

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 71/2014

APPLICATION NO 146/2014

BETWEEN	CABLE AND WIRELESS (JAMAICA) LIMITED (TRADING AS LIME)	APPLICANT
AND	TRAILLE CARIBBEAN LIMITED	RESPONDENT

21 August 2014

Considered on paper pursuant to rule 2.10(3) of the Court of Appeal Rules

IN CHAMBERS

BROOKS JA

[1] On 15 August 2014, G Brown J granted a mandatory injunction compelling Cable and Wireless (Jamaica) Limited (trading as LIME), upon a payment made to it by Traille Caribbean Limited, to turn on a switch that would allow Traille to terminate international calls on LIME's telephone network. Brown J granted a stay of his order for 10 days to allow LIME to file an appeal against it. LIME has filed an appeal but now applies for a further stay of the order pending the hearing of the appeal.

[2] The main basis for the application for the stay is that compliance will oblige LIME to pay certain monies over to the Commissioner of Taxes, which monies it may not be

able to recover from Traille. In support of the application Ms Sola Hines explained LIME's fear. She said at paragraph 11 of her affidavit sworn to on 20 August 2014:

"If the stay is not granted pending the appeal, [LIME] upon terminating the international calls on its network is **at peril** to pay [telephone calls tax] TCT to the Commissioner of Taxes ("Commissioner"). In addition, having received monies representing the required deposit on the [interconnection agreement between the parties] ICA, [LIME] would be required to pay the sum of US\$67,500.00 to the Commissioner. [LIME] would be unable to recover these sums from [Traille], His Lordship having by his order excluded the payment of the TCT on the required deposit to facilitate the interconnection between the parties, as well as **in the event that [Traille] does not honour its future obligations to pay issued invoices which would include sums for TCT.**"

[3] Although Ms Hines deposed that the learned judge did not provide written reasons for his decision, it is reflected in the notice and grounds of appeal that he did give oral reasons. It also appears from the notice and grounds that the learned judge specifically dealt with the issues of the TCT, the ICA and the exclusion of the TCT from the deposit.

[4] Whereas the grant of a mandatory injunction usually requires a high degree of confidence on the part of the judge, making the grant, that at the conclusion of the matter, it would have been felt that the injunction had been rightly granted, it is similarly well established that this court will not lightly disturb the judge's exercise of his or her discretion to grant or refuse an injunction.

[5] In order for the court to order a stay of such a grant, it is necessary for the party seeking the stay, not only to demonstrate the appeal's likelihood of success, but to also

show that unless the stay is granted it will be irreparably prejudiced. LIME has done neither. In respect of the former point, Ms Hines merely opines, without explanation, that LIME's appeal has a reasonable prospect of success. In respect of the issue of prejudice, she states that there is a greater risk of injustice to LIME, if the stay is not granted, than to Traille, if the stay is granted.

[6] It appears from the quote, set out above, from her affidavit, that Ms Hine's assertion of prejudice is based on speculation. Firstly, there seems to be some uncertainty as to whether the TCT is payable at all. She uses the curious phrase "at peril" in respect of the liability to the Commissioner of Taxes. Secondly, the fear of being prejudiced has been predicated on the possibility that Traille may not pay its bill, by which payment LIME would recover the payment of the TCT. Ms Hines gives no basis for contemplating the non-payment of the bill. She does not even suggest that Traille is likely to default in making the payment.

[7] Although the document formalising Brown J's order does not mention an undertaking as to damages, it would seem that Traille must have given one (rule 17.4(2) of the Civil Procedure Rules). There certainly is no mention of it being exempted from the requirement. It would also be reasonable to assume that the ICA between the parties would allow for the cessation of service by LIME in the event of non payment of invoices. At worst, such non-payment would be a basis for LIME applying for a discharge of the injunction. These matters undercut the validity of LIME's fear of being left financially embarrassed.

[8] The question of non-payment has been examined against the principle that where an award of damages would compensate a party, that party is less likely to be prejudiced than a party whose ability to do business would be prejudiced for want of an essential element of its business.

[9] It is for those reasons that the application for a stay of the injunction is refused.

Order

- (1) The application for a stay of the interlocutory mandatory injunction granted by G Brown J on 15 August 2014 is refused.
- (2) No order as to costs.