

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 148/2009

APPLICATION NO. 196/09

BETWEEN CABLE & WIRELESS JAMAICA LIMITED APPELLANT
(T/A LIME)

AND DIGICEL (JAMAICA) LIMITED RESPONDENT
(FORMERLY MOSSEL JAMAICA LIMITED)

IN CHAMBERS

Mr Vincent Nelson, Q.C. and Miss Maliaca Wong, instructed by Myers, Fletcher & Gordon, for the appellant

Mrs M. Georgia Gibson-Henlin and Miss Sherian MacDonald, instructed by Henlin Gibson Henlin, for the respondent

14 and 16 December 2009

MORRISON, J.A.

Introduction

1. On 16 December 2009 I made an order staying execution pending the hearing of the appeal in this matter of a part of an order made by Norma McIntosh J in the Supreme Court on 30 October 2009. These are the reasons for that decision.

2. The appellant and the respondent are both limited liability companies engaged, among other things, in the provision of mobile telecommunications services in Jamaica. In these reasons I will refer to the appellant as 'Lime' and the respondent as 'Digicel'.

The procedural background

3. On 7 August 2009 Digicel commenced an action against Lime in the Supreme Court claiming (i) a declaration that Lime is in breach of the confidentiality provisions of the Interconnection Agreement dated 18 April 2001 between Digicel and Lime ("the ICA"), (ii) a declaration that Lime has misused confidential information by providing Digicel's confidential information to and/or for the benefit of Lime's customer facing division, (iii) an order that Lime has with intent to cause loss to Digicel unlawfully interfered with Digicel's business relations or contracts with its customers/subscribers, or (iv) alternatively, that Lime is liable to Digicel for procuring breaches of contracts between Digicel and its customers. Digicel also claimed a number of reliefs, including injunctions, an order for search and seizure, an account and damages (to include exemplary damages).

4. Also on 7 August 2009, Digicel filed an application for court orders seeking interim relief by way of the injunctions sought and the search and seizure order. As a result of clause 35 of the ICA, which provides for the referral of disputes arising between the parties to arbitration, Lime immediately filed an Acknowledgment of Service and an application to stay the proceedings pending arbitration, pursuant to section 5 of the Arbitration Act. This application was heard by Jones J who, in a written

ruling dated 24 August 2009, made the order sought by Lime staying further proceedings in the action pending arbitration.

5. This order notwithstanding, Digicel pursued its application to the court for interim relief and this was heard and determined by Norma McIntosh J who, by an order made orally on 30 October 2009, granted the injunctions sought by Digicel. (A draft of the judge's reasons for her ruling prepared by counsel for Digicel was put before me, but had not yet been approved by the judge by the time of the hearing.) However, the learned judge declined to make the search and seizure order, and instead continued a preservation order granted earlier by Brooks J on Digicel's without notice application.

6. The injunctions granted by McIntosh J were in the following terms:

"1. That the Defendant is restrained whether by itself, its officers, directors, servants, agents or otherwise howsoever, from using or disclosing the Claimant's confidential customer information relating to the use, quantity, destination and location of the services belonging to the Claimant or any part thereof for any purpose, otherwise than for giving effect to the Interconnection Agreement dated 18th April 2001.

2. That the Defendant is restrained whether by itself, its officers, directors, servants, agents or otherwise howsoever, from misusing the Claimant's confidential customer information relating to the use, quantity, destination and location of services belonging to the Claimant or any part thereof.

3. That the Defendant is restrained whether by itself, its officers, directors, servants and/or agents otherwise howsoever from targeting, calling or soliciting the Claimant's subscribers/customers or otherwise interfering with the business or business assets of the Claimant and/or interfering with contractual relations and/or procuring breaches of contract between the Claimant and its subscribers."

7. On 13 November 2009, pursuant to leave to appeal granted by Norma McIntosh J, Lime filed notice of appeal against this order. The grounds of appeal (so far 13 in all, with the right reserved to expand or amend when the judge's written reasons become available) challenge the order on several bases. Lime contends that the judge erred in finding that there are serious issues to be tried, that there would be greater harm to Digicel if the injunctions were not granted than there would be to Lime if they were granted, that Digicel would suffer loss by virtue of sections 49 and 67 of the Telecommunications Act ("the TCA") and that Digicel could suffer reputational risk as a result of a breach of the confidentiality provisions of the ICA by Lime. With regard to the form of the order itself, Lime complains that, in its present state, it restricts it from the legitimate use of information in the public domain to market its services to Digicel's customers or at all, an activity which is not prohibited either by the ICA or by the TCA and that the order, which is in its terms much wider than is justified by Digicel's pleaded case, has the

effect of significantly impeding competition in the telecommunications sector, contrary to section 3 of the TCA.

8. By Notice of Application for Court Orders, also filed on 13 November 2009, Lime applied for a stay of execution of Norma McIntosh J's order, pending the hearing of the appeal. The grounds of this application were as follows:

"1. The judgment severely impairs the Appellant's ability to market in circumstances where it has a minority share in the market and thus has the potential to cripple the Appellant's viability as a going concern;

2. The Appellant's Appeal has a good prospect of success.

3. Costs be costs in the claim."

The dispute in outline

9. The application was supported by Lime and opposed by Digicel in affidavits filed on behalf of both parties. The following is a very brief outline of the dispute between the parties, insofar as I have been able to understand it from a reading of the particulars of claim and the affidavits so far filed.

10. Section 27(1) of the TCA requires public voice carriers licensed under the Act to permit interconnection with each other's network, subject to the principles, terms and conditions set out in sections 27 to 37 of the TCA. The ICA was entered into between Digicel and Lime

pursuant to the provisions of the TCA and governs the relationship between the parties with regard to the provision of mobile telephone services in Jamaica by setting out the terms on which calls originate and are terminated on the network of each provider. In other words, it provides the terms on which the customers of one network can reach and speak to customers on the other network (referred to in section 29(2) of the Act as "any-to-any- connectivity").

11. For the purposes of facilitating interconnection provided for by the ICA, each party must of necessity disclose to the other highly confidential information, such as, for instance, billing information and marketing and commercial knowledge of a confidential nature (which is not part of the public domain). Clause 19 of the ICA sets out the terms governing the obligation of confidentiality between the parties and clause 19.6 specifically prohibits a party receiving confidential information of the other party from using that information "to provide commercial advantage to its Customer Facing Divisions" (i.e., the division of the company dealing directly with subscribers and/or having responsibility for sales and marketing). Section 47 of the TCA also provides for the confidentiality of customer information, with section 67 giving a right of action for damages for any loss or damage caused to any person by a breach of any obligation or prohibition set out in the Act.

12. Digicel contends that, in breach of the confidentiality clauses of the ICA, Lime has used information from its call detail records for targeting and soliciting Digicel's customers "on divers days including between May and June of 2009 and continuing" (Particulars of Claim, para. 22). Further and/or alternatively, Digicel contends that Lime has "unlawfully and with intent to cause loss to [Digicel's] business used the said [call detail records] to target and solicit and/or interfere with [Digicel's] customers" over the said period (para. 23). Digicel states that it became aware of these breaches as a result of several of its customers having called its customer care centre to complain about intrusions into their privacy by unsolicited calls from representatives of Lime.

13. Lime's response to these allegations has been to deny any breach of the ICA or the TCA and to say that what it has done is to use the number ranges in use by Digicel, which are publicly available information provided by the Office of Utilities Regulation ("OUR"), and by a random selection process embarked on a telemarketing campaign which, Lime further contends, is a perfectly legal activity. Lime specifically denies using any information belonging to Digicel made available to it pursuant to the ICA for this purpose. Digicel in turn challenges strenuously the explanation provided by Lime and maintains that, on the basis of its own analysis, the pattern of the numbers actually

called by Lime as part of this campaign could not have been derived from a random selection process, but could only have been the result of Lime's misuse of its call detail records.

The submissions for and against a stay

14. At the hearing before me on 14 December 2009, both Mr Nelson QC and Mrs Gibson-Henlin supplemented their detailed skeleton arguments with further oral submissions, the high quality of all of which I gratefully acknowledge. If I do not refer in detail to any of this material in these reasons, it is not out of any disrespect, but only in recognition of the fact that the resolution of the dispute between the parties, notwithstanding the powerful blows already traded on both sides, is still very much in its preliminary phase, with no doubt much more to come, both at the hearing of the appeal itself and in the arbitration, if and whenever it does get off the ground. I shall therefore restrict myself to such references to the submissions as are necessary for the purposes of considering the application.

15. Mr Nelson directed most of his attention in his submissions to paragraph 3 of Norma McIntosh J's order, submitting that it effectively restricted Lime from doing any calling or marketing of Digicel's customers, "even where there is use of information publicly available". So, for example, he submitted, a restriction which prevented Lime from calling even its own landline customers to market its mobile products "is

a total injustice to [Lime] and cannot be justified on the law or the facts of the case". Mr Nelson also submitted that the sections of the TCA referred to by Digicel gave it no cause of action and that the claim for reputational loss was equally unfounded. He accordingly submitted that Lime had a strong prospect of success in the appeal and that there were also good grounds for a stay on the basis of the potential ruin to its mobile telephone business (given that Digicel already had a 75% market share). Further, to the extent that the order was wider in scope than Digicel's pleaded case, the justice of the case called for a stay of execution of the order pending appeal.

16. Mrs Gibson-Henlin vigorously opposed the application, taking first of all a preliminary objection that the application ought to have been made in the first instance to the court below and that, this not having been done, the application ought not to be entertained by this court. She was also at pains to point out that Digicel's pleaded claim went further than the allegation of a breach of the ICA, emphasising that a substantial aspect of the claim was based on the alleged commission by Lime of the economic tort of causing loss by unlawful means, as quite recently clarified by the judgments of the House of Lords in ***OBG Ltd and another v Allan*** [2008] 1 All ER (Comm) 1. Accordingly, Mrs Gibson-Henlin submitted, Lime had not demonstrated that the appeal had any good prospect of success. Further, Lime had not produced any

documentary evidence in support of its contention that without a stay it would be financially ruined or that it would suffer irreparable harm.

Jurisdiction

17. Rule 2.14 of the Court of Appeal Rules ("the CAR") provides as follows:

"Except so far as the court below or the court or a single judge may otherwise direct –
(a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and
(b) no intermediate act or proceeding is invalidated by an appeal."

18. Rule 2.11(1)(b) of the CAR empowers a single judge of this court to make an order staying execution of any judgment or order appealed from, pending the hearing of the appeal.

19. With regard to Digicel's preliminary objection to the hearing of this application on the ground that there had been no application for a stay in the court below, while it is a fact that rule 2.14 provides that an appeal shall not operate as a stay of execution except as ordered by the court below or by this court, there is in my view no requirement in the CAR that such an application must first be made to the court below, effectively as a precondition, as Digicel contends, of an application to this court. The position with regard an application for a stay of execution therefore appears to me to be that such an application may be made, at the option of the party applying, either to the court below

or to this court. (This stands in contrast to an application for permission to appeal, which, where it may be made either to this court or to the court below, must be made in the first instance to the court below – see rule 1.8(2)). If it is in fact made and refused by the court below, then it may also be renewed in this court. Digicel's preliminary objection therefore fails and I consider that the rules clearly establish the jurisdiction of a single judge of this court to hear and determine an application for a stay of execution in the circumstances of this case.

The criteria for the grant of a stay pending appeal

20. In *Watersports Enterprises Ltd v Jamaica Grande Limited, Grand Resort Limited and Urban Development Corporation* (SCCA No. 110/2008, Application No. 159/08, judgment delivered 4 February 2009), Harrison JA regarded it as a matter of "established principle" that a stay should not be granted "unless the appellant can show that the appeal has some prospect of success" (para. 7). Thereafter, the decision whether or not to grant a stay is a discretionary one depending upon all the circumstances of the case, "but the essential question is whether there is a risk of injustice to one or other or both parties if [the court] grants or refuses a stay" (para. 10).

21. Both parties also referred to and relied on the decisions in *Linotype-Hell Finance Ltd v Baker* [1992] 4 All ER 887 (for the oft cited statement by Staughton LJ at page 888 that "if a defendant can say

that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution"), and ***Hammond Suddard Solicitors v Agrichem International Holding Ltd*** [2001] All ER (D) 258 (Dec) (for the increasingly cited statement by Clarke LJ, as he then was, at para. 22 that "the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?").

22. In addition, Mr Nelson brought to my attention the less well known and apparently unreported decision in ***Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited*** (FC2 97/6273/C, judgment delivered 23 July 1997), in which Phillips LJ, as he then was, said this:

"In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the

plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But if there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice. The starting point must be that the normal rule as indicated by Order 59, rule 13 is that there is no stay but, where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal."

Disposal of this application

23. On the basis of these authorities, I am obliged firstly to consider whether Lime's appeal in this matter has "some prospect of success". Paragraph 1 of Norma McIntosh J's order is directed at restraining Lime from using or disclosing Digicel's confidential customer information "otherwise than for giving effect to the [ICA]", while paragraph 2, which is somewhat more widely cast, seeks to restrain Lime from "misusing" that information altogether. To the extent that Lime appears to accept that the use of such information otherwise than for giving effect to the ICA would be a breach of the agreement, but insists that it has not in fact used or misused such information, it seems to me that a successful challenge to the judge's order in relation to these two paragraphs might pose some difficulties on appeal. In other words, it is difficult to see how Lime could successfully resist an interim order restraining it from doing

something which it acknowledges that it is not entitled to do. The question of whether, as factual matter, Lime has in fact breached the ICA and misused Digicel's confidential information in the manner alleged by it, would plainly amount in my view to a serious question to be tried, in accordance with **American Cyanamid v Ethicon** [1975] 1 All ER 504, and in these circumstances it would also seem that the balance of convenience lies in favour of enjoining further breaches pending trial (or, as in this case, arbitration), which is what the judge did. Indeed, in relation to these paragraphs of the order, I did not understand Mr Nelson to seriously contend to the contrary.

24. While I am somewhat more diffident whether Digicel has demonstrated that there is a serious issue to be tried in respect of those causes of action which it pleads as arising as a separate matter from the ICA (the economic torts and the provisions of the TCA), I am content to express no view on this aspect of the matter, since my conclusion in the preceding paragraph suffices for the purpose of the application that is actually before me. But as I indicated to Mrs Gibson-Henlin when I gave my decision orally, the judgments in the very important case of **OBG Ltd v Allan**, upon which she so heavily relied on these points, make fascinating reading, and I have no doubt that the true dimensions of those judgments and their applicability to this matter will be fully explored in the arbitration.

25. However, with regard to paragraph 3 of the order, it appears to me to be at least arguable, and perhaps strongly so, that it goes further than is necessary to preserve Digicel's rights pending arbitration, given that Digicel equally does not appear to contend that there is anything intrinsically illegal in the activity of telemarketing. If, as Digicel contends, Lime's telemarketing campaign is not, as Lime maintains, based on random dialling using publicly available number ranges, but rather on the use/misuse of its confidential information, then it seems to me that this, if proved, would be a clear breach of both paragraphs 1 and 2 of the judge's order and would fall to be dealt with by Digicel as such. But it certainly does appear to me that paragraph 3 in its current breadth could prove to be somewhat difficult to justify on appeal. On this basis, I would therefore conclude that, in respect of paragraph 3, Lime's application for a stay has crossed the threshold of showing that there is some prospect of success on appeal.

26. The further question that arises, therefore, is whether this is a fit case for the exercise of my discretion to grant the stay sought by Lime in respect of paragraph 3 of the judge's order. In this regard, the primary question is, it seems to me, to consider what order best accords with the interests of justice, taken into account all the known circumstances of the case. With regard to the issue of potential financial ruin, although there is obviously much at stake on both sides in this matter, I am

inclined to agree with Mrs Gibson-Henlin that this has not really been established on the evidence so far produced by Lime. However, taking the matter more broadly, I consider that there is a real risk of injustice to Lime if this paragraph of the order remains in its present form, even pending the hearing of the appeal. The order as it stands appears to me to be a broad, virtually unlimited restraint (unjustified by the evidence so far adduced) on the undertaking of what might be considered ordinary marketing activities in what is obviously a highly competitive environment. The enforcement of the order in this form does therefore have, in my view, the potential to cause irremediable harm to Lime.

27. Having indicated to the parties my view that the case for a stay of paragraph 3 of the order had been made out by Lime, I invited submissions from them as to whether it might usefully be amended in some way that could allow it to stand pending the hearing of the appeal. However, having taken into account the views of both counsel (Mr Nelson naturally invited me to stay the paragraph in its entirety, while Mrs Gibson-Henlin, equally naturally, invited me to amend it so as to preserve some elements of the prohibition), I have concluded that it would be best to stay paragraph 3 in its entirety, particularly as there is absolutely no evidence that there has been to date any interference by Lime with Digicel's business or business assets and/or contractual

relations, and/or that there has been any procurement by Lime of any breaches of contracts between Digicel and its customers.

28. In the result, the order I make is that paragraph 3 of the order made on 30 October 2009 by Norma McIntosh J is stayed, pending the hearing of the appeal. The costs of this application are to be costs in the appeal.

