JAMAICA

IN THE COURT OF APPEAL

MOTION NO: 18/98

COR: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	MINISTER OF COMMERCE AND TECHNOLOGY	APPLICANT
AND	CABLE & WIRELESS JAMAICA LTD	RESPONDENT

Douglas Leys, Senior Assistant Attorney General, and Miss Yolande Alexander for the Applicant

Dennis Goffe, Q.C. and Jermaine Simms for the Respondent

26th, 27th, 28th October & 10th November, 1998

DOWNER, J.A.

The important point of law to be decided on this aspect of the application is whether the applicant Minister has a right of appeal to this Court from the order of Langrin, J granting the respondent company leave to apply to the Full Court of the Supreme Court, for the issue of an order of certiorari to quash the Minister's decision in respect of the grant of five licences issued pursuant to the Radio & Telegraph Control Act. Also there was an application for an order of prohibition against the issue of any further licences. Since it is the Minister who has raised this

issue, the respondent company has taken a preliminary point of law to the effect that since jurisdiction on this part of the case is entrusted to the Full Court by virtue of Section 564(B)(5) of the Civil Procedure Code Law then this Court has no jurisdiction to hear this appeal.

Narrative of events

How did this issue arise? Cable & Wireless Jamaica Ltd is the successor to Jamintel whose official name was Telecommunications of Jamaica Ltd. They were granted a special licence in 1988 by the Ministry of Public Utilities & Transport. Here is how they described it in the affidavit of their director Trevor Patterson of 12th August, 1998:

> "**4.** (ii) The Telecommunications of Jamaica Limited (External Telecommunications Services) Special Licence, granted under the Radio and Telegraph Control Act whereby the Applicant is licensed to provide international telecommunication services between Jamaica and points outside Jamaica and in transit through Jamaica."

It is the contention of the respondent company that it has an exclusive licence to provide telecommunication services between Jamaica and points outside Jamaica, with ships at sea and small vessels in coastal waters. The further contention is that the Minister of Commerce and Technology has granted five licences to competitors of the company and that those grants were in breach of their exclusive special licence. When the respondent company discovered the grants to its competitors they took steps to have the Minister's decision quashed, but they were out of time for certiorari, the time permitted by law being one month. Therefore they were obliged to make an application before Langrin, J. for an

extension of time in respect to certiorari. The authority of ***Regina v. Ashford, Kent, Justices ex parte Richley*** [1955] 1 W.L.R. 562 at 563 reads:

> "The court has power, of course, to extend the order, and the present case is one in which it would be right to apply for the order to be extended. But where a person intends to apply to the court for an extension of time he must give notice to the person whom he would serve in the ordinary way as one who would be affected if the order challenged were quashed, that he intends to apply for an extension because the person affected has a right to be heard and to object to such an extension. He very likely has what I will call a vested interest in the upholding of the order. In the same way as if you go to the Court of Appeal out of time you have to give notice of motion for the time to be extended and as you have to do so in this court when justices have not stated a case within the requisite time, so, if you are going to move for certiorari out of time, you must give notice to the person who would be made in the ordinary way a respondent to the motion in order that he may be heard as to whether or not it is a fit case in which to extend the time."

Section 676 of the Civil Procedure Code Law is the provision which permits "Enlargement of time". It reads:

> "**676**. The Court shall have power to enlarge or abridge the time appointed by this Law, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

Langrin, J therefore correctly heard the summons for extension of time inter-partes. The five who were granted licences were also heard in opposition. The learned judge granted the extension and refused leave to appeal.

It is appropriate to refer to his order which in part reads thus:

> "1. (a) An extension of time to September 15, 1998 is granted to the Applicant to apply for leave to apply for an Order of Certiorari;
>
> (b) The Applicant is granted leave to apply for an Order of Certiorari to remove into this Honourable Court and to quash the decisions of the Minister of Commerce and Technology made on or about the 16th day of June, 1998, 27th February, 1998, 4th April, 1998, 6th May, 1998, and 16th May, 1998, granting licences for the operation of Radio and Telegraph stations for the purposes of international wireless telecommunications under the Radio and Telegraph Control Act,
>
> 2. Leave is granted to the Applicant to apply for an order of Prohibition to prohibit the issue of any other such licences.
>
> 3. The costs of and incidental to the application for extension of time should be reserved for the Full Court, and the costs of and incidental to the application for leave to be costs in the cause.
>
> No order in respect of a stay of any proceeding.
>
> 4. Leave to appeal refused."

It will be demonstrated that in paragraph 4. "Leave to appeal refused" ought not to have been included in the order. It gives the impression that the applicant Minister could go to the Full Court or come to this court to seek leave to appeal

This application proceeded on the basis that a decision would be handed down by **this** Court, firstly on whether **this** Court is empowered to hear an appeal against that part of the order namely 1(b) which granted The Company leave to go to the Full Court for the issue of an order for certiorari. When that decision has been made, then **this** Court would have to hear the application for leave to appeal against the learned judge's grant of extension of time. Because the extension of time was the initial application before Langrin J. it was heard inter partes. Further

the application for leave was also heard on the same basis. It is against this background that the jurisdictional issue must be determined.

> ***Does this Court, have jurisdiction to hear an appeal by the Minister from the grant of an order by a Judge in Chambers to go to the Full Court for an order of Certiorari?***

The procedural rules governing an application for an order of certiorari must take into account the special nature of the proceedings. These proceedings are markedly different from ordinary adversarial proceedings commenced by writ of summons. In the first place remedy is discretionary, but it will not be refused where the interests of justice are in favour of the applicant. Secondly, it is a public law remedy and so its issue is generally against the order of a Tribunal or a member of the Executive. Thirdly, there is an initial scrutiny or filtering process to eliminate worthless applications. Fourthly, promptitude is a necessary feature of certiorari proceedings as proceedings may be stayed until the merits are determined by the Full Court. In the case of a Minister, an important administrative decision may be quashed so the Minister may consider it prudent and suspend action until the merits of the case are determined. Fifthly, certiorari is a remedy in proceedings for judicial review. In judicial review proceedings the merits of the Tribunal's decision or the prudence of the Minister's policy is not in issue. It is the legality of procedure that is being tested. It is whether the proceedings were in accordance with law not whether the decision was right. Sixthly, there is a distinction between judicial review and an appeal An appeal is concerned with the merits of a decision and is always on a statutory basis. Judicial review has its origin in the common law. It is the exercise of the

supervisory jurisdiction of the Supreme Court. Seventhly, judicial review is recognized in the Constitution in Chapter 1 Section 1(9) which reads:

> "No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law".

Eighthly, it is always the private person who seeks the remedy of certiorari. The Tribunal or Ministry is always the respondent. Where two public authorities have a dispute they resort to the remedy of a declaration to determine their respective rights. These special features of the remedy of certiorari are not meant to be exhaustive but they are sufficient to form the background to consider the jurisdictional issue. That issue depends on the true construction of Section 564B of the Civil Procedure Code Law in the context of the Judicature (Appellate Jurisdiction) Act.

Turning now to the specific provisions of the Civil Procedure Code Law which are relevant to the jurisdictional issue, section 564A reads in part:

> "**564A.** (1) The following proceedings (in addition to any other proceeding directing by this Law or by any other Law to be so heard) shall be heard by a Full Court:
>
> (a) applications for an order of mandamus, an order of prohibition or an order of certiorari; ..."

Then there is the proviso which reads:

> "Provided that this section shall have effect subject to any provision of this Title or of any other provisions of this or any other Law giving jurisdiction to a single judge (whether in Court or Chambers) to hear any such proceeding, and shall not be construed as taking away any power

> of a single Judge which, but for this Title, would exist to hear any such proceeding."

And finally:

> "(2) No order nisi, rule nisi or summons to show cause shall be made, granted or issued in any proceedings to which this Title relates."

There are two aspects to note in this context. The Full Court of the Supreme Court is the tribunal to hear certiorari proceedings and it is recognized that provisions under the Code or another law may entrust the jurisdiction to a single judge.

Section 564B is crucial. It reads in part:

> "**564B.** (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this section.
>
> (2) An application for such leave as aforesaid shall be made 'ex parte' to a Judge in Chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on. The Judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit."

Although this section provides for ex parte applications, nothing precludes a judge from relying on the inherent jurisdiction of the Court to order that the papers be served on the respondent. The hearing will then be inter-partes but the jurisdiction is unaltered. Then comes the important section. Section 564B(5) reads:

> "**564B.** (5) Where an application for leave under this section is refused, the applicant may appeal to a Full Court, but in any such appeal a refusal of leave by the Court shall be final.
>
> (6) An appeal under this section shall be by motion made within eight days after the refusal to

> give leave, or if the Full Court does not sit within that period, on the first day on which it so sits thereafter."

The Code provides for appeal to the Full Court and states in plain language that the appeal against leave is final. It is a sensible arrangement, for the Full Court is the Tribunal which has jurisdiction of the matter, and the common form of many appeals is that the leave to appeal and the merits if any are generally inter-partes at the same time and the decision of the Court is reflected in the order which generally grants or refuses the order for certiorari. It is not to be understood that the Full Court never hears an appeal simpliciter for leave to appeal and refuse to grant leave, but those are perhaps rare occasions.

The other issue to note is that the rules specifically mention the applicant. It is the applicant who seeks to challenge a Tribunal or Minister. In arriving at its decision the Full Court may be assisted by the respondent, but the decision for the Court is to determine whether there is an arguable case presented by the applicant. There is no provision made for the respondent to appeal. Where the law gives no right of appeal to the Minister or Tribunal, they cannot pray in aid the general provisions of the Judicature (Appellate Jurisdiction) Act so as to give them a right of appeal to **this** Court. Implicit in Mr. Leys' submission that the Minister has a right to come to **this** Court is that the Minister had no right to go to the Full Court to appeal the order of Langrin, J granting the respondent company the right to go to the Full Court to seek an order of Certiorari. Mr. Goffe, Q.C. stressed the fact that a hearing before the Full Court has been fixed for 7th December where all the issues would be canvassed and thereafter there would be an appeal to **this** Court. The foundation of the applicant's case that there is a right to appeal to **this** Court was based on **Kemper Reinsurance Co v. Minister of Finance & Others**

[1998] 3 W.L.R. 630. The internet copy was relied on at this hearing. That case involved an examination of the relevant statutes in Bermuda and England. However, there is a useful statement by Lord Hoffmann which is apt in the circumstances of this case. It reads:

> "It may be appropriate, as a matter of policy, to restrict that right of appeal, but their Lordships consider that this is a matter for legislation rather than judicial interpretation."

Turning to relevant legislation which governs this issue, section 11(1) of the Judicature (Appellate Jurisdiction) Act reads:

> 11.--(1) No appeal shall lie--
>
> (a) from an order allowing an extension of time for appealing from a judgment or order;
> ...
>
> (c) from the decision of the Supreme Court or of any Judge thereof where it is provided by any law that the decision is to be final;"

As regards section 11(1)(c), it is a complete answer to the elaborate submissions of counsel. **This** Court has no jurisdiction to hear the Minister's appeal against the order of Langrin, J., granting the respondent company leave to go to the Full Court for the issue of an order for certiorari. Had the learned judge refused leave, then the respondent company could have appealed the learned judge's order, and the decision of the Full Court would have been final. There is another approach to this issue and it is equally conclusive against the submission of Mr. Leys. Turning to section 11(1)(f)(vi), it reads:

> "11--(1) No appeal shall lie--
> ...
>
> (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or

> any interlocutory order given or made by a Judge except--
>
> ...
>
> (vi) in such other cases, to be prescribed, as are in the opinion of the authority having power to make rules of court of the nature of final decisions.
>
> (2) In this section 'Judge' means Judge of the Supreme Court."

It is now necessary to turn to the Judicature (Rules of Court) Act and sections 3 and 4 read as follows:

> "3.--(1) There is hereby established a Committee to be known as the Rules Committee of the Supreme Court.
>
> (2) The provisions of the Schedule shall have effect as to the constitution and operation of the Committee and otherwise in relation thereto.
>
> 4.--(1) It shall be the function of the Committee to make rules (in this Act referred to as 'rules of court') for the purposes of the Judicature (Civil Procedure Code) Law, the Judicature (Appellate Jurisdiction) Act, the Judicature (Supreme Court) Act, the Judicature (Supreme Court) (Additional Powers of Registrar) Act, the Justices of the Peace (Appeals) Act, the Indictments Act and any other law or enactment for the time being in force relating to or affecting the jurisdiction of the Supreme Court, or the Court of Appeal or any Judge or officer of such respective Court."

The Rules Committee have provided in section 564B(5) of the Civil Procedure Code Law that the decision of the Full Court is final, and, section (11)(1)(f)(vi) of the Judicature (Appellate Jurisdiction) Act states that, no appeal shall lie to this court from any interlocutory order in such circumstances. So the only issue was whether the filtering or screening order of Langrin, J. granting leave to go to the Full Court for the issue of the order of certiorari could properly be described as interlocutory.

This is how Lord Hoffmann described the order of Wade, J. in **Kemper Reinsurance Co.** (supra). Wade, J., it must be explained, had discharged the exparte order granted by Ground, J. to quash the order of the Minister of Finance in the context of section 12(2) of the Bermuda Court of Appeal Act, 1964, which reads:

> "12(2) No appeal shall lie to the Court of Appeal -- (a) against the decision in respect of any interlocutory matter; or (b) against an order for costs, except with leave of the Supreme Court or the Court of Appeal."

Here are Lord Hoffmann's words:

> "This language appears prima facie wide enough to include the order of Wade J. In so far as her decision was interlocutory, she gave leave under section 12(2)."

Equally, Langrin's J. order granting leave to appeal to the Full Court is to be regarded as interlocutory for appeals to **this** court. So on either section 11(1)(c) or section 11(1)(f)(vi) of the Judicature (Appellate Jurisdiction) Act, the submission of Mr. Leys must fail.

Regarding the appeal against the extension of time granted to the respondent company by Langrin, J.

There is one answer to this issue and it is conclusive against the Minister. Langrin, J. granted an extension of time as more than one month had elapsed when the respondent company sought to challenge the Minister's order issuing licences to five competitors of the respondent company. The one month period is stipulated thus in section 564C of the Civil Procedure Code Law:

> "Times for applying for certiorari in certain cases.
>
> 564C. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is

> made not later than one month after the date of the proceeding or such shorter period as may be prescribed by any enactment; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

Section 11(1)(a) of the Judicature (Appellate Jurisdiction) Act (supra) provides the answer: "No appeal shall lie."

Conclusion

The preliminary objection taken by Mr. Goffe, Q.C. has succeeded because This Court in accordance with section 21 of the Interpretation Act, took judicial notice of the statute conferring jurisdiction on this court. That statute in plain language states that we have no jurisdiction to hear the proposed appeals and so cannot grant leave to appeal. We have already spent three days hearing the application for leave and the preliminary objection raised. Any further submissions would serve no useful purpose. So the motion is dismissed and the respondent company must have the agreed or taxed costs.