[2017] JMSC CIV 10

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL

CLAIM NO. 2016 HCV 05208

BETWEEN	**SYMBIOTE INVESTMENTS LIMITED**	**APPLICANT**
AND	**THE SPECTRUM MANAGEMENT AUTHORITY**	**1ST RESPONDENT**
AND	**THE OFFICE OF UTILITIES REGULATION**	**2ND RESPONDENT**
AND	**THE MINISTER OF SCIENCE, ENERGY AND TECHNOLOGY**	**3RD RESPONDENT**

IN CHAMBERS

Mr. Douglas Leys Q. C. and Mr. Douglas Thompson instructed by LeySmith for the Applicant.

Mrs. Marlene Malahoo Forte Q. C. Attorney General, Mrs. Althea Jarrett and Ms. Carla Thomas instructed by the Director of State Proceedings for the First and Third Respondents.

Mrs. Daniella Gentles-Silvera, Mr. Adam Jones and Miss Kathryn Williams instructed by Livingston, Alexander and Levy for the Second Respondent.

Mr. K. D. Knight Q. C. and Miss Stacy Knight instructed by Knight, Junor and Samuels watching proceedings for an interested party.

January 5th, 6th and 24th 2017

Leave for Judicial Review – the Telecommunications Act – Error on the face of the record – Is a preliminary decision reviewable? – Alternative remedy to Judicial Review – Section 14 of the Telecommunications Act – Section 23 of the Telecommunications Act

PUSEY J

[1] Judicial Review is one of the important cornerstones of a democratic society. It developed in a time where the citizen needed relief from unjust and capricious nobles and from organs of the state which used their powers in ways which were unreasonable and oppressive. It has developed in modern times into a process which not only allows the citizen to keep public authorities in check but it also ensures that the rule of law is maintained, in that no entity sees itself above the law.

[2] As Mangatal J described it in **Tyndall, Hon. Shirley and Hylton, Patrick et al v Carey, Hon. Justice Boyd and Ross, Charles et al** at paragraph 6 Claim No. 2010 HCV 00474 (unreported).

> *Judicial Review is the process by which the Courts exercise a supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or certain administrative powers which affect the public. This is the process that allows the private citizen to approach the Courts seeking redress against ultra vires or unlawful acts or conduct of the State, by public officers or authorities . By this process the Courts have a discretion ... to uphold a challenge to decisions or proceedings of such bodies on the basis ... of illegality, irrationality and procedural impropriety. The Court is not engaged in an analysis of the merits of the decisions themselves, but rather is concerned with the process by which the proceedings were conducted and by which the decisions were arrived at.*

[3] It is a powerful weapon as it gives the Court the power to quash a decision, prohibit the action of a state entity or order an entity to do a specific act [see Civil Procedure rules 2002 Rule 56.1(3)]. In order to ensure that this powerful weapon is properly deployed by the citizen, it is required that the Court grants leave before an application for judicial review is made. The requirement for a grant of leave is not intended to be a barrier for the genuine applicant or an additional expense aimed at denying the impecunious citizen of a remedy, rather it is a means to ensure that the Court only considers the matters which merit the Court's attention.

[4] As Mangatal J puts it in **Digicel (Jamaica) Limited v The Office of Utilities Regulation** [2012] JMSC Civ. 91 at paragraph 21

> *It is part of the Court's function ... to be astute to avoid applications being made by busybodies with hopeless, weak, misguided or trivial complaints. Public authorities need protection from unwarranted interference and plainly, the business of government could grind to a halt and good administration be adversely affected if the Courts do not perform this sifting role efficiently and with care.*

The leave process is not merely the elimination of weak and infirm cases in a judicial version of natural selection. The Privy Council in **Sharma v. Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)** [2006] UKPC 57 has indicated that the standard is much higher than that. The Board declared at paragraph 14

> *The ordinary rule is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see R v Legal Aid Board ex p Hughes (1992) 5 Admin LR623,628 and Fordham, Judicial Review handbook 4th ed (2004) p426. But arguability canot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (N) v Mental Health*

> *Review Tribunal (Northern Region) [2006] QB 468, para 62 in a passage applicable mutatis mutandis, to arguability*
>
> *" the more serious the allegation or the more serious the consequences if the allegation is proved , the stronger must be evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation must be proved to a higher degree of probability), but in the strength and the quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."*
>
> *It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings of the court on a speculative basis which it is hoped the interlocutory processes of the court may strengthen" Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 713.*

[5] In summary **Sharma** bestows on the court what has been called a threshold test of realistic prospect of success. In applying this test the Court is expected to look on all the evidence and the seriousness of the allegations in applying the test. The law on Judicial Review and the test for leave is well settled, and it is set out here merely for completeness. It was universally agreed by the parties in this case.

[6] The point of emphasis will be left to Sykes J who said in **Regina v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited)** Claim No. 2009 HCV 04798 at paragraph 58

> *The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. The Judges regardless of the opinion of the litigants, are required to make an assessment of whether leave should be granted in light of the stated approach ... it also means that an application cannot simply be dressed up in the correct formulation and hope to get by. An applicant cannot cast about expressions*

> *such as a "ultra vires", "null and void", "erroneous in law", "wrong in law", "unreasonable" without adducing in the affidavit evidence making these conclusions arguable with a realistic prospect of success.*

[7] The circumstances leading to this application for leave for judicial review are set out in the affidavits of Mr Lowell Lawrence sworn to on the 13th, 14th and 15th of December 2016.

[8] Symbiote Investments Limited was granted its Domestic Mobile Carrier and Service Provider Licences for domestic, fixed and international services with effect the 25th of May 2016. The applicant also made an application for the allocation of spectrum and the Spectrum Licence was issued on the 14th of September 2016.

[9] Prior to the Spectrum Licence being granted, but after the Domestic Mobile and Carrier Licences were granted, the Office of the Contractor General (the OCG) launched an investigation into the circumstances surrounding the grant of the Spectrum Licence. By letter dated August 26th 2016, the Honourable Prime Minister invited the applicant to a meeting of the Cabinet to take place on August 29th to discuss matters concerning the grant of the licence and the OCG report.

[10] Following that Cabinet meeting the Spectrum Licence was issued on the 14th of September 2016, by the 3rd Respondent (the Minister). It was delivered under cover of a letter signed by the 1st Respondent (the SMA). The letter indicated some conditions which were to be read as conditions of the licence. The licence itself did not state these conditions.

[11] By letters dated December 6th and 7th 2016, issued by the SMA and the OUR respectively (the earlier letters), the Applicant was notified that investigations were to be conducted, with the possible effect that the Applicant's licences could be revoked. It was noted that these investigations stemmed from possible national security concerns. These letters are the subject of this application.

[12] On December 13th 2016, the 2nd Respondent (the OUR) sent a letter to the Applicant referencing its earlier letter and indicating that it required the answers to particular questions by virtue of Section 14 (8) of the Telecommunications Act (the Act). That letter sets out some thirteen detailed questions and indicated a timeline for answers to be provided.

[13] On December 14th 2016, the SMA sent a letter to the Applicant referencing its earlier letter and seeking information pursuant to section 23A (8) and 23 A (9) of the Act. The SMA sets out some 15 questions that it required answers to and also set a timeline for these answers to be provided. These last two letters are referred to as the later letters.

[14] The Court will refrain from mentioning the details of any questions asked by the SMA or the OUR. It is sufficient to say that the questions are relevant to the conduct of the operations of the Applicant and relate to the respective licences.

[15] The Applicant appeared before the Court *ex parte* on 20th December 2016 and the Court set an *inter partes* hearing for the following day. On 21st December 2016 , all the parties appeared and a full hearing was set for January 5th and 6th 2017. On request of the Applicant the parties undertook not to discuss the matters in the print or electronic media , because of the sensitivity of the matters.

Application

[16] The Applicant has sought the following reliefs:

1.

(a) A declaration that the 1st Respondent, acted ultra vires its statutory authority by issuing a Notice of Investigation (pursuant to Section 23A (1) of the Act) dated December 6, 2016.

(b) A declaration that the 2nd Respondent, acted ultra vires its statutory authority by issuing a Notice of Investigation (pursuant to Section 14 (1) of the Act) dated December 7, 2016.

2. Accordingly, an Order of Certiorari, quashing the decisions of the 1st and 2nd Respondents to issue the respective Notices of Investigation dated December 6th and 7th 2016 respectively ("the Notices"); and

3. An Order of Prohibition directed to the 3rd Respondent prohibiting him from acting pursuant to any report based on the said investigations and in particular revoking or suspending any of the licenses granted to the Applicant pursuant to any such investigation.

4. A stay of proceedings against the 1st 2nd and 3rd Respondents staying any investigation or decision consequent on such investigation, pursuant to the Notices and from taking any steps preparatory to such investigations, until a determination of the issues in this matter by this Honourable Court

5. Alternatively an interlocutory injunction restraining the 1st and 2nd Respondents, from taking any steps to carry out any investigation pursuant to the Notices until a determination of the issues in this matter by this Honourable Court.

The grounds on which the Applicant has sought the reliefs are as follows; that:

The 1st Respondent

I. *The 1st Respondent has acted ultra vires the Act and in particular section 23A(1) as there is no statutory basis for the issue of the Notice purportedly issued under the said section by the 1st Respondent on the 6th day of December 2016.*

II. *It is the contention of the Applicant that any Notice issued pursuant to the said section 23A(1), must specify the particulars of contravention of the terms and conditions of its licence and further require the Applicant to justify whatever action is the subject of the breach, or to otherwise take such remedial action within such time as may be specified in the Notice. The said Notice fails to comply with these statutory prerequisites, with the result that the said investigation, if*

allowed to proceed would deny the Applicant the specific remedies outlined in the said section of the Act.

III. *The Notice is predicated on events and/or conduct attributable to the Applicant, which allegedly occurred subsequent to the grant of the licence; which actions are said to constitute threats to national security. The Applicant is not aware of its operations constituting any threat to national security and if there is a threat to national security, this falls under the purview of the Minister of National Security and the remit of the security forces. It is further the contention of the Applicant that the 1st Respondent does not have the jurisdictional nor technical competence to properly investigate and determine threats to national security. The Applicant fears that if the 1st Respondent is allowed to embark on this trailof enquiry it will be prejudiced and will suffer loss and damage.*

IV. *There are no particulars in the said Notice on which the Applicant can properly address the allegations that the principals of the Applicant are not fit and proper persons to be entrusted with the licences issued. Neither is there in the said Notice an opportunity provided for the Applicant to address these concerns (if they do exist).*

V. *There are no particulars in the said Notice as to the continued participation by someone with an ongoing adverse trace in the operations of the Applicant. The said Notice does not identify this person, thus denying the Applicant an opportunity to address this issue or to take the necessary remedial action (assuming there is such a person).*

VI. *The Applicant has suffered loss and damage from the issuance of this Notice, as its commercial efforts for entry into the telecommunications market have been compromised.*

VII. *The 1st Respondent has breached and defeated the legitimate expectations of the Applicant founded in the statute, by issuing the said Notice which is patently without statutory foundation and authority, and discloses a clear bias*

against the Applicant; in that the form of the Notice presupposes that revocation or suspension of the Applicant's licence is a possible result of its investigations. Section 56 of the Act, which provides for intervention on the ground of national security issues does not confer the jurisdiction to revoke or suspend the licence.

VIII. *The 1st Respondent has acted irrationally in issuing the said Notice, as no reasonable authority faced with the alleged information in the Notice, would have issued a Notice to the Applicant in this form and embark on this course of action.*

The 2nd Respondent

IX. *The 2nd Respondent has acted ultra vires the Act and in particular section 14(1), as there is no statutory basis for the issue of the Notice purpotedly issued undre the said section by the 2nd Respondent on the 7th day of December 2016.*

X. *It is the contention of the Applicant that any Notice issued pursuant to section 14(1) of the Telecommunications Act must specify the particulars of contravention of the terms and conditions of its licence and further require the Applicant to justify whatever action is the subject of the breach, or to otherwise take such remedial action, within such time as may be specified in the Notice*

XI. *The said Notice fails to comply with these statutory prerequisites, with the result that the said investigation if allowed to proceed would deny the Applicant the specific remedies outlined in the said section of the Act.*

XII. *The Notice is predicated on events and/or conduct attributable to the Applicant, which allegedly occurred subsequent to the grant of the licences which actions are said to constitute threats to national security. The Applicant is not aware of its operations constituting any threat to national security and if there is a threat to national security this falls under the purview of the Minister of National Security and the remit of the security forces. It is the contention of the Applicant that the 2nd Respondent does not*

have the jurisdictional, nor technical competence to properly investigate and determine threats to national security. The Applicant fears that if the 2nd Respondent is allowed to embark on this trail of enquiry, it is likely that it will be prejudiced and suffer loss and damage.

XIII. *There are noparticulars in the said Notice on which the Applicant can properly address the allegations that the principals of the Applicant are fit and proper persons to be entrusted with the licences issued. Neither is there in the said Notice any opportunity provided for the Applicant to address these concerns (if they do exist).*

XIV. *There are no particulars in the said Notice as to the continued participation by someone with ongoing adverse traces in the operations of the Applicant. The said Notice does not identify this person, thus denying the Applicant an opportunity to address this issue, or taking the necessary remedial action (assuming there is such a person).*

XV. *The Applicant has suffered harm loss and damage from the issuance of this Notice, as its commercial efforts for entry into the telecommunications market have been compromised.*

XVI. *The 2nd Respondent has breached and defeated the legitimate expectations of the Applicant founded in the statute by issuing the said Notice, which is patently without statutory foundation and authority and discloses a clear bias against the Applicant, in that the form of the Notice presupposes that revocation or suspension of the Applicant's licence is a possible result of its investigations. Section 56 of the Act, which provides for intervention on the ground of naitonal security issues, does not confer the jurisdiciton to revoke or suspend the licence.*

XVII. *The 2nd Respondent has acted irrationally in issuing the said Notice, as no reasonable authority faced with the alleged information in the Notice would have issued a Notice to the Applicant in this form and embark on this course of action.*

The 3rd Respondent

XVIII. The 3rd Respondent acts on the recommendation of the 1st and 2nd Respondents. It is the contention of the Applicant as outlined in this Application, that the Notices issued by the 1st and 2nd Respondents are bad in law. Accordingly the 3rd Respondent should be prohibited from acting on any recommendation from either the 1st or 2nd Respondent arising out of the Notices, as any such action of the 3rd Respondent be it revocation or suspension of the licence would be ultra vires the Act.

XIX. The 3rd Respondent can only act on recommendations issued by the 1st or 2nd Respondent pursuant to the Notices lawfully issued in accordance with the statutory procedures.

XX. Any threat to national security on which the Notice is purportedly based is best investigated and determined by the security forces and the 3rd Respondent would be taking irrelevant factors into account and ignoring relevant factors were he to act on any such investigation by the 1st or 2nd Respondents simpliciter. Additionally, under the provisions of Section 56 of the Act, the 3rd Respondent has no jurisdiction to orginate any regulatory procedure on the ground of national security.

XXI. The concurrent existence of two separate investigations of the same allegations, by two regulators reporting to the 3rd Respondent; ostensibly for the same purpose is oppressive and an abuse of process. The 3rd Respondent's conduct in authorising, condoning, or initiating such investigations is arbitrary, irrational, unreasonable and oppressive.

Stay of Proceedings and/or Injunctive Relief

XXII. The balance of convenience favours preserving the rights of the Applicant; were the 1st and 2nd Respondents allowed to carry out the said investigations, the Applicant's business interests will be adversely affected and irreparably so.

XXIII. Injunctive relief or a stay of further proceedings is in the interests of justice as it will preserve the rights of the Applicant and maintain the status quo, until the issues can be adjudicated. There is no prejudice to any of the Respondents should the stay or injunction be granted.

Telecommunications Act

[17] The powers of the SMA and the OUR which are being challenged are grounded in the followig sections of the Telecommunications Act.

14

(1) Where the Office has reason to believe that a licensee has contravened the conditions of the licence or, as the case may be, has failed to pay any amount required under section 16, the Office shall give to that licensee notice in writing

(a) specifying particulars of such contravention; and

(b) requiring the licensee to justify its action to the Office or otherwise to take such remedial action as may be specified in the notice.

(2) Where the Office gives any notice under subsection (1), the Office shall send a copy thereof to the Minister for his information.

(3) Where a licensee fails to justify its actions to the satisfaction of the Office or fails or refuses to take any remedial action specified in the notice issued under subsection (1), the Office shall notify the Minister in writing of the fact of such failure or refusal.

(4) Where a licensee fails to comply with any requirements of a notice under subsection (1), the Office may

(a) on the first occasion of such failure, recommend to the Minister that the licence be suspended for a period not exceeding three months; or

(b) if the failure occurs on any second or subsequent occasion, recommend to the Minister that the licence be suspended for such a period as the Office considers appropriate or be revoked.

(5) Before suspending or revoking the licence, the Minister shall direct the Office to notify the licensee accordingly and shall afford the licensee an opportunity to show cause why the licence should not be suspended or revoked.

(6) Subject to subsection (7), the Office may recommend to the Minister that a licence be suspended or revoked, as the case may be, if, on its own initiative or on representations made by any other person, the Office is satisfied that the licensee has

(a) knowingly made any false statement in an application for a licence or in any statement made to the Office;

(b) knowingly failed to provide information or evidence that would have resulted in a refusal to grant a licence;

(c) wilfully failed to comply with the terms of its licence;

(d) wilfully contravened any provision of this Act or any rules or regulations made hereunder;

(e) violated or failed to comply with a cease and desist order issued under section 63;

(f) provided services not authorised by its licence;

(g) operated a facility without a carrier licence;

(h) failed to make payments in a timely manner in connection with the universal service obligation levy or in respect of the regulatory fee imposed pursuant to section 16.

(7) Before taking action under subsection (1), the Office shall carry out such investigations as may be necessary and afford the licensee concerned an opportunity to be heard.

(8) For the purpose of this section, the Office may

(a) summon and examine witnesses;

(b) call for and examine documents;

(c) require that any document submitted be verified by affidavit;

(d) adjourn any investigation from time to time.

(9) If a person fails or refuses without reasonable cause, to furnish information to the Office when required to do so, the Office may apply to the Court for an order to compel the person to furnish the information the Office.

23A

(1) Where the Authority has reason to believe that spectrum licensee has contravened any term or condition of the spectrum licence or has failed to pay any amount required under section 23(7) or 26, the Authority shall give to that spectrum licensee notice in writing.

(a) specifying the particulars of the contravention; and

(b) requiring the spectrum licensee to justify its actions to the Authority, or otherwise take such remedial action within such time as may be specified in the notice.

(2) Where the Authority gives any notice under subsection (1), the Authority shall send a copy thereof to the Minister, for his information.

(3) Where a spectrum licensee fails to justify its actions to the satisfaction of the Authority or fails or refuses to take any remedial action specified in the notice issued under subsection (1), the Authority shall notify the Minister, in writing, of the fact of such failure or refusal.

(4) Where a spectrum licensee fails to comply with any requirements of a notice under subsection (1), the Authority may recommend to the Minister that the spectrum licence

(a) be suspended for such period as the Authority considers appropriate; or

(b) be revoked

(5) Before suspending or revoking a spectrum licence, the Minister shall direct the Authority to notify the spectrum licensee accordingly and shall afford the spectrum licensee an opportunity to show cause why the spectrum licence should be suspended or revoked

(6) Subject to subsection (8), the Authority may recommend to the Minister that a spectrum licence be suspended or revoked, as the case may be, if, on its own initiative or on representations made by any other person, the Authority is satisfied that the spectrum licensee has

(a) knowingly made any false statement in an application for a spectrum licence or in any statement made to the Authority;

(b) knowingly failed to provide information or evidence that may have resulted in a refusal to grant a spectrum licence;

(c) failed to comply with the terms and conditions of the spectrum licence;

(d) contravened any provision of this Act or any rules or regulations made under this Act;

(e) contravened or failed to comply with a cease and desist order under this Act;

(f) provided services not authorised by its spectrum licence;

(g) failed to pay in a timely manner any fee determined or imposed pursuant to section 23(7) or 26;

(h) failed to utilise the spectrum efficiently or at all

(7) Where a licensee holds both a licence (in this section called a "telecommunications licence") and a spectrum licence, the Minister may, upon the recommendation of the Authority, revoke the spectrum licence in any case where it has been proposed that the telecommunications licence be assigned or where the control of the licensee's operations are being transferred (whether directly or indirectly).

(8) Before taking action under subsection (6), the Authority shall carry out such investigations as may be necessary and afford the spectrum licensee concerned an opportunity to be heard.

(9) For the purposes of this section, the Authority may

(a) summon and examine witnesses;

(b) summon the production by the spectrum licensee concerned of equipment, records, documents or other information maintained or stored by the spectrum licensee in whatever manner;

(c) required that any equipment, record, document or information submitted be verified by affidavit;

(d) enter and search, in the company of an authorised officer, the premises or other property of a spectrum licensee and inspect, or seal or remove such equipment, records, documents or other information for the purpose of carrying out investigations.

(10) If a person fails or refuses without reasonable cause, to furnish any equipment, record, document or other information to the Authority when required to do so or obstructs the Authority in the exercise of its functions under this section, the Authority may apply to the Court for an order to compel the person to comply with the requirements of the Authority.

[18] In the Act , "Office" refers to the OUR and "Authority" refers to the SMA.

The December Letters

[19] The gravamen of the Applicant's case is that the purported Notices of Investigation are *ultra vires* the Telecommunications Act. These notices were sent by way of the earlier letters and are ostensibly done under Section 14 of the Act in relation to the OUR and section 23A of the Act in relation to the SMA. These sections which are set out above, deal with the investigative process that may lead to a suspension or revocation of a telecommunications licence or a spectrum licence.

[20] Mr. Leys contends that the OUR and SMA proceeded under subsection 1 of the respective sections of the Act. Those subsections require that specific disclosure be made of the alleged contravention of the Act and a requirement be made for the licensee to remedy this contravention. The Applicant points out that there are no particulars in the notice to indicate the substance of the allegations made against it. The consequence of this, Mr. Leys asserts, is that the Notice is defective and the investigation and all other acts which originate from that notice ought to be stayed as a result.

[21] The SMA has indicated by way of affidavit from its Managing Director that the reference to subsection 1 of section 23A was done in error. They have indicated that the investigation was initiated under subsections 6, 7 and 8 of the Act. The subsection 6 investigation does not have the requirements of having to declare the contravention as required in the process started under subsection 1.

[22] The learned Attorney General, appearing for the SMA and the Minister, indicated that the SMA's earlier letter was not in fact a subsection 1 Notice as required under section 23A but was in fact a notification of the fact that this investigation was instituted. Mrs. Malahoo-Forte pointed out that such notification was not required under section 23A of the Act and therefore it was a boon to the Applicant. In other words, rather than depriving the Applicant of its rights, the SMA was paying it a courtesy not required by law.

[23] The OUR has indicated in argument that the reference to subsection 1 of section 14 of the Act is in error, even though they have not made that assertion by way of affidavit. Mrs Silvera on behalf of the OUR has indicated that the text of the Notice and the specific questions asked in the later letter, indicate the nature and subject matter of the investigation. Mrs. Silvera has also indicated that the text of both of the letters sent by the OUR indicate that the investigation was in fact one under sub sectons 6, 7 and 8 of section 14 of the Act.

[24] For the avoidance of doubt it is clear that sections 14 and 23A contemplate two kinds of processes. Sections 14 and 23A empower the OUR and SMA, respectively to investigate, in circumstances that may lead to the suspension of licences granted by them. The two sections are almost indentical in their wording. In the process mentioned in subsection 1 of sections 14 and 23A the condition of the license allegedly contravened is apparent to the particular agency and the licensee must be informed of the alleged breach and given an oppourtunity to remedy that breach. A Notice must be served in relation to the alleged breach and if no action is taken, then the agency (that is, either the SMA or OUR) may recommend to the Minister that the license be revoked.

[25] The second type of process which lies under Subsections 6, 7, and 8 of sections 14 and 23A describes an investigation in which the OUR or SMA is empowered by the statute to examine witnesses and documents, require documents to be verified and even **adjourn** the investigation. In this type of investigation the agency has to afford the licensee an oppourtunity to be heard. Additionally, should the licensee refuse to answer questions the authorities may only compel the licensee by way of a Court order.

[26] It is to be noted that the word “investigation” first appears in subsection 6 of sections 14 and 23A. This Court is of the view that to describe the process initiated by way of notice issued under subsection 1 of the respective sections as an investigation is misleading. It is clear that the process in the later part of the sections refer to an investigation and the process in the early part of the sections refers to regulatory action where there is a clear and apparent breach for which no investigative course of action is employed.

[27] The letters sent to the applicant on December 13th and 14th 2016 by the OUR and SMA respectively refer to sections 14 (8) and 23A (8) and (9) of the Act. Those letters clearly set out the information requested and the type of investigation being conducted. Mr. Leys contends that these two investigations cannot coexist

and that the Applicant is likely to be confused by these two investigations, namely one under subsection 1 and the other under subsection 8.

[28] There is some lack of clarity in the letters. Not only do the earlier letters refer to subsection 1 of the relevant sections of the Act, but both of the later letters refer to their respective earlier letters as a "Notice of Investigation". The Court accepts the submission of the learned Attorney General that there was no legal requirement for a notification under the investigate powers of the SMA. That reasoning also applies to the OUR.

[29] The Court agrees with the submission of Mrs. Silvera that a careful reading of the December 7th OUR letter would indicate that the OUR was proceeding under subsection 8 of section 14 of the Act. Mrs Silvera argued that the December 7th letter refers to being informed by another entity and refers in the body of the letter to subsections 7 and 8 of section 14. A look at the December 6th letter from the SMA shows the same position. The letter mentions 23A (1) but the substance of the letter refers to the latter part of the Act.

[30] The Court holds that these letters of December 2016 were sufficient to set out the scope of the investigation. Aside from an initial reference to section 14 (1) and 23A (1) in the earlier letters, nothing in any of the letters indicate that this was a subsection 1 process. In passing, had the applicant been confused by the conflicting subsections, a simple letter from the applicant's attorneys seeking clarity may have saved all parties (and the Court) a great deal of time.

[31] In summary, the letters of December 13th and 14th set out clearly the circumstances of the investigations, and the applicable parts of the Act that empowered the authoroites to investigate. The earlier letters contained an erroneous allusion to another subsection and this error would be apparent from a proper reading of the Act and all the letters.

[32] The subsection erroneously indicated was a harmless or inconsequential error. This is not an error on the face of the record which would affect the Applicants

rights and would need to be quashed by the Court. It is not the type of error which is substantial enough for leave for judicial review to be granted.

Preliminary Decision

[33] Mr. Leys also addressed the issue of whether or not a preliminary decision could be stayed. He quoted **Judicial Review (Fifth edition)** by Sir Michael Supperstone et al at paragraph 16.511 where the text indicates

> *Certiorari could issue in respect of decisions as to gathering evidence, such as the issue of a search warrant or a witness summons. It also lay in respect of a preliminary decision.*

[34] He argued that the effect of the decision of the OUR and SMA to investigate the Applicant was so serious that it was necessary to quash the decisions. Mr. Leys pointed out that the notices of investigation caused the Applicant to spend significant sums employing attorneys from out of the jurisdiction and will put the Applicant at a disadvantage in Jamaica's competitive telecommunications market.

[35] The learned Attorney General strongly refuted this point. She cited several authorities in particular Carnwath J in **R (on the application of London Borough of Hillingdon and others) v Secretary of State for Transport** [2010] EWHC 626 in which he states that preparatory steps are not reviewable.

[36] In relation to the issue of whether this preliminary decision is reviewable, authorities seem to go in both directions. The Court was also aided by a few cases, not referred to in argument. In **Regina v. The Police Service Commission Ex parte John Luke Davis** M82 of 2000 delivered November 10th 2000 Hazel Harris J (as she then was) was asked to quash inter alia the advice of the Police Services Commission. The Commission was not authorised to discipline the applicant but could only advise the Governor General on the likely punishment and make recommendations.

[37] Harris J cited **R v Statutory Visitors to St. Lawrence's Hospital Caterham; ex parte Pritchard** 1953 2 All ER 766 for the principle that certiorari does not proceed to quash a recommendation. In Pritchard the visitors did not allow the mother of an infant to make representations to them. The Applicant sought to quash the report of the visitors and the court held that since the visitors did not have the power to make a decision but only to make a recommendation to the Board of Control, the certiorari would be inappropriate. Harris J applied that same principle to the recommendation of the Police Services Commission.

[38] In **R v Agricultural Dwelling-House Advisory Committee for Bedfordshire, Cambridgeshire and Northamptonshire, ex parte Brough** [1987] 1 EGLR 106 the court decided to quash the report of an advisory committee. In this case the competing parties were heard in absence of each other and some allegations were made against the Applicant who had no oppourtunity to refute them. Hodgson J looked at cases and authorities on this point. He despaired that

> *... we could have gone on for hours and hours finding passages both in textbooks and authorities to support either view*

[39] But his reasoning bears some examination. He said

> *In my judgment, particularly when one is considering the procedural impropriety or otherwise by which a decision of this nature – that is, one which is not finally determined - ` can be subject to judicial review, one has to pay great regard to a consideration which appears in a sentence of de Smith at p 234.*
>
> *The degree of proximity between the investigation and an act or decision directly adverse to the interests of the person claiming entitlement to be heard may be important.*
>
> *I think that is right. Merely because a decision to give advice, or the advice itself, is not finally determinative of a question is not in my view the determining factor. I think it is important to look at all the facts and see in general terms what part that subdecision, if i can coin a phrase, plays in the making of the decision as a whole.*

> *If it is only a decision to give evidence one way or another, then plainly it would not be subject to judicial review. But where that advice is sought by the determining authority from a committee of whose decision the authority is required by statute to take full account, and where there is some evidence that in practice the advice is - to put it no higher –highly likely to be followed, then I think it would be wrong to allow the proceedings to go further and require the applicant to wait until the decision of the local authority is made against him, if it is, before attacking that decision on the basis that the material upon which it was based is flawed.*
>
> *That would seem to be a wholly unnecessary requirement, and I have no doubt on the facts of this case and within the context of this legislation that the court has power to interfere at this stage and that it is a power which it ought to exercise if it is satisfied that there has been a procedural impropriety. I am satisfied that there has been that procedural impropriety. I think that in my discretion I ought not to refuse the relief sought at this stage and the consequence of that is that this decision of the committee must be brought up to this court and quashed.*

[40] I believe that there are principles to be distilled from this passage as to what circumstances need to exist for one to consider setting aside a preliminary decision.

[41] Firstly, the Court must determine whether there is a procedural impropriety. In **Brough** that impropriety was a defect in the right to be heard and to hear all the relevant allegations. The mistake in the letters to the Applicant do not in the view of this Court rise to the level of a procedural impropriety. This Court has taken the view that the error is a harmless mistake not a procedural impropriety. It is still necessary however to look at the other factors in setting aside a preliminary decision in case the Court is wrong on that point.

[42] Secondly, the Court should look at the proximity between the preliminary decision and the final one that affects the rights of the party. In **Brough** the evidence indicated that the authority usually accepted the decision of the advisory committee. Consequently, the preliminary decision went a long way to

determine the rights of the applicant. In the case before this Court, the decision made by the agencies is merely a decision to initiate an investigation which may lead to a recommendation to the Minnister. There is no evidence that the Minister always accepts such recommendations. On the contrary, there is evidence that he did not accept the recommendation of another state agency, namely the OCG in the granting of one of the original licences.

[43] Thirdly, the Court needs to look at what procedural steps follow this preliminary decision. If there are safeguards in the procedural steps after the preliminary decision, including an oppourtunity to influence the final determination, then to quash the preliminary decision would not be prudent. In the case before this Court, the SMA and OUR are able to summon witnesses, certify documents and must give the Applicant an oppourtunity to be heard. In fact , the authorities have indicated to the Applicant that they intend to use those powers in the investigation, which has not yet started. Consequently, there are sufficient safeguards in the investigative process to protect the Applicant.

[44] For these reasons this Court will not grant leave to review a decision at this stage. In my view, an application for leave to review an investigation under the sections cited may be countenanced if the authorities refused to hear evidence from the licensee during an investigation or denied them the oppourtunity to be heard.

[45] It follows therefore that the Minister cannot be at this stage prohibited from accepting the recommendation of the SMA and the OUR. This aspect of the application is premature and at this stage (to borrow the words of mangatal J) an ”unwarranted interference” in the statutory duties of the SMA and the OUR.

Mistake

[46] Counsel for the Applicant went further and indicated that even if the act was done by mistake it ought to be struck down. In support of this proposition he cited the case of **R v Leicester Gaming Licensing Committee ex parte Shine and**

another [1971] 2 All ER 1329 where the English Court of Appeal ruled that a notice placed in the paper that had a mistake should be struck down. In that case the applicants for a license mistakenly added more particulars than required under the regulation.

[47] As Denning M. R. put it the section was mandatory and even though the mistake was minor the action being specifically prohibited made the notice invalid. In concurring Edmund Davies LJ in looking at the relevant section opined

A more unqualified prohibition than that cannot be conjured up.

It is no surprise then, that Mrs. Silvera distinguished this case by the specificity of the section. She pointed out that there is no such prohibition in the Act in question.

Alternative Remedy

[48] The OUR has also pointed out that the Act has a review process set out in Part XII. That Part provides for a person aggrieved to make an application to review a decision made by the OUR, the SMA or the Minister. In addition to a review, an aggrieved person may apply to the Appeals Tribunal. The Appeals Tribunal is established by section 61 of the Act and the Second Schedule indicates that one member should be a retired judge of the Supreme Court or Court of Appeal. The other members are appointed on the recommendation of the Advisory Council and the Consumer Affairs commission.

[49] This provision of the Act provides the Applicant with a viable alternate remedy for any grievance it may have.

[50] It is this Court's view that any one of the three points already dealt with, namely that the error was a harmless error and not reviewable, that a preliminary decision of this type is not reviewable as there are sufficient safeguards, and that there is a viable and robust alternative remedy open to the Applicant that has not

been employed, would suffficently dispose of this application for leave. However for completeness, the Court will deal with some of the other issues raised.

[51] Section 56 of the Act has been prayed to indicate that national security matters cannot be investigated by the SMA or the OUR. The applicant has argued that these agencies have neither the statutory authority or the professional competence to investigate such a matter. There is nothing in section 56 or the Act generally, that creates a specific scheme to investigate national security matters. The Act provides the Minister of National Security with the power to take over or close down some entities in case of an emergency, or for reasons of national security. There is nothing before the Court to suggest that those circumstances exist at this time. The investigations being pursued touch and concern the license and are within the statutory purview of the SMA and the OUR.

[52] In light of an ongoing investigation, I am reluctant to menton detailed aspects of the letters. However, the contention that the decision to investigate was irrational or without statutory authority is not supported by the reading of the later letters. Those detailed questions in the letters comprehensively set out, the aspects of the Applicant's operations which are being investigated. Ironically, other state agencies could embark on such an investigation without informing the Applicant or giving it an opportunity to be heard.

[53] The applicant has asserted that the agencies indicate a bias by declaring that the investigations may lead to the revocation of the licences. This view is not supported by the materials issued by the Respondents. The offending letters merely indicated the seriousness of the investigation by indicating the most serious possible penalty. There is no indication that either the SMA or the OUR have come to a decision in relation to the result of the investigation.

[54] Similarly it was pleaded that the legitimate expectation of the applicants were breached by the issue of the Notice without statutory foundation. In argument we

heard that the right to a telecommunications licence was guaranteed under the Constitution. It is sufficient to point out that neither legitimate expectation or the assertion of constitutional rights can deny a regulatory authority with the requisite statutory authority to investigate the circumstances of the operation of a licence. The grant of a licence not only implies that there is no unrestricted right, but also entails that the licensee must be open to the regulatory oversight of the relevant agencies. To paraphrase Sykes J in **Regina v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited)** (cited at paragraph 6) *it is not sufficent to dress up an application in the clothes of judicial review by claiming legitmate expectation or constitutional rights. In this case the attempt to adorn this application in such a matter was equivalent to the Emperor's new clothes.*

[55] The decisions the Court has made makes it unnecessary to consider a stay of proceedings or an injunction. However, even if leave had been granted, this Court would find it difficult to grant a stay of the investigative process of a regulatory agency.

[56] Leave to apply for judicial review is refused. The court does not believe that the Applicant has a realistic prospect of success for the following reasons:

> *The letters complained of do not disclose anything more than a harmless error.*
>
> *The preliminary decision will not be reviewable as the Applicant has ample opportunity during the process of investigation to be heard and provide evidence.*
>
> *There are alternate remedies to be exhausted before seeking judicial review.*

[57] The application for leave to apply for judicial review is refused.