IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMERCIAL DIVISION
CLAIM NO. 2010 HCV 00098

IN CHAMBERS

BETWEEN	OCEANIC DIGITAL JAMAICA LIMITED (Trading as Claro)	CLAIMANT
AND	DIGICEL (JAMAICA) LIMITED	DEFENDANT

Mr Gordon Robinson, Mr Harold Brady and Ms Kay-Ann Anderson instructed by Brady & Co. for Claimant.

Mrs M. Georgia Gibson-Henlin instructed by Henlin Gibson-Henlin for Defendant.

Practice and Procedure - Application for interim injunction to restrain disconnection of service – Agreement as to charge for the services – Bills rendered according to agreement – Whether agreement disadvantageous to claimant – Application for rectification pursuant to The Fair Competition and The Telecommunications Acts – Whether damages an adequate remedy.

4, 13 and 20 October 2010

BROOKS, J.

Oceanic Digital Jamaica Limited (trading as Claro) and Digicel (Jamaica) Limited provide wireless telecommunications services in Jamaica. The nature of their industry requires them, despite the fact that they are competitors, to co-operate so as to allow their respective customers to communicate with each other. This requires the companies to enter into contracts, with each other and also with the other companies providing such services. The contracts are sometimes called "Network Connect Agreements" (NCAs). The NCA between Digicel and Claro was made on April 1, 2004.

Claro is, however, unhappy with the certain aspects of the NCA. It complains that the pricing structure for the service provided by Digicel, under the NCA, is discriminatory against Claro and threatens to ruin its business. In June 2010, it sought to

implement a dispute resolution procedure contained in the NCA and, as a result, has since then, been withholding a portion of the monies due under bills rendered by Digicel, pursuant to the NCA. Digicel has contested the basis on which the monies were withheld. It accused Claro of not acting in good faith and threatened to disconnect the service it provided under the NCA.

In response, Claro filed the instant claim seeking declarations that the dispute about the pricing, has been initiated in good faith and is contemplated by the NCA. More importantly, for these purposes, it also seeks an injunction, pending resolution of those issues, preventing Digicel from terminating the service provided under the NCA. The issue for resolution here, is whether the interim injunction, which Claro secured from this court on 8 September 2010, should be extended until the finalization of the claim.

The Submissions on behalf of Claro

Mr Robinson, for Claro, in his usual succinct style, emphasised the requirement for the court, in approaching this task, to consider the balance of convenience. He sought to demonstrate that whereas it might be said, superficially, that this claim was "all about money", in fact the evidence demonstrates that there is much more to be considered. Learned counsel pointed out, that because of the highly competitive nature of the telecommunications industry, discriminatory practices and dislocation of services will wreak "irreparable harm", to the customer base and goodwill of the victim. It is a loss, he submitted, that "our system of compensatory damages in inherently unable to address".

In support of his submissions, learned counsel relied on the cases of *Olint Corp. Ltd. v National Commercial Bank Jamaica Limited* SCCA No. 40 of 2008 (delivered 18 July 2008), *Cable and Wireless Jamaica Ltd. (T/A "LIME") and Oceanic Digital*

Jamaica Ltd. (Trading as Claro) v Mossell Jamaica Limited (T/A Digicel) 2009 HCV 00036 (delivered 11 February 2010), *Nottingham Building Society v Eurodynamic Systems* [1993] FSR 468 and *Half Moon Bay Ltd. v Earl Levy* (1997) 34 JLR 215. Those submissions were made against the backdrop of the requirements for considering interim injunctions, which were set out in the seminal case of *American Cyanamid Co. v Ethicon Ltd*. [1975] 1 All ER 504.

On Mr Robinson's submissions, were this injunction extended as prayed, Digicel would suffer no loss which could not be easily quantifiable in damages. The outstanding amount on each bill, together with interest thereon, according to the NCA, provides that calculation. Learned counsel submitted that the Claimant, "as a fellow dominant carrier in the marketplace…will have no trouble in paying" Digicel's damages. He submitted that the situation was quite the converse with the Claimant, whose loss could not be so easily computed or compensated.

Learned counsel emphasised the decision of Anderson J in *Cable and Wireless Jamaica Ltd. (T/A "LIME") and Oceanic Digital Jamaica Ltd. (Trading as Claro) v Mossell Jamaica Limited (T/A Digicel),* which has been cited above. In that case the learned judge imposed, not only a prohibitory injunction preventing the disconnection of telecommunication services between providers, but also a mandatory injunction for the interconnectivity capacity, which had been adversely affected, to be fully restored.

On Mr Robinson's submissions, the balance of convenience lay in favour of granting the extension of the injunction.

The Submissions on behalf of Digicel

Mrs Gibson-Henlin, in resisting the application, made comprehensive submissions. She sought to emphasise that Claro had no reasonable grounds for bringing the claim. She argued that there was, as a result, no serious question to be tried. Learned counsel also submitted that Claro had delayed bringing its complaint; that damages would be an adequate remedy for Claro and that the balance of convenience therefore, lay in favour of Digicel. She submitted that there was no basis for the extension of the injunction.

In addition to the *American Cyanamid* case cited above, learned counsel cited, as supporting her stance, the cases of *National Commercial Bank of Jamaica v Olint Corp. Ltd* PCA 61 of 2008 (delivered 29 April 2009), *Sebol Ltd. v Selective Homes and others* SCCA 115 of 2007 (delivered 12 December 2008), *Cabot Paul v Victoria Mutual Building Society* 2007HCV 05120 (delivered 29 February 2007), *Global Trust Ltd. and another v Jamaica Redevelopment Foundation Inc. and another* SCCA (delivered 27 July 2007), *Shepherd Homes Ltd v Sandham* [1971] 1 Ch 340 and *Osmond Hemans and another v St Andrew Developers* (1993) 30 JLR 290.

Analysis

I shall approach the analysis of the application, as both counsel have done, along the lines set out by Lord Diplock in *American Cyanamid*.

Is there a serious question to be tried?

The first question to be answered, in following Lord Diplock's guide to considering injunctive relief, is whether Claro has established that there is a serious issue to be tried. Claro has pitched its claim on the platforms of the provisions of the NCA and

the Telecommunications and Fair Competitions Acts. I bear in mind that it is not for me to conduct a "mini-trial" of the issues raised by the claim.

Claro asserts that the NCA is subject to the provisions of the Telecommunications Act. It cites the requirement of the Act that dominant public voice carriers shall provide interconnection on a non-discriminatory basis. Digicel, it is alleged, is a dominant public voice carrier. Claro then asserts that the rates Digicel charges it to terminate calls from Claro's network onto Digicel's, is more than the rate that Digicel charges another named competitor for termination services. On that basis, Claro asserts, Digicel is discriminating against Claro and Claro has a genuine dispute which must be resolved. Claro therefore asserts that it has a *bona fide* claim for the Office of Utilities Regulation (OUR) to investigate the matter and that it also has the right to have the dispute resolution process, set out in the NCA, activated.

I shall not, in this judgment, set out any of the rates involved. Rates are considered highly confidential information and the question of disclosure of those rates, has been the source of litigation in the past. I can say, however, that Claro has a difficulty, at this first stage. The difficulty results from a dispute as to fact. There is evidence that when it sought to bring the rate discrepancy to the attention of the OUR, the response from the OUR, was that Claro's information about the rate given to the competitor was incorrect. It would seem that the premise, on which the dispute is founded, is flawed. It may be, however, that the principle behind the request to the OUR, is not affected. I am prepared to give Claro the benefit of the doubt in that regard and consider the next issue set out by Lord Diplock.

Are damages an adequate remedy?

The second question to be asked, according to Lord Diplock's guide, is whether, in the event that the injunction were refused, damages would provide an adequate remedy in the event that Claro were successful at trial. Mr. Robinson pointed to the evidence, which indicates the disparity in the termination rates. He submitted that the failure/refusal of Digicel to submit the dispute to the process set out in the NCA, threatens Claro's financial viability. In addition Claro's reputation is at risk. According to the evidence of Mr Robert Shaw, if Digicel terminates the interconnection services, Claro's "reputation in the market with its telecommunications partners and customers would be damaged beyond repair and the lost good will (sic) could not be retrieved".

I do not accept the evidential premise, supporting the submissions, as valid. This is not a case where something has been imposed on Claro. The rates, which Digicel seeks to have observed, are the rates that Digicel and Claro sat down and agreed to. The situation, as I understand it, is as follows:

a. Digicel and Claro agreed certain interconnection rates in the NCA;

b. Claro operated in compliance with the applicable rates for a period of time;

c. Claro then "discovered" that another entity was paying to Digicel, a cheaper rate for interconnection;

d. Claro asserts that the disparity in rates is against the letter and spirit of the Telecommunications Act and that it should not be placed at a disadvantage;

e. Claro says that if it is not granted an adjournment it would be ruined in this highly competitive industry.

I do not think that it is open to Claro, at this stage, to say, in effect, "someone else has made a more advantageous bargain than I did, please allow me to pay at that better rate, until the dispute concerning rates is resolved". As I understand Digicel's response, it is saying, "Claro can have all that it bargained for, so long as it pays the agreed rate". If my understanding is correct, then this is a question of money. If Claro is successful at the end of the trial, then it would be entitled to a recovery of the monies which it paid in excess of the appropriate rate. It cannot be heard to say the rate will threaten its viability. This is because it agreed to do business at that rate.

I draw a distinction between external factors which are imposed after an agreement has been reached and which adversely affect a party's competitive edge, and aspects to which that party has agreed. A court may well grant an injunction in the former instance, but all else being equal, I do not think it is appropriate to relieve a party from its bargain merely because it subsequently finds it commercially inconvenient.

In the circumstances I am of the view that damages are an adequate remedy for Claro. Having so found, I need not consider any other factor in respect of the balance of convenience.

Conclusion

It may well be that Claro has established that it has a serious issue to be tried. It seeks declarations based on provisions of the Telecommunications Act and The Fair Competition Act. Those aspects will be dealt with at trial. It is my view however that Claro has failed to clear the second hurdle required by the guidelines in *American Cyanamid Co. v Ethicon Ltd*. It has struck a bargain with Digicel. I find that it would be improper for this court to allow Claro to deviate from the terms of that agreement on the

basis that it has discovered that it could have got a better deal. It must continue to pay at the agreed rate until it has been relieved of that obligation by one means or other. This is a clear case of a dispute over money. Equity should not be called upon to relieve it from its bargain. Claro is not entitled to an extension of the injunction.

It is, therefore, ordered that:

1. The Claimant's application for an extension of an injunction granted herein on 8 September 2010, is hereby refused;
2. The affidavit of Robert Shaw sworn to on 7 September 2010 and filed herein shall be resealed and remain sealed pending the trial of this action or until further order of the court;
3. Costs to the defendant to be taxed if not agreed;
4. Leave to appeal granted.