claimant alleges that the Defendants herein have acted in contravention to section 29 of the BVI Constitution Order and seeks the following relief pursuant to section 31 of the BVI Constitution:

1. An injunction ordering the immediate suspension of the transmission of radiation into the Applicant's home from the cellular antennas outside of his home.
2. An injunction ordering the immediate suspension of the transmission of radiation into the Applicant's office in the Attorney General's Chambers from the cellular antennas over the office in the Attorney General's Chambers where he works i.e. on the TTT Building and Jayla Place Building adjoined to the TTT Building.
3. An order for the immediate removal of the two radiation emitting cellular phone antennas from outside of the applicant's home.
4. An order for the immediate removal of the two radiation emitting cellular phone antennas from over the office in the Attorney General's Chambers where he works i.e. on the TTT Building and Jayla Place Building adjoined to the TTT Building.

[1] Per Lord Pearson in Drummond Jackson -v- British Medical Association [1970] 1All ER 1094 CA

[2] Per Lord Diplock in Letang v Cooper [1965] 1 QB 232 at p 242

5. An order for the immediate removal of the radiation emitting cellular phones antennas immediately outside the Terrance B. Lettsome Airport where he assists with the management of his parent's restaurant
6. The immediate removal of the radiation emitting cellular phones antennas from outside the Sports Club where radiation from low lying antenna is very high.
7. Damages
8. Costs
9. Such further and other relief.

[7] The Claim Form is supported by two affidavits. The first affidavit filed on 31st December 2012 does little more than detail the Claimant's condition and the effects of radiation on the Claimant. These appear to be extensive and range from general fatigue to nose bleeds and headaches. It is in the Claimant's second affidavit filed on 17th January 2013 that he launches his case against the Defendants. At paragraphs 12 – 32 of the Affidavit he sets out his case against the First Defendant and at paragraphs 33 – 54 he makes a number of allegations against the Town and Country Planning Department. He concludes his evidence by analysing a number of judicial authorities which he says are relevant authorities and support the relief claimed.

[8] Having reviewed the written submissions of both Defendants and having listened to the oral submissions of the Claimant as well as Counsel for the Defendants, the Court is satisfied that the Fixed Date Claim Form and the evidence filed in support do not establish a sustainable claim of infringement of section 29 of the Constitution.

[9] It is settled law that a Claimant who seeks to claim breach of constitutional provisions must show on the face of the pleadings the nature of the alleged violation or contravention that is being asserted.[3] In order to succeed in his claim for relief under section 31 of the Constitution, the Claimant would have to establish

[3] Operation Dismantle v The Queen (1985) 1 SCR 441 and Amerally and Bentham v Attorney General (1978) 25 WIR 272

a violation or threat of violation of his right under section 29 of the Constitution which provides that:

> "Every person has the right to an environment that is generally not harmful to his or her health or well-being and to have the environment protected, for the benefit of present and future generations, through such laws as may be enacted by the Legislature including laws to —
>
> (a) prevent pollution and ecological degradation;
> (b) promote conservation; and
> (c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[10] The Court notes that although the Claimant seeks injunctive relief against the Defendants he has omitted a critical first step. He has not specifically sought to obtain a declaration of unconstitutionality under Section 29. In order to obtain a declaration of unconstitutionality the Claimant would have to demonstrate that the Defendants have in some way acted inconsistently with his rights under Section 29 which obliges the Government to refrain from activities which are harmful to the environment, and to adopt and enforce policies and statutes which prevent its degradation and which promote conservation and improvement of its quality. This right recognizes a right to a healthy or clean environment or an environment conducive to an individual's well-being.

[11] The Claimant's pleadings must therefore not only allege but must provide cogent evidence that these Defendants have through their action or inaction so impaired the environment such as to cause harm to his health and well-being. The Claim must therefore demonstrate on its face:

i. That the emissions of electromagnetic energy/radiation from the relevant cellular phone antennas in proximity to his residence, workplace and other places of interest have rendered the environment unsafe or harmful.

ii. That such harm was caused or contributed to by the acts or omissions of the Defendants.

iii. That there is a direct causal link between the emissions from the cellular phone antennas and the harm alleged to be suffered by him.

[12] The Court finds that the Claim fails on all fronts.

[13] Although there is a fair amount of ambiguity and contention surrounding what constitutes a pollutant, it is commonly accepted that whether a contaminant will amount to a pollutant will depend on a number of factors including its concentration when released; how quickly it breaks down in the environment; its toxicity and impact on plants, animals, humans and microorganisms and its impact on the environment generally. As it stands the Claimant's case provides no or insufficient information about the allegedly offending cellular antennas. He does not allege that they are in fact emitting electromagnetic energy; he fails to indicate the levels of such emissions or whether they have resulted in an undesirable, harmful or dangerous change to the environment.

[14] In this case, the basic theory of environmental infringement requires that the Claimant demonstrate in his pleadings the actual or potential damage that is alleged to have been caused by the Defendants. It is therefore surprising that the Claimant does not allege that the Defendant's action have resulted pollution, electromagnetic or otherwise. The Claimant does not contend that there has been any wrongful contamination of the atmosphere, water or soil or otherwise which could cause material injury of the right of an individual. There is in fact no statement; scientific, technical or otherwise, demonstrating that the environment has in any way been adversely impacted by the Defendants. Indeed, the Claim does not allege any impairment of the environment at all.

[15] What is even more damning is that the evidence in this case (which is not disputed by the Claimant), reveals that the relevant levels of electromagnetic radiation do not exceed applicable international standards established by the International Commission of Non – Ionising Radiation Pollution Protection (ICNIRP) and which have been adopted locally. By these standards there is therefore no actual or potential damage directly caused by the operator. In applying these standards, it is the Defendant's evidence that the environment has not been rendered harmful or unsafe and in short, no infringement has occurred.

[16] The Claimant seems well aware that some standard of pleading is required to ground a sustainable constitutional rights claim. He has in his evidence quoted the case of Fadeyva v Russia[4] in which the Claimant alleged a breach of Article 8 of the European Convention - Right to respect for private and family life. The Court in that case concluded that in order to obtain relief under Art.8, complaints relating to environmental nuisances had to show, first, that there had been an actual interference with the complainant's private sphere, and, secondly, that a minimum level of severity had been attained. In that case, the concentration of various toxic elements in the air near the Claimant's house was found to have seriously exceeded the maximum permissible limit over a significant period of time, so that the Court conclusion was not surprising.

[17] It is important to note that that case concerned a breach of Article 8 of the European Convention which does incorporate a specific right to a safe environment as obtains in the British Virgin Islands Constitution Order. It is in the Court's view, even more critical for a Claimant wishing to ground his claim under section 29 to demonstrate an actual interference or infringement of this right?

[18] On the facts as pleaded, the Claimant suffers from a condition called electromagnetic hypersensitivity syndrome which is described as hypersensitivity to electromagnetic fields of energy. The evidence which he has put before the Court demonstrates that this is not a medical disorder recognised by the World Health Organisation and that there are no known paths to its diagnosis and no clear diagnostic criteria. Further, the medical evidence submitted by the Claimant also states that there is no known cause for this condition but that the treatment is to avoid the stimulating effects of electromagnetic waves and electricity.

[19] The Claimant's pleading discloses that what he really seeks is to secure some accommodation which would take into account his hypersensitivity and thus alleviate the serious symptoms which he claims to experience by minimizing or removing altogether what he considers to be the environmental triggers. This, with

[4] 2007 45 E.H.R.R 10

the greatest of respect to the Claimant is not enough to ground this constitutional action.

[20] While he may well have a potential claim under some other constitutional provision, the Claimant's pleadings do not reveal a sustainable claim alleging a contravention of Section 29 of the Constitution.

The Fixed Date Claim Form does not identify any action taken by the First Defendant which infringes the Claimant's constitutional rights

[21] The Court also accepts that the Claimant has not alleged any actionable act or omission on the part of the First Defendant which could be said to amount to an infringement of his rights under section 29 of the Constitution. The only contravention which can be extrapolated is set out at paragraph 18 of his second affidavit in which he states that;

> "*Given my Electromagnetic Sensitivity, the Commission ought reasonably to have amended the licence issued which permitted the relevant service providers to continue to emit the debilitating radiation into his home*."

[22] He then goes on to quote a number of statutory provisions within the Telecommunications Act 2006 which he contends empowers the First Defendant to amend the licence in the public interest. He also alleges that the First Defendant has failed to take enforcement action against the relevant operators who in his opinion are carrying on or likely to carry on business in a manner that is detrimental to the public interest.

[23] When questioned about the import of these statutory provisions, the Claimant contended that as he is a member of the public, his interests ought to be considered relative to any such amendment or enforcement action.

[24] It is clear that the Claimant has not given any consideration to how the courts have treated the complex and often vexing concept known as the "public interest". Lord Justice Griffiths in Lion Laboratories Limited v Evans 1985 QB 526 provides a helpful exposition at page 533 where he states:

> *"The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals."*

[25] It follows that these statutory provisions do not assist the Claimant.

[26] The Claimant also alleges a number of other statutory provisions in the Telecommunication Act which he says could be but which have not been employed by the First Defendant to alleviate his condition. The Court found that on a clear reading of these statutory provisions they are either not relevant or do not assist the Claimant.

[27] On the totality of the evidence, it is apparent that the First Defendant has a statutory obligation under Section 6 and 42 (1) (b) of the Telecommunications Act to undertake testing and certification of telecommunications equipment to ensure compliance with relevant safety standards. There is however no allegation that this statutory duty has been breached. In fact, on the undisputed evidence of Gregory Nelson, the contrary is the case.

[28] For these reasons and for the reasons already stated the Court finds that there is no sustainable action or omission attributable to the First Defendant which could be said to have infringed the Claimant's constitutional rights under Section 29.

The injunctive relief (both mandatory and prohibitory) claimed as against the First Defendant would be futile since they do not own or otherwise control the transmissions from the cellular phone antennas in question.

[29] While the First Defendant has general and broad regulatory powers in respect of the telecommunications providers in the Territory, it is clear that it has no powers under the Town and Country Planning Act and cannot purport to usurp the authority of the regulatory and enforcement body established under that Act. While

the Town and Country Planning Authority and the Telecommunications Regulatory Authority have functions which complement each other, there can be no doubt that they have distinct and disparate statutory remits. For example and perhaps most importantly, the Telecommunications Regulatory Authority does not have the enforcement powers which are vested in the Planning Authority.

[30] The Court is satisfied that if any mandatory injunctive relief could properly be granted in this case, it would could only be to compel the First Defendant to carry out its prescribed statutory functions under the Telecommunications Act. The Court could not properly compel the Authority to exceed its powers under the Act.

[31] For these reasons and given the fact that the First Defendant is not a telecommunications provider/ operator and does not own the offending antennas, it is clear that the relief which is sought against the First Defendant would be impractical and ineffective in any event. The remedies sought, are appropriate as against the actual telecommunications providers who have not been sued by the Claimant and are therefore not before the Court.

[32] Further, Counsel for the First Defendant contended that even if the relief which is claimed was granted, it would be futile because if the level of coverage in the area is to be maintained it will be necessary to amplify the emissions from other antennas at other new locations, effectively exposing the Claimant to the same levels of emission. Evidence to that effect is set out in paragraph 19 of the affidavit of Corinne Philip, Counsel for the First Defendant who contends that Court should not exercise its jurisdiction to grant injunctions which are futile or which are incapable of enforcement.

[33] This contention was not addressed or traversed in the Claimant's case.

ALTERNATIVE REMEDY

[34] Given the substance of the claim, it is clear that the Claimant has alternative remedies available to him which he has chosen not to pursue. There are private law actions which are available to him in tort. During the hearing of this Application it became clear to the Court that the Claimant had considered these carefully prior to filing this claim and that there were practical and fiscal considerations which informed his decision to launch this constitutional challenge.

[35] These considerations have been alluded to in many cases and in particular in the case of Attorney General v Ramanoop [2005] UKPC15 where Lord Nicholls in delivering the Board's judgement noted that:

> "Over the years admonitions against the misuse of constitutional proceedings have been repeated: Chokolingo v Attorney-General of Trinidad and Tobago [1981] 1 WLR 106, 111-112, and Attorney-General of Trinidad and Tobago v McLeod [1984] 1 WLR 522, 530. These warnings were reiterated more recently by Lord Bingham of Cornhill in Hinds v Attorney-General of Barbados [2002] 1 AC 854, 870, para 24.
>
> Despite these warnings, abuse of the court's jurisdiction to grant constitutional relief has been "unrelenting" until brought to a "sudden and welcome halt" by the decision of the Board in Jaroo v Attorney-General of Trinidad and Tobago [2002] 1 AC 871: see Hamel-Smith JA in George v Attorney-General of Trinidad and Tobago (8 April 2003, unreported). The explanation for the continuing misuse of this jurisdiction seems to be that proceedings brought by way of originating motion for constitutional relief are less costly and lead to a speedier hearing than proceedings brought by way of writ.
>
> From an applicant's point of view this reason for seeking constitutional relief is eminently understandable. But this reason does not in itself furnish a sufficient ground for invoking the constitutional jurisdiction. In the

ordinary course it does not constitute a reason why the parallel remedy at law is to be regarded as inadequate. Proceedings brought by way of constitutional motion solely for this reason are a misuse of the section 14 jurisdiction."

[36] While there are obvious advantages to pursuing a public law claim rather than private law action against the relevant telecommunication operators/providers, it is clear that in an order to do so the Claimant has fashioned a claim largely out of inference and supposition, referencing in evidence, statutory provisions which do nothing to advance his claim. The basic elements which should underpin a claim for infringement of section 29 of the Constitution are absent and this claim is therefore not maintainable.

[37] Given the affidavit evidence filed in support of this claim, the Claimant has an alternative form of redress which would be more appropriate and suitable in the circumstances. Therefore under section of Constitution Order, the Court must exercise its discretion to decline to entertain this claim as against the First Defendant.

The Second Defendant's Application to strike out

[38] In so far as the Second Defendant is concerned the Court is also satisfied that for the reasons set out at paragraphs 8 – 20 herein, the Claim must be struck out.

[39] The Court does not however accept that the Attorney General would not have been a proper party to this Claim. There can be no doubt that where an infringement of constitutional rights is alleged that the appropriate party to be joined is the Attorney General. Whether the claim is maintainable is another matter altogether but it does not *without more* proscribe the Attorney General's joinder.

[40] Although it is not evident from the Fixed Date Claim Form, it is apparent that the Claimant in his evidence makes certain allegations against both the Chief Planner and the Town and Country Planning Department, both are admitted Government agencies. There can also be no doubt that as regards development in the Territory the Planning Department has a significant statutory role to play ensuring the protection of the environment in the interest of the all persons residing therein.

[41] However the Claimant's case against the relevant government agencies is fragmented and fails to set out in a coherent manner the case which they are required to answer. First, the Claimant's makes some vague reference to the Planning Authority's statutory power to establish environmentally protected areas in a development plan and states that this is an avenue which may have been open to the Government (presumably to restrict the placement of the towers) but which was not pursued.

[42] The Claimant also contends that in granting planning permission to erect the cell towers, the Authority has failed to take into account his individual circumstances i.e. his electromagnetic hypersensitivity and have otherwise ignored his pleas for redress. Finally, he alleges that the Government has sufficient statutory power which it has failed or refused to employ, but which could be used to amend or modify existing planning permissions (presumably to mandate the removal of the cell towers).

[43] These claims (to the extent that they can be maintained) are best suited to a judicial review challenge. The Court is satisfied on the authority of Harrikissoon v Attorney-General of Trinidad and Tobago [1980] AC 265 that these claims should not properly advance under a constitutional challenge. In that case Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action.

[44] He reasoned that permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke constitutional relief if it is apparent that this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right":

[45] Where, as in the case at bar, the Claimant does not allege any definitive act or omission on the part of the Planning Authority which could be said to have harmed the environment and thus infringed his constitutional rights, it is clear that constitutional relief under section 31 would not be appropriate.

Conclusion

[46] Given these conclusions the Court is satisfied on the way that the Claimant has chosen to advance his case that no infringement of his right under section 29 of the Constitution could be said to have been made out. In such circumstances, the overriding objective demands that further substantial outflow in costs should cease and expectations should not be raised. For the reason set out, the Court is of the view that this claim is unsustainable and should be struck out as against both Defendants.

Costs

[47] Both Defendants have sought costs against the Claimant and have indicated the Court should exercise his discretion to award costs despite the clear guidance provided by Part 56.13 (6). The contention is that the Claimant has acted unreasonably in bringing this claim. CPR 56.13(6) provides that no order for costs may be made against an applicant for an administrative order unless the Court

considers that the applicant has acted unreasonably in making the application or his conduct was in some way worthy of censure in bringing it.

[48] Despite the failings of this case, the Court does not accept that this case falls within that matrix. It is clear that this litigant has felt aggrieved for some time and has made numerous efforts to seek redress. This claim is clearly a last resort for him. The fact that as pleaded it is not viable does not in the Court's view make his action unreasonable or warrant censure. There will therefore be no order as to costs.

Vicki Ann Ellis
High Court Judge