NMCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2009HCV04656

BETWEEN	**CABLE AND WIRELESS JAMAICA LIMITED (Trading as LIME)**	**CLAIMANT**
AND	**DIGICEL (JAMAICA) LIMITED**	**DEFENDANT**

IN CHAMBERS

Paul Beswick and Richard Fraser instructed by Ballantyne, Beswick & Co. for the Defendant/ Applicant

Vincent Nelson, Q.C. and Mrs. Denise Kitson instructed by Grant, Stewart, Phillips & Co. for the Claimant/ Respondent

HEARD: October 30 & November 6, 2009

Contract - arbitration clause in contract - claim for breach of Interconnection Agreement - application for stay of proceedings and for submission to arbitration - principles governing application for stay – whether conditions satisfied for grant of stay - modern approach of the court to alternate dispute resolution - effect of CPR on proceedings - Arbitration Act, ss.5&20.

McDONALD-BISHOP, J

1. The parties are well-known players and rivals in the telecommunications industry of Jamaica. On April 18, 2001, Cable and Wireless Jamaica Ltd ("LIME"), the claimant and Digicel (Jamaica) Ltd ("Digicel"), the defendant, entered into an interconnection agreement ("the ICA") which, according to the particulars of claim, *"defines the relationship of the parties and sets out the*

parameters of its legal arrangements." The ICA sets out the terms and conditions on which the parties would enable their customers to make telephone calls across both networks and prescribes the basis for payment between them of interconnection fees.

2. In May 2002, the Office of Utilities Regulation (OUR) issued a Determination Notice that is said to have affected the applicability of the interconnection payment regime under the ICA. A bone of contention eventually arose between the parties leading to LIME applying to the OUR for clarification of the Determination Notice. On June 5, 2009, the OUR issued a Clarification Notice with regards to clause 2.5 of its Determination Notice.

3. This Clarification Notice caused a dispute between the parties in relation to the applicable rates for interconnection. Digicel also took issue with the Clarification Notice and sought to have the Clarification Notice stayed pending a hearing to set it aside on an Appeal to the Telecommunications Appeal Tribunal. A stay was denied and from all indications that appeal is still pending.

4. However, following on the Clarification Notice, on September 4, 2009, LIME commenced proceedings against Digicel claiming, *inter alia*, damages for breach of the ICA and payment of the sum of J$3,895,202,865.00 with interest thereon which it alleges are monies had and received by Digicel which are due and payable to it.

THE APPLICATION

5. On October 15, 2009, Digicel, after acknowledging the service of the claim form, filed a Notice of Application for Court Orders seeking an order that proceedings in the claim be stayed and that the dispute between the parties be referred to arbitration. It is this application that now stands before me for determination.

6. The grounds on which Digicel seeks this order for stay of proceedings are summarized as follows:

(1) *The claim is based on allegations of breach of the ICA made between the parties and a mistake of fact in relation to its operation.*

(2) *The agreement expressly provides in clause 35 that disputes in connection with the agreement should be settled by arbitration.*

(3) *The claim constitutes a dispute in relation to the ICA in which LIME seeks damages and other relief.*

(4) *The **Arbitration Act, s.5** provides for an action to be stayed where there is a submission.*

(5) *Digicel was, at the time of the commencement of the claim, and still remains, ready and willing to do all things necessary to the proper conduct of arbitration.*

THE LAW

7. The application for stay is prompted and informed by the ***Arbitration Act, section 5*** and the terms of clause 35 of the ICA. It, therefore, seems convenient at this point to set out firstly the relevant terms of clause 35. It reads, in part:

"35.1 *Subject to Paragraphs 2.2.6, 2.4.7, 2.6.5, and 3.3 of the Joint Working Manual, all disputes in connection with the Agreement not settled under other terms of this Agreement shall, at the request of either Party, be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) by three (3) arbitrators appointed in accordance with the said Rules.*

35.2 *The place of arbitration shall be Jamaica or such other place as shall be agreed by the Parties and the proceedings shall be conducted in the English language.*

35.3 Providing there is no fundamental error at law or no fundamental manifest error of fact the award shall be final and binding and (sic) the Parties.

35.4 The Arbitrator shall be authorised to determine any dispute between the Parties including, but not limited to, the construction, interpretation or application of this Agreement. In reaching a decision, the arbitrator shall take into account the commercial relationship between the Parties, the contentions of the Parties, previous dealings between the Parties and any other factor which may be relevant.

35.5 For the avoidance of doubt, nothing in this Clause 35 shall prejudice any Party's rights to make submissions to the OUR or other regulatory body and it is not intended to prejudice the rights, liabilities and obligations of either Party arising under the Act or under either Party's Carriers Licence(s) or Service Provider Licence(s) or Spectrum Licence(s).

8. It is against the background of those terms of the agreement that Digicel now seeks to invoke the court's jurisdiction to stay the claim pursuant to the ***Arbitration Act, s. 5*** which reads:

5. *"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court or a Judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and*

willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

9. It is by now well settled that the exercise of the jurisdiction to stay proceedings pursuant to section 5 is fundamentally a matter for judicial discretion. See: ***Walmsley v White*** (1892) 67 L.T. 433; ***Joplin v. Postlethwaite*** (1889) 61 L.T. 629; ***Bristol Corporation v. Aird (John) & Co.*** [1913] A.C. 241. However, it is accepted that if the conditions laid down in the section are fulfilled, the court will seldom refuse a stay. The conditions to be fulfilled have been authoritatively laid down as follows:

(i) *There must be a valid arbitration agreement and the matter in question in the legal proceedings which is sought to stay must be within the scope of that arbitration agreement.*

(ii) *The applicant for the stay must be entitled to rely on the agreement in that he is a party to the agreement or he claims through or under a party to the agreement.*

(iii) *The applicant must have taken no steps in the proceedings after appearance which under the new rules would mean after acknowledgment of service.*

(iv) *The applicant must satisfy the court not only that he is but also that he was, at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the arbitration. He must file an affidavit to this effect in support of the application.*

(v) *The court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement.*

10. If these conditions are fulfilled, then it is for the party who wishes the matter to be litigated in court, instead of being referred to arbitration, to show that the matter is one which ought not to be referred and unless he can show that, an order to stay will be made. See: ***Halsbury's Laws of England*** 3rd edn vol. 2 paras. 55-60 and the cases cited therein and ***Digicel (Jamaica) Limited v. Cable and Wireless Jamaica Limited (T/A LIME)*** 2009 HCV04120 delivered August 24, 2009 (Unreported Judgment of Jones, J).

11. Digicel, for its part, in seeking to establish that the applicant has fulfilled all these conditions, relies on the affidavits of Jan Tjernell and Paul Beswick filed in support of the application. Through these affidavits, Digicel seeks to establish that the application should be granted as based on LIME's statement of case, it is clear that the claim is based principally on an allegation of a breach of the ICA and is, therefore, a dispute in connection with the ICA. Also, that from the time of commencement of the claim to now, Digicel has been ready, willing and able to do all things necessary to further the proper conduct of the arbitration. In effect, Digicel is contending that no sufficient reason exists why the dispute should not be referred to arbitration.

LIME'S CONTENTION OPPOSING THE APPLICATION

12. LIME, in opposing the application, has conceded that Digicel has fulfilled the conditions necessary for a stay enumerated in paragraphs (i) – (iv) above. However, it contends that condition (v) is not fulfilled as sufficient reason exists for the stay to be refused. Having examined Digicel's application against the background of clause 35 and the applicable law, I do accept the concession of LIME as one rightly made. It is, indeed, beyond dispute that on the face of it, four of the five conditions necessary for the grant of a stay are fulfilled. The sole question for my determination within section 5 of the ***Arbitration Act***, therefore,

would be whether there is no sufficient reason why the matter should not be referred to arbitration.

13. LIME contends, through the affidavit of Derrick Nelson filed in these proceedings and through the submissions of learned Queen's Counsel, acting on its behalf, Mr. Vincent Nelson, that its claim arises out of the provisions of the ICA which defines the relationship of the parties and sets out the parameters of its legal arrangements. According to LIME, the question in dispute involves an issue as to what is the true construction of the ICA and the Determination Notice as clarified by the Clarification Notice of the OUR ("the OUR notices").

14. Mr. Nelson, Q.C., in an effort to demonstrate, in the absence of a filed defence by Digicel, that the substance of the dispute between the parties will involve a question of construction of the ICA and the OUR notices, directed attention to affidavits filed by the parties in proceedings before the Telecommunications Appeal Tribunal. Mr. Nelson, Q.C. submitted that certain aspects of the contents of the affidavits of Richard Fraser, affiant on behalf of DIGICEL in those proceedings, ('the Fraser affidavits') give a "*flavour as to how the matter is going to proceed*". These affidavits, he said, show what would most likely be the contention of Digicel if they were to proceed to arbitration. He submitted that the Fraser affidavits show that the Clarification Notice is a part of the dispute as it feeds into the ICA and will affect the interpretation of the ICA.

15. Learned Queen's Counsel indicated all this to demonstrate that the dispute raises a question of law as it will call into focus the construction of the ICA and the OUR notices. He continued that the primary question in determining the amount of money due and payable by Digicel to LIME, as a result of the breaches alleged, depends on the interpretation of the Clarification Notice. This must, he said, be determined and is a question of law.

16. According to Mr. Nelson, Q.C., the court would be required to determine, first, as a matter of law, the proper interpretation of the ICA and, secondly, again as a matter of law, the effect, if any, of the interpretation of the OUR notices upon the ICA. The resolution of these issues, he submitted, will impact the manner in which Digicel should be paid under the ICA and whether it is in breach of that agreement.

17. One of the main thrusts of LIME's contention that the dispute gives rise to a question of law is that, pursuant to the ***Arbitration Act, s. 20,*** the Arbitrator can be compelled to state in the form of a special case for the opinion of the court any question of law arising in the course of the reference. Mr. Nelson, Q.C. pointed out that as a matter of general principle, the construction/interpretation of a contract or any other legal document is a matter of law. Thus, where the question in dispute is one of law arising on the construction of a contract (or any other document necessary for the resolution of the dispute between the parties) the court will refuse a stay since it would be idle to remit to the arbitrator a question which the arbitrator, in his turn, would have to submit to the court.

18. In support of his arguments, Mr. Nelson, Q.C. relied on an extract from ***Halsbury's Laws of England,*** 4th edn, vol. 2, para. 566, page 292, where it is stated:

> "*Before the Arbitration Act 1889 came into force, it was laid down in a number of cases that the fact that the matter at issue between the parties was merely a question of law was `not a sufficient reason for refusing a stay, because if the parties, instead of resorting to the ordinary courts, agreed to submit their dispute to a domestic tribunal of their own choosing, it was prima facie the duty of the court to give effect to their agreement. Now, however, since an arbitrator can be compelled to state in the form of a special case for the opinion of the High Court*

any question of law arising in the course of the reference, it would seem that where the only question in dispute is a question of law, the court would be disposed to refuse a stay, at least if the arbitration agreement was in general terms and of future disputes, since it would be idle to remit to the arbitrator a question which the arbitrator in his turn would have to submit to the courts."

19. For this proposition, ***Re Carlisle, Clegg v Clegg*** (1890), 44 Ch. D. 200 was cited as the authority. In ***Re Carlisle*** a deed of partnership between four partners contained a clause providing for referral to arbitration of any dispute relating to the construction of the deed or any other matter relating to the partnership. After the death of two of the partners, the executors of one of them commenced an action claiming payment of a sum which they alleged to be due to them as executors in respect of their testator's share and interest in the partnership. Before the delivery of any defence, two of the defendants took out a summons asking that all proceedings in the action be stayed and that the matter in dispute be referred to arbitration. Although the summons was brought under the 1854 Common Law Procedure Act, the hearing took place after the commencement of the Arbitration Act of 1889, section 4 of which was identical to section 5 of our Act.

20. North, J, before whom the summons was brought, being of the opinion that the matter in dispute was one of law arising on the construction of the deed, ordered the summons to stand over. His Lordship said that he would not dismiss the summons at that point in time but would await delivery of the defence. In adopting this course, North, J explained at pages 203-204:

"So far as I can judge at present there is only a question of law to be decided. It would be absurd to refer that question to an arbitrator, who would in all probability invoke the opinion of the Court under sect. 19. I have a discretion under sect. 4, and I think the best course will be to try the question of law first. I will not dismiss the summons now, but I will order it to stand over until after the defences have been delivered. It will then appear what point of law arises. When

the defences have been delivered, any of the parties can apply to me to decide the point of law. If after that point has been decided, any question of accounts remains, I can refer it to the arbitrator to settle the figures."

21. In light of this course of action adopted by North, J, Mr. Nelson, Q.C. submitted that in ***Re Carlisle***, where in circumstances not as compelling as in this case and in respect of an arbitration clause providing for issues of construction of the agreement to be referred to arbitration, the court refused to stay the proceedings. He continued that in the instant case, the Arbitration Act is in identical terms to that under consideration in ***Re Carlisle*** and so, on that basis and in these circumstances, the court ought not to stay the matter.

22. LIME also relies further on the fact that Digicel has taken issue with the Clarification Notice before the Telecommunications Appeal Tribunal. Those proceedings, Mr. Nelson, Q.C. submitted, concern a question of law which has not yet been determined by the Appeal Tribunal. He argued that given that the Clarification Notice is not stayed and is fully effective and applicable to the parties' relationship, Digicel is, *prima facie*, entitled to raise those defences in these proceedings.

DIGICEL'S RESPONSE

23. Mr. Beswick, arguing on behalf of Digicel, submitted that when one examines the terms of clause 35, 'it is apparent and undoubtedly correct' that irrespective of the fact that the issues in dispute may include the interpretation of the ICA, the parties have voluntarily consented to arbitration as the primary method of resolution of disputes.

24. In forging this argument, learned counsel placed reliance on dicta from the House of Lords in ***Heyman and Another v Darwins Ltd*** [1942] 1 All ER 337 and particularly the dictum of Lord Wright at page 354 as confirming the correctness

of this position. The relevant portion of Lord Wright's speech is extracted as follows:

> *"It has been argued here that the order of Cassels J was right, or, at least, was not so clearly wrong as to justify its being reversed. The judge in this case, like the master, has carefully set out his reasons in writing. His view, in effect, is that the broad issue is a question of law, apparently not so much on the construction of the contract as on that of the correspondence, whether in law or in fact or in both there has been a repudiation. In my opinion, these reasons are not sufficient to justify staying the action. The judge seems to rely on the language which he quotes from Lord Parker in* ***Bristol Corporation v Aird*** *to the effect that everybody knows that, with regard to the construction of an agreement, it is absolutely useless to stay the action, because it will only come back to the court on a case stated. Any expression of opinion falling from that great judge must receive the most careful consideration, but it would not be safe to tear it from its context and give it a general application. I need not quote authorities for what has been said so often that, under a general submission, the arbitrator is appointed to decide issues both of fact and law. In the background, indeed, is the court's jurisdiction to set aside an award if it is bad in law on its face, and the opinion of the court on issues of law may be invoked by means of cases stated under the Acts of 1889 and 1934. If the submission is general, however, it will require some substantial reason to induce the court to deny its due effect to the agreement of the parties to submit the whole dispute, whether it includes both fact and law or is limited to either fact or law. In the present case, I can find no sufficient reason. The dispute is of the most ordinary character. The correspondence pursues a course similar to that in hosts of other commercial disputes. I think that the judge has acted upon an erroneous conception of the true rule in cases of this nature and that his order should be set aside."*
> (Counsel's emphasis).

25. Mr. Beswick further submitted that similar statements of the other law lords in that case has the cumulative effect of confirming that there is no rule or

principle which can be relied on to assert that because the issues involve interpretation of a contract, a dispute must inexorably be decided in the courts.

26. Mr. Beswick also pointed out that while LIME is now contending that the construction of the Clarification Notice is a question to be determined, it was, however, indicated at the Telecommunications Appeal Tribunal by Maurice Charvis, Deputy Director General of the OUR, in an affidavit filed in those proceedings, that the action proposed by LIME was not based entirely on the Clarification Notice and that LIME had indicated that its decision is based on the ICA with Digicel. Counsel also noted that in the Affidavit of Derrick Nelson filed in the same proceedings before the Telecommunications Appeal Tribunal, Mr. Nelson asserted that he disagreed with the Fraser affidavits in which it was stated that the action of LIME was based entirely on the Clarification Notice.

27. Mr. Beswick maintained that the existence of the Clarification Notice and the challenge which is made to it before the Appeal Tribunal, pursuant to a statutory right under the Telecommunications Act, does not undermine the efficacy of the arbitration clause nor does it deprive Digicel of its rights to submit the dispute to arbitration. Within this context, learned counsel made reference to clause 35.5, in particular. The statutory appeal process, he argued, is also separate and distinct from the arbitration process because the former contains no provisions for settlement of the amount being withheld by LIME.

28. In the furtherance of his argument that there is no sufficient reason why the reference should not be made, Mr. Beswick pointed to what he noted to be the 'modern approach' where the courts have begun, increasingly, to resist the attempt of parties to resile from their arbitration agreements. He directed attention to the House of Lords decision in ***Premium Nafta Products Limited and others v Fili***

Shipping Company Limited and others [2007] UKHL 40 wherein Lord Hoffman stated:

> *"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore, LJ remarked at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."*

ANALYSIS AND FINDINGS

29. Having duly considered the submissions of counsel on both sides and the evidence proffered in support of and in opposition to the application being considered, I will now turn to the sole question for my determination, namely, whether I am satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement.

30. In examining this question, I must state from the outset that having accepted that the decision to grant or not to grant the stay is a discretionary one, I am nevertheless cognizant, as Mr. Nelson, Q.C. reminded, that such discretion, like all discretions, must be exercised rationally and in accordance with recognized principles of law.

31. Therefore, in launching my examination into the circumstances of this case, I chose to employ as my springboard certain principles distilled from some relevant cases dealing with the question at hand that I find quite instructive. I seek to begin by highlighting the historical context in which arbitration contracts have assumed their efficacy in modern day commercial life and how their standing has been established and viewed in modern jurisprudence. In this regard, I have found

the words of Lord Moulton speaking, in or around 1913 in ***Bristol Corporation v Aird & Co.***, quite illuminating and useful when he stated:

> *"It has been a long and settled principle of the common law of this country that no man can effectively withdraw himself from the protection of the Courts of law any more than he can effectively deprive himself of his personal freedom. But, on the other hand, for many years it has been recognized that there are cases in which a well selected domestic tribunal... may give more complete and speedier justice than the more elaborate procedures than the Courts of law... is ever in a condition to render. Submissions to arbitration have therefore been more and more respected by the Legislature, and by the Courts in administering the legislation relating to them during the last sixty years. The great step which gave them their present status was taken in the Common Law Procedure Act, 1854. Up to that time a man could repudiate a submission to arbitration, even if the arbitration was pending and he could refuse to go to arbitration, no matter how plainly he had contracted to do so... But after the Common Law Procedure Act, 1854 matters were in a very different position. The Legislature enabled these submissions to arbitration to be made the subject of indirect decrees of specific performance. A man was not deprived of his right to come to the Court and bring his disputes there, but the Court was invested with a discretion to refuse him its assistance, if he had contractually bound himself to go to a domestic tribunal and nothing had happened which would make it unjust for the Court to insist on his keeping the bargain. In this way the right to come to Court was preserved, while at the same time men could be forced to keep contracts which they had made as to the tribunal which would settle disputes, which contracts in the eyes of the business world were an important part of the total contract entered into between the parties...Therefore, I always look upon these arbitration clauses as in business point of view a substantial portion of the contract, and I think the Courts have acted quite rightly in requiring good reason to be shewn why this part of a contract should not be strictly performed."*

32. Thirty years or so later, Lord Wright, speaking in ***Heyman v Darwins Ltd*** of the jurisdiction granted to the court under the U.K 1889 Act, s. 4. had this to say:

> *The Arbitration Act 1889, s 4, makes the power of the court to stay an action under the arbitration clause a matter of discretion and not ex debito justitiae. Though the dispute is clearly within the arbitration clause, the court "may" still refuse to stay if, on the whole, that appears to be the better course. The court must, however, be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the court is on the person opposing the stay, because in a sense he is seeking to get out of his contract to refer, though, in truth, an arbitration clause is not of strict obligation, because it is, under s 4, always subject to the discretion of the court."*

33. It is also evident from my examination of relevant authorities that in considering whether the discretion to stay or not to stay should be exercised, there is, of course, no defined menu of circumstances or a closed category of situations in which it can be said that there is or there is no sufficient reason. As expressed by Lord Parker of Waddington in ***Bristol Corporation v Aird,*** "*it appears [to me] absolutely impossible to define and certainly undesirable to attempt to define, with any precision what circumstances will prevent the Court from exercising its discretionary power."*

34. Lord Moulton, in the same case, instructed that in each case, the court is bound to consider all the circumstances. His Lordship, after looking at a few scenarios relevant to the question as to whether or not the discretion may be exercised, then said:

> *"I do not cite these as exhausting the considerations which are legitimate for a Court to pay attention to in a case like this. It must consider all the circumstances of the case but it has to consider them with a strong bias, in my opinion, in favour of maintaining the special bargain between the parties, though*

at the same time with a vigilance to see that it is not driving either party or the parties to a tribunal where he will not get substantial justice."

35. In ***Heyman v Darwins***, Lord McMillan also offered a helpful approach in conducting the enquiry as to whether a stay should be granted or not. The following are the questions he suggested to be asked (I have re-formulated them but in the order the learned Judge proposed that they should be considered):

(1) What is the precise nature of the dispute that has arisen?

(2) Does the dispute fall within the terms of the arbitration clause?

(3) Is the arbitration clause still effective or has something happened to render it inoperable?

(4) Upon the nature of the dispute being ascertained and it is found to fall within the arbitration clause which is still effective, then, is there sufficient reason why the matter in dispute should not be referred to arbitration?

36. It is, indeed, established on high authority that although the question whether to grant a stay is a discretionary one, given the nature of arbitration agreements, the starting point in determining the question should be a leaning towards upholding the parties' intention as manifested in their agreement. As such, the onus is on the party seeking to get out of the agreement to satisfy the court, on good grounds, that the agreement ought not to be enforced.

37. Having considered the various authorities, I form the view that although the court will always have a discretion to refuse a referral, where it is such, however, that the dispute is within the scope of the parties' agreement and all other conditions are, prima facie, satisfied for a referral to be made, then there must be something shown, in all the circumstances disclosed to the court at the time of the making of the application for stay, that it would be unjust, unfair or inappropriate for the court to insist that the arbitration agreement made by the parties be upheld.

38. It is against this background that I now consider LIME's contention for refusal of a stay. LIME has based its opposition primarily on the fact that the dispute involves construction or interpretation of the ICA and the OUR notices. In relying on a passage extracted from ***Russell on the Law of Arbitration,*** 20th edn. page 294, Mr. Nelson, Q.C. pointed out that since construction is involved, then it raises a question of law. The relevant phrase from the text reads: *"construction is always a question of law, and even though the document is a commercial document and the arbitrators are commercial men, their findings on construction are findings of law are not binding on the court."*

39. Of course, this extract is by no means suggesting that arbitrators are barred from dealing with issues of construction which amount to questions of law. What it is saying, for sure, is that an arbitrator's findings on questions of law are not binding on the court. The court, therefore, can review the findings of the arbitrator and make its determination as to its accuracy, reasonableness or otherwise. It cannot be taken to follow, however, that since the court is not bound by the arbitrator's finding of law then questions of law cannot or should not be the subject of a submission.

40. I share the view that for the dispute to fall outside the purview of the arbitrator, it must be that the questions raised are such that they were not among the types contemplated by the parties and are such, by their very nature, not suitable to be placed before an arbitrator. In looking at clause 35, it can be seen that it provides that all disputes in connection with the ICA, not settled under other the terms of it, shall be finally settled by arbitration. The parties further expressly and specifically declared and agreed therein that "the Arbitrator shall be authorised to determine any dispute *between the Parties including, but not limited*

to, the construction, interpretation or application of this Agreement. (Emphasis added.)

41. It is therefore clear and equally indisputable that the agreement for arbitration extends to and includes disputes that would essentially raise questions of law as well as facts. It provides for a general submission. The fact that the parties had specifically agreed to a submission in the terms of the one specified in clause 35 leads to the inevitable conclusion that they must have had it in their contemplation and reasonable foreseeability that questions of law were likely to arise. Yet, in agreeing that disputes be taken outside of the court for determination, they did not see it fit to exclude any aspect of any dispute that might give rise to any such question of law.

42. On the wording of clause 35, the referral of disputes involving construction of the ICA and relating to the ICA was clearly intended by the parties. Given the status of the parties as large and well-established commercial entities who, incidentally, are also competitors with each other, they must be taken to have fully intended all those things which they had, evidently, taken time out to carefully consider and agree. The comprehensive nature of the ICA and, in particular, the terms of clause 35 suggests just that.

43. So, upon my finding that the nature of the dispute is one that fits squarely within the four corners of the agreement and having found that the agreement is still effective and operable and manifesting a clear intention of the parties to go to arbitration with the type of dispute that has arisen, the critical question is now whether sufficient reason is shown why it should not be sent to arbitration.

44. I have noted that it has not been advanced by LIME that the sole question for determination in this dispute is one of law. Neither is it contended that the dispute is based entirely on the OUR notices. The dispute principally, in my view,

as gleaned from all the exhibited material, is about the ICA and is likely to involve both questions of fact and law. The OUR notices are collateral to the main issue although as Mr. Nelson Q.C. said the issue concerning the notices feeds into the ICA. I do not reject that as being so. The question, however, is whether this makes a referral to arbitration inappropriate or unwarranted.

45. No argument has been advanced before me to demonstrate effectively that this is a question that cannot be dealt with by three arbitrators which the parties would be obliged to select. LIME's main reason to exclude such questions from arbitration is that because the dispute is likely to involve a question of law and given that the ***Arbitration Act, s. 20*** provides for the arbitrator to state a case on question of law to the court, it would make no sense to refer the matter when the arbitrator would return it on a case stated. This, of course, is the principle enunciated in ***Re Carlisle*** and which had enjoyed the support of Lord Parker of Waddington in ***Bristol Corporation***.

Arbitration Act, section 20

46. I now deem it necessary to consider the provisions of section 20. In so far as is relevant, it provides that an arbitrator may, at any stage of the proceedings under a reference and shall, if so directed by the court, state a special case for the opinion of the court on any question of law arising in the course of the reference. This means that the arbitrator, of his own motion, may state a case or he will be obliged to do so upon the direction of the court to that effect.

47. There is, however, no provision under section 20 that once a question of law arises, the arbitrator is duty bound, without more, to state that question for the court's determination. There is no automatic referral to the court, so to speak. But then, even if an application is made to the court, there is nothing in the statute to

say that the court must automatically order the arbitrator to state a case, without more.

48. It is said that the court will not direct the arbitrator to state a case unless (1) the applicant had, in the first instance, requested the arbitrator to state a case and the request is refused; (2) the question of law on which the court's opinion is desired is material to the issues between the parties; and (3) having regard to all the circumstances of the case, the question is such as should be determined by the court: See ***Halsbury's Laws of England***, 3rd edn., vol. 2, para. 91. It means then that the referral to the court by way of case stated and the entertainment of that application by the court are possible and may, in fact, be probable. It is, however, by no means a certainty so that it can be said, with any degree of conviction, that the case *will* come back to court and the court *will* intervene where a question of law arises for determination.

49. Section 20 does not possess the effect, in my mind, that LIME seems to want me to give it. I say this because I have also noted that Parliament, in its wisdom, had not made either section 5 or section 20 subject to each other. Both sections are separate and independent of each other. Indeed, it is not stated anywhere else in the ***Arbitration Act*** that where issues of law arise, there is a duty on the arbitrator to refer such question to the court.

50. The fact that section 20 exists and provides a regime for questions of law to be dealt with cannot, in, of and by itself, be taken as a sufficient reason to stop parties from upholding their contractual obligations and for the court to refuse a stay. Section 20 was, to my mind, inserted so that parties, in their election not to invoke the court's jurisdiction in the settlement of their disputes, would nevertheless have the court's supervision and protection hovering in the background. I take section 20 as being complementary to section 5 and I will not

treat it as a curtailment on the discretion given to the court under section 5 unless good or sufficient reason is shown for me to do so.

51. In light of Mr. Nelson's submissions, the question is whether I would be minded to adopt the course adopted in ***Re Carlisle*** and stay the claim in light of section 20. I will say now that in my view the course adopted by North, J really suggests that in essence and in reality, he did not have sufficient reason disclosed before him at the time when the summons was brought for him to refuse the stay out of hand. It is for that reason that he said, *"I will not dismiss the summons now"* but that he would have given an opportunity for the defence to be filed and then for a party to apply to him to construe the document. He would then decide the question of law and then if necessary refer the matter to the arbitrator for the accounting to be done.

52. I do not think it is appropriate to adopt such a course under the **Arbitration Act, s. 5** where a party is given the statutory right to invoke the jurisdiction of the court for a stay before 'declaring his hands' in the proceedings. For such a party to be asked to disclose his pleadings before a determination can be made one way or the other, without good reason shown, would be to take it outside of the words and intent of the statute. Section 5 clearly does not require that pleadings must be closed. I believe that the application for a stay must be determined by the court on the material before it at the given time. I therefore conclude that to ask for pleadings to be closed and then for other applications to be made before deciding whether the matter should go to arbitration seems not to be in keeping with the letter and spirit of section 5.

53. I have noted within this context that there is no application by LIME in its claim seeking the assistance of the court in the proper construction of any aspects of the ICA or the OUR notices on which it seeks to rely. In ***Re Carlisle*** an

application to do so was evidently deemed necessary as North, J stood over the summons for one to be made. Of note, is that North, J was not prepared to refuse the stay out of hand until such an application was made. Even more importantly, he made no decision on the summons before the pleadings were closed. He gave time for the defence to be filed so that the question in dispute could be ascertained. I have duly noted the approach of the learned judge and it is indeed instructive that he made no decision at the time on the summons before him. I am not prepared to follow such a course in all the circumstances.

54. I am persuaded to endorse and follow the views expressed by Lord Wright in ***Heyman v Darwins*** which I will now reiterate that:

> *"[U]nder a general submission, the arbitrator is appointed to decide issues both of fact and law. In the background, indeed, is the court's jurisdiction to set aside an award if it is bad in law on its face, and the opinion of the court on issues of law may be invoked by means of cases stated under the Acts of 1889 and 1934. If the submission is general, however, it will require some substantial reason to induce the court to deny its due effect to the agreement of the parties to submit the whole dispute, whether it includes both fact and law or is limited to either fact or law."*

55. Viscount Simon, LC also expressed similar sentiments at page 338 when he said:

> *"I think the Court of Appeal was right in reversing the decision of Cassels J on this head. Even if the judge were right in regarding the issue as one in which nothing but a question of law is involved, that circumstance would not necessarily, and in all cases, make it right to refuse a stay. The observation of Lord Parker in* ***Bristol Corpn v Aird****, refers to a question of construction. Moreover, in the present case questions of fact may well have to be determined and the dispute as a whole is of a class which is constantly dealt with by an arbitrator. There is no sufficient reason why*

the matter should not be referred, and therefore, by the express language of the Arbitration Act 1889, s 4, there must be a stay."

56. I am also persuaded by Mr. Beswick's submission to adopt the words of Lord Hoffman in dealing with this question in ***Premium Nafta Products Limited v Fili Shipping Company Limited*** when he stated:

> *"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore, LJ remarked at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."*

57. In the end, I do not see sufficient reason given for me to use section 20 to refuse the application for stay.

The appeal pending at the Telecommunications Appeal Tribunal

58. Having said all this, I now turn to the second reason advanced for a stay. The reason given is that there is the matter in the Appeal Tribunal where Digicel has raised two issues of law that are expected to be raised as a defence if the dispute were to be referred. These issues of law, according to Mr. Nelson Q.C., have not yet been determined by the Appeal Tribunal. It seems to me, however, that LIME was prepared to commence court proceedings against Digicel with knowledge of Digicel's stance on the Clarification Notice which has resulted in a sore point between them. It did not, however, seek as a preliminary issue to have the notices construed before initiating its claim.

59. The fact is that a claim is now before the court notwithstanding those proceedings before the Appeal Tribunal. If the determination of that appeal is so important to the resolution of the dispute between the parties, to the extent that it is a sufficient reason for the matter not to be referred to arbitration, then it would also be a sufficient reason to stay the claim since both proceedings are adjudicative. In both proceedings, both the claim and the defence could be affected by the results of the Tribunal's findings. LIME is, however, saying 'let the claim proceed in court notwithstanding those proceedings' while at the same time saying 'do not refer the dispute to arbitration because of the pending decision.' I find this a bit mind-boggling because it means that if the claim were to proceed, then Digicel could be affected in its defence in the same way it could be affected in its defence if the matter were to proceed to arbitration. Its position would be the same whichever course is pursued.

60. Interestingly too, this point is not being taken by Digicel who is the party most likely to be adversely affected in its defence as Mr. Nelson, Q.C. is contending. Digicel is prepared to go to arbitration in accordance with the arbitration clause in the ICA despite the proceedings before the Tribunal. In fact, in light of LIME's willingness to pursue the claim with that decision pending, I am driven to conclude that it too had not regarded the appeal proceedings as being substantially critical to its claim. Having considered this argument advanced by LIME, I agree with Mr. Beswick that the agreement for arbitration is separate and distinct from the proceedings being pursued by Digicel at the Appeal Tribunal. I reject the fact of the pending appeal as a sufficiently good reason to refuse the application for a stay.

The current approach of the court to ADR

61. Before concluding, there is one other aspect of the parties' contention before me that I would like to note. Mr. Nelson, Q.C. has placed great reliance on

Re Carlisle hailing it as the case decided on legislation of identical terms and, therefore, as the decision to be followed but so was ***Heyman v Darwins*** for that matter. The question in ***Heyman and Darwins*** that went on appeal before the House of Lords in or around 1942 also concerned a question that arose in the King's Bench Division on an application for a stay pursuant to the same 1889 Act. The approach of the House in that case should, therefore, be of no less relevance or applicability than the approach of North, J in ***Re Carlisle***. I will also say that ***Re Carlisle*** was determined at a time when the 1889 Act was still in its infancy and so the jurisprudence surrounding the exercise of the court's jurisdiction within section 4 would not have been sufficiently developed.

62. Having taken all that into account, I must say that looking now (being over a century later) at a similar question that was examined in ***Re Carlisle***, I think it incumbent on me to explore legal history to see the development of the jurisprudence surrounding the question before me. I cannot agree with Mr. Nelson that the modern approach of the court as alluded to by Mr. Beswick should be ignored simply because we are dealing with a statute passed in 1900. All necessary and relevant considerations must be given to the question in issue.

63. This leads me to say that although the Arbitration Act might have lagged behind, over the past century since ***Re Carlisle***, the society has changed and so has the approach of the court in several fundamental respects. Today, the approach of the court in civil litigation is characterized by the growing importance being given to Alternate Dispute Resolution (ADR) as a means of the settlement of dispute. Arbitration is, of course, the oldest and most common form. In the last few years, the courts, the world over, have been actively promoting ADR. In this regard, one of the features of our **Civil Procedure Rules, 2002 (the CPR)** is the provision for mediation in most cases. The CPR in Part 74, has expressly recognized mediation

as a mean of improving the pace of litigation, promoting the early and fair resolution of disputes and reducing the cost of litigation.

64. And so it is that even if an application for stay had not been made in this claim and the matter was allowed to proceed unhindered, this is a type of proceeding that would fall for automatic referral to mediation upon the close of pleadings unless the court dispenses with mediation upon an application made for it to do so. It is to be further noted that even with mediation, no provision is made for the exclusion of cases involving questions of law from mediation. As the learned authors of ***Blackstone's 2004*** state:

> *"The fact that a dispute raises complicated issues of facts or law and involves more than two parties or has given rise to an acrimonious relationship between the litigants should be no barrier to mediation. In all these cases, mediation may ultimately provide the parties with a more satisfactory resolution to their dispute than the court can."*

I would adopt this view and say that it should be made to apply with even greater force to agreements for arbitration since that is what the parties themselves, from the very outset, would have freely selected as the method for the settlement of their disputes. I find, therefore, that in the instant case, the mere fact that the determination of a question of law may be involved in the resolution of this dispute between the parties should not, by itself, be a barrier to arbitration.

65. In this case, the agreement provides for not one but three arbitrators. These arbitrators are not yet named. So, there is nothing to suggest that a referral to a particular arbitrator may raise the possibility of bias or prejudice or that the question of law is such that it could not be competently or be fairly dealt with by the arbitrators who will be selected. The parties have agreed to select their adjudicators and so it is within their power to select a panel that possesses the

attributes they consider necessary to deal with the issues likely to arise between them. The parties are, therefore, able and should be willing to choose the arbitrators to meet the specific needs of the case in accordance with their agreement. I find nothing in the circumstances that would make it unfair, unjust or otherwise inappropriate for me to insist that the parties keep their bargain to submit the issues in dispute between them to arbitration.

CONCLUSION

66. After what I hope to have been a full consideration of all the relevant circumstances and having paid due regard to the stimulating and helpful arguments of counsel on both sides, I must conclude by saying that I am not moved to endorse and follow the course of action adopted by North, J in **Re *Carlisle*** as submitted on behalf of LIME. That approach does not commend itself to me in the context of this case. I find, therefore, that there is no sufficient reason shown why the dispute should not be referred to arbitration. Digicel, therefore, succeeds on this notice of application for stay of proceedings.

ORDER

67. Accordingly, the Order of the court is as follows:

1. There be a stay of the claim filed herein.

2. The dispute between the parties is to proceed to arbitration pursuant to clause 35 of the Interconnection Agreement between them.

3. Costs to the defendant to be taxed if not agreed.