IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION

CLAIM NO. HCV 2011/5659

BETWEEN	**CABLE & WIRELESS JAMAICA LIMITED T/A AS LIME**	**APPLICANT**
AND	**THE HONOURABLE PRIME MINISTER BRUCE GOLDING MINISTER WITH RESPONSIBILITY FOR INFORMATION, TELECOMMUNICATIONS AND SPECIAL PROJECTS**	**FIRST RESPONDENT**
AND	**THE FAIR TRADING COMMISSION**	**SECOND RESPONDENT**

IN CHAMBERS

Denise Kitson, Suzanne Risden Foster and Kashina Moore instructed by Grant Stewart Phillips for the applicant

Douglas Leys Q.C. Solicitor General and Harrington McDermott instructed by the Director of State Proceedings for the first respondent

Dr. Delroy Beckford, Wendy Duncan and Sashawah Newby for the second respondent

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW – WHETHER TEST FOR JUDICIAL REVIEW MET – SECTIONS 11 (1) (a), (b), 17 (2), (3) OF THE TELECOMMUNICATIONS ACT – SECTIONS 17, 19, 20, 21, 35, 46, 47 OF THE FAIR COMPETITION ACT

September 19, 20, 26, 27 and October 7, 2011

SYKES J

[1] In March 2011, Oceanic Digital Jamaica Limited trading as Claro ('Claro') and Digicel Jamaica Limited trading as Digicel ('Digicel') announced that Claro would be transferring all its assets in Jamaica to Digicel and Digicel would be transferring all its assets in El Salvador and Honduras to Claro. This transaction would mean that Claro's licence to provide mobile communication services in Jamaica would be transferred to Digicel. Section 17 of the Telecommunications Act ('TCA') authorises the Minister to give approval to this transfer of licence. The Minister with responsibility for Information, Telecommunication and Special Projects has approved the transfer.

[2] Cable and Wireless Jamaica Limited which trades under the name LIME ('LIME') wants to apply for judicial review for the following remedies:

a. an order of certiorari against the first respondent quashing the approval given by the 1st Respondent in August 2011 to the merger entered into between Oceanic Digital Jamaica Limited trading as Claro and Digicel Jamaica Limited trading as Digicel whereby it is, *inter alia*, agreed that there be an assignment of the licence and/or rights thereunder and/or control of the operations of Claro to Digicel;

b. a declaration that the first respondent's decision to approve the Transaction is unlawful and/or was effected by an improper exercise of his powers.

[3] LIME is also disgruntled with the Fair Trading Commission ('FTC') a statutory body established under the Fair Competition Act ('FCA') to regulate competition in the market place in Jamaica. LIME says that the FTC is not utilizing its powers under the FCA to scrutinize this transaction between Claro and Digicel. This prompted LIME to seek leave to get an order of mandamus. LIME wants to ask the judicial review court to grant:

a. An order of mandamus against the 2nd Respondent compelling it to complete its investigation into the likely effects on competition in the telecommunications sector of the agreement for the assignment of the license and transfer of the business operations of Claro to Digicel against the criteria set out in Sections 17, 19 to 21 and 35 of the Fair Competition Act and take such action in relation thereto as may be deemed appropriate including but not limited to:
    i. seeking an injunction against Digicel and Claro under section 47 of the Fair Competition Act 1993 (the "FCA") on the basis of breaches of sections 17 and 35 of the FCA, such injunction to last until such time as the transaction can be lawfully approved;
    ii. issuing directions under section 21 of the FCA to prevent the abuse of dominance given effect to by the transaction itself;
    iii. issuing directions under section 21 of the FCA to halt the steps already being taken by Digicel and Claro to combine their operations pending final judgment in this action, should leave be granted.

[4] What has been set out above in respect of the FTC is the amended application

for leave. Both respondents appeared and vigourously opposed the application. The application was dismissed on September 27 and leave to appeal refused. These are the reasons for the decisions.

Background

[5] All legal disputes have a factual and social context. LIME, a Jamaican company, for many years was the incumbent and sole provider of telephonic services within Jamaica. It pioneered the introduction of mobile telecommunication services in Jamaica. Indeed, it enjoyed a monopoly in many Caribbean countries. In early 2000, the Government of Jamaica decided that the monopoly should be broken. In response to this development, an Irish based company alighted on the shores of Jamaica. Since its arrival, the provision of mobile services underwent a virtual revolution. The company, Digicel, has been locked in fierce combat with LIME for market share. Claro, a third provider of telecommunications services, also took advantage of the liberalized market in Jamaica.

[6] Since liberalization, Digicel and LIME have had innumerable disputes. They have been litigated both here in Jamaica and in the United Kingdom. This is the latest skirmish in this long running 'war.' In the eyes of LIME this transaction between Claro and Digicel will lead to a reduction of competition because the number of mobile service providers will be reduced from three to two. This, according to LIME, is reason enough for the Minister not to grant permission for the assignment of the licence to Digicel by Claro. LIME also takes the view that the FTC has not exercised its powers to prevent the

merger or to take such other steps as may be necessary to preserve and enhance the competitive environment which, LIME claims, now prevails. LIME is also saying that Digicel is not constrained by competitive forces even at the present moment and this transaction will only serve to strengthen Digicel's hand in the mobile service market. LIME goes further to say that failure to act on the part of the FTC and the decision of the Minister mean that the consumers will be worse off.

The application: LIME

[7] The modern test for leave to apply for judicial review is now found in the Judicial Committee of the Privy Council's decision ***Sharma v Bell-Antoine*** (2006) 69 WIR 369 [14], on an appeal from the Republic of Trinidad and Tobago (Lord Bingham and Lord Walker):

> *The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628 and Fordham, Judicial Review Handbook 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.*
>
> …
>
> *It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen": Matalulu v Director of Public Prosecutions [2003] 4 LRC 712.733.*

[8] The old test was stated by Lord Diplock in ***Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.*** [1982] A.C. 617 is no longer used. Lord Diplock said at pages 643 – 644:

> *The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.*

[9] Lord Diplock's test, at best, amounts to a potentially arguable test.

[10] In relation to the Minister, the proposition is that he did not take into account all relevant matters. LIME alleges that he failed to have due regard to sections 11 (1) (a) and (b) and 17 of the TCA. It is necessary to refer to those sections.

[11] Section 11 (1) (a) and (b) reads:

(1) An application for a licence under this Act shall be made to the Office in the prescribed form and shall be accompanied by the prescribed application fee and contain a statement that -

(a) The applicant undertakes to comply with the provisions of this Act relating to the type of facility or specified service to which the application relates, including –

(i) interconnection obligations;

(ii) universal service obligations;

(iii) licence limitations; and

(iv) network expansion requirements

(b) The application is not disqualified from being granted a licence by reason of any legal impediment;

[12] Section 17 (2) and (3) provides as follows:

(2) A licensee may, with the prior approval of the Minister assign its licence or any rights thereunder or transfer control of its operations.

(3) An application for approval of an assignment or transfer under this section shall be made in writing to the Minister who shall grant such approval if he is satisfied that the assignee satisfied the requirements of section 11 (1) (a) to (b) as regards the obligations imposed on a licensee by this Act or the licensee.

[13] It is plain that the Minister had the power to approve the assignment of a licence granted under the TCA once the proposed assignee meets the statutory requirements. It is equally plain that section 17 (3) directs the Minister to some of the matters that he is to consider.

[14] Section 11 (1) (a) and (b) along with section 17 subject the proposed assignee of a licence to the rigours applicable to a first time applicant for a licence under the TCA; the difference being that not all that is stated in section 11 applies to the assignee.

[15] LIME has attached great importance to the word 'legal impediment' in section 11 (1) (b). LIME contends that there is a 'legal impediment' under section 11 (1) (b). The legal impediment is this. According to LIME any agreement which has or might have the effect of lessening competition is a breach of section 17 of the FTA and that breach amounts to a legal impediment because the

exception provided by the FTA does not apply. The exception only applies if FTC approves the transaction before the Minister makes approves the assignment and there is no evidence that the FTC has given its approval, therefore the impediment remains. In other words, the FTA creates a hurdle to the Minister's approval under the TCA and that hurdle has not been cleared. Consequently, the Minister's decision is unlawful because he failed to consider the implication of the FCA. This submission requires consideration of the provisions of the FCA.

[16] Section 17 (1) of the FTA states that section 17 applies to agreements 'which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.'

[17] Section 17 (3) indicates that 'no person shall give effect to any provision of an agreement which has the purpose or effect referred to in subsection (1); and no such provision is enforceable.'

[18] Section 17 (4) provides that section 17 (3) does not apply to agreements authorised under Part 5, or which the FTC is satisfied that they meet the criteria stated in section 17 (4).

[19] Section 19 defines dominant position. It reads:

> *For the purposes of this Act an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its*

competitors or potential consumers.

[20] LIME further submits that Digicel is in a dominant position and it has in fact abused its dominant position in times past and continues to do so now because there is, at present, little effective constraint from its competitors. The transaction between Digicel and Claro will increase Digicel's position and since this transaction is an agreement within section 17 which has not been approved by the FTC and neither has it met the statutory criteria for approval by the FTC, then it is a legal impediment within the meaning of section 11 (1) (b) of the TCA.

[21] The Solicitor General made two responses both of which the court accepts. The first is factual and the second legal. The court will deal with the factual response first. In the documents exhibited to the affidavit of Mr. Garth Sinclair, Managing Director of LIME, there is a statement attributed to the Minister. He made his report to Parliament indicating the things he took into account. In that statement, the Minister referred to sections 11 and 17 of the TCA. The Minister noted that the transaction raised issues such as the impact on the level of competition within the mobile telecommunications market. The Minister referred explicitly to four factors which the transaction raised. First, the impact the transaction would have on the level of competition within the mobile telecommunications market and in particular the wide disparity in termination rates among the service providers. Second, would Claro have existed within the market whether or not the transaction was approved. Third, the service options available to 517,000 Claro subscribers. Fourth, the statutory limitations

governing the exercise of ministerial discretion in relation to the application. The Minister indicated that he received advice from the Attorney General who advised that no conditions could be imposed on the licence to be assigned. He even stated that the FTC 'is considering specific steps that may be taken within its statutory functions to ensure that the acquisition of Claro by Digicel does not adversely impact the consuming public.' The Minister concluded by indicating that the existing statutory framework is not satisfactory and need alteration.

[22] From his statement it is too plain that the Minister considered the TCA, competition issues and whether he could impose any conditions on Digicel in this transaction and the learned Attorney General advised him that he could not.

[23] Even LIME seemed to have agreed with the Minister that the regulatory framework needed upgrading. LIME was driven to the utterly untenable proposition that the Minister should not have approved the transaction but should have awaited the change in the law. This is clearly asking the Minister not to act in accordance with the law as it presently stands but to act in accordance with what the law ought to be. This submission only serves to demonstrate the weakness of LIME's application in relation to the Minister. The very things that it said the Minister had not done, his statement to Parliament proves that he considered all relevant matters and set out a blue print for change. The factual foundation for the challenge simply does not exist.

[24] The second aspect of the factual insufficiency is this. LIME indicated that Digicel was in a dominant position in relation to the telecommunications market. However, the factual basis for this was built on sand. The only report from an official source relied on in support of this proposition does not support the case. The report from the Office of Utilities Regulation ('OUR') stated that each service provider was dominant in relation to its own market of termination of calls. Thus Digicel, Claro and LIME were, in relation to calls terminating on each service provider's network, dominant in that specific market. One cannot, without more, transpose dominance in one specific market to dominance in another market. Further, LIME was also relying on Digicel's self-proclaimed market share of over 70% of subscriber number or market value in the market in question. Where is the evidence that corresponds with Digicel's proclamation? Are there figures from the OUR or FTC or any other body to support this? Did LIME undertake such a study? Could a rational Minister make such a far reaching decision by taking into account a self-proclaimed statement without independent verification? These questions speak for themselves.

[25] The court now turns to the weak legal foundation of LIME's case. LIME's proposition is repeated. LIME submitted that it is the fact that the agreement between Digicel and Claro in and of itself is an agreement which has the effect of substantially lessening competition or is likely to have that effect in breach of section 17 of the FCA that there is therefore a legal impediment for the purposes of section 11 of the Telecommunications Act 2000. This court

unhesitatingly rejects this proposition. The case relied on by LIME was ***The Queen on the application of AR v Secretary of State for the Home Department*** [2011] EWCA Civ 857. In that case a Somali national applied for asylum in the United Kingdom. Ultimately, his application was rejected. The Home Secretary gave orders for him to be removed. Judicial review was brought against the Home Secretary. It was argued that the Home Secretary knew that the applicant would be seeking legal redress including going to the European Court of Human Rights ('ECtHR') for redress and that court had a policy of issuing a stay until it had adjudicated on the matter and therefore there was a legal impediment in the way of removing the applicant from the United Kingdom. It was common ground in the case that there was in fact a well-established practice of the ECtHR to issue stays preventing deportation from member states of the European Union once that court was approached. In the case of the Somali national, he had not yet approached the court and so the well-attested practice of the court was not activated at the time the Home Secretary made the decision.

[26] The Court of Appeal, unsurprisingly, rejected the submission. The court held that **at the time** the Home Secretary made the decision, the ECtHR or indeed any other court had not issued any judicial order barring the removal of the applicant. The fact that the ECtHR had a settled policy does not amount to a legal impediment. The Home Secretary is only obliged to recognise orders issued from a court of competent jurisdiction. Interestingly, in paragraph 22 of the judgment the court referred to a statutory provision in the immigration

statute that explicitly stated that when an applicant for asylum was appealing through the administrative tribunals, as distinct from pursuing a remedy through the law courts, then that appeal suspended the decision of the Home Secretary. In other words, the appeal acted as a statutory legal impediment to the Home Secretary actually removing the person from the United Kingdom. There was no equivalent statutory provision that applied when the person had exhausted those administrative procedures and was now turning to the law courts for a remedy. The implication of all this is that not even an application for judicial review was a legal impediment to the Home Secretary removing the Somali applicant because such an application is not a judicial order. The fact that the asylum seeker alleged that Home Secretary had committed an 'egregious sin' which would enable him to make a successful challenge to the decision was not a legal impediment. In other words, the decision is consistent with the proposition, which is the major premise, that the fact that a person alleges facts which, if established, would entitle the person to a remedy does not amount, in law, to a legal impediment to the decision of the statutory functionary.

[27] By parity of reasoning here, the fact that LIME believes that what it alleges amounts to a breach of the TCA and FTA is not a legal impediment unless and until a court or properly authorised body, such as the FTC or the OUR so declares. At the time the Minister made his decision there was no decision from a court, the FTC or the OUR or any other competent body indicating that the transaction breached the FTA or any other relevant legislation. Legal

impediment cannot mean what a court or competent legally authorised body may conclude at a future uncertain time. The impediment has to exist at the time the decision is made. If it were otherwise, all that a person need do is to say to the Minister that what you are doing breaches some legislation and that is a legal impediment to your actions. At best, what there is is LIME's view of the matter but until a court or some competent tribunal says so then there is no breach established. In addition, it is extremely unlikely given the complexities (legal and economic analysis) involved in finding a lessening of competition and abuse of a dominant position that simply to say that there will now be two competitors instead of three is sufficient to find a lessening of competition. For these reasons this court agreed with the learned Solicitor General when he said that at the time the Minister made his decision there was no legal impediment in the way of the Minister in approving the transaction.

The application: FTC

[28] Dr. Beckford's main point was that the courts cannot compel the FTC to conduct or not conduct any investigation or to exercise any remedial power given to it under sections 21, 46 and 47 of the FTA. He submitted that when one is looking at competition issues, they are quite complex. They involve complex economic analysis that is looked at in light of the relevant law. This process is not done overnight. Also, he submitted, competition issues are not in relation to a sector as the notice of application for leave suggests but in relation to specific markets. It could not be that the FTC was expected to undertake a review of the whole telecommunications market. As has been

seen from the OUR report on the call termination market, there were three separate markets and not one as the uninformed might imagine. It is because of these complexities why it would be unwise for the court to grant leave in respect of the FTC. Under the FCA, it was submitted, the FTC, even in the face of mandamus, has the lawful authority to (a) commence an investigation; (b) stop an investigation or (c) not investigate at all. If mandamus were to issue what would be its content and how efficacious would it be? What would the FTC be ordered to do? Investigate? Not investigate? What if the FTC initiated an investigation in light of the mandamus but finds early in the day that further investigation is not necessary? What if LIME disagrees? What then? What would be the response of the courts? These questions indicate why courts are hesitant to go down the road of mandamus where the statutory functionary has a discretion whether or not to investigate a complaint and a further discretion in the remedy pursued if the complaint is investigated and substantiated. These circumstances suggest the court would become the driver of the FTC bus and not the Commissioners.

[29] This court agrees with Dr. Beckford's submissions. Judicial review is about process not merits. No material has been placed before the court to suggest that the FTC has not complied with the statute. The allegations made against the FTC, as in the case of the Minister, are without factual foundation. Once again the material before the court shows that the FTC has begun its work. For example, there is a letter, dated April 7, 2011, from the FTC's Executive Director requesting information from LIME in relation to the proposed

acquisition by Digicel of Claro's licence. There is a letter, dated April 28, 2011, from Miss Rochelle Cameron, Head of Legal and Regulatory of LIME, to the Executive Director providing responses to the FTC's request for information.

[30] Let all this be put in sequential order. The proposed transaction between Claro and Digicel is announced on or about March 11, 2011. By March 14 and 15, LIME is writing to the FTC and OUR respectively indicating its concerns about the transaction. There is a follow up with LIME's epistle to the OUR dated March 23, 2011 in which LIME is proposing to the FTC what its (LIME's) legal position is and what view the FTC ought to take and what it should do. On March 30, LIME wrote to the Minister outlining its concerns about the transaction. By April 7, 2011, the FTC is asking LIME for information. In the first week of July, the FTC announces that its assessment is complete and would be made public.

[31] The FTC has acted. It has exercised a discretion to decide whether to undertake an investigation. In real terms what LIME is asking for is for the FTC to (a) take action against the proposed transaction; (b) issue directions or (c) apply to the court for an injunction. The basis for this is not readily apparent to the court. It has omitted to make its finding public; something which it is not compelled by statute to do. At one point counsel for LIME submitted that if the FTC had acted properly then it would agree with LIME's position. This only underscores the weakness of LIME's application. It indicates that LIME has no real basis for the application. As the Privy Council has said, leave cannot be granted on a speculative basis in the hope that interlocutory processes will

strengthen the applicant's case. This is precisely what would happen here if leave were granted at this time. The best case for LIME is that it is potentially arguable but this not sufficient.

[32] Before leaving this application there are two submissions which were made by Dr. Beckford which did not find favour with the court. He submitted, first, that there was no time frame set out in the statute by which the FTC is to conduct an investigation and second, there was no time frame or even duty on the FTC to conduct an investigation. In relation to the second point, the proposition was that it was within the discretion of the FTC whether to conduct an investigation there was no time stated in the statute by which this discretion must be exercised. The view of this court is that the fact that the statute does not set a time frame for conducting investigation can never ever mean that the FTC cannot be compelled to act. Admittedly, the circumstances in which the court would act, hopefully, would be quite rare but surely if it were the case that there was evidence that the FTC's inactivity was motivated by malice, fraud or bad faith a court would be compelled to act against the it. To accept Dr. Beckford's submission would be take the FTC beyond the reach of judicial review. This would be an extraordinary development at this time given the fact that even statutes that expressly purport to exclude judicial review have failed to achieve that objective (***Anisminic Ltd v Foreign Compensation Commission*** [1969] AC 147).

Conclusion

[33] LIME has failed to meet the test laid down. It has failed to show that it has an

arguable case with a real prospect of success. The factual basis for the application does not exist. The legal foundation for the application has not been established. The application is dismissed with costs to the respondents to be agreed or taxed. Leave to appeal refused.