

Judgment Bosh

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C/L 1.038/2000

BETWEEN INFOCHANNEL LTD PLAINTIFF
AND CABLE AND WIRELESS JAMAICA LTD DEFENDANT

Dr. Lloyd Barnett and Mr. Harold Brady, Attorneys-at-law for the plaintiff instructed by Harold Brady & Co.
Miss Hilary Phillips, Q.C. and Miss Minnett Palmer, Attorneys-at-law for the defendant instructed by Grant, Stewart, Phillips & Co.

Reckord, J.

HEARD: APRIL 13, 17, 18, 19, 20, 26, 27 AND 17.8.2000

On the 12th of April, 2000 on the **ex-parte** application of the plaintiff.

I granted an interim injunction against the defendant whereby it was ordered that

1. The defendant reconvert from uni-directional to bi-directional and to restore the full characteristic of the telephone lines supplied by the defendant to the plaintiff so that they can operate in the manner in which they operated prior to Friday 31st March, 2000, forthwith.
2. The defendant by itself, its servants or agents, or otherwise howsoever be restrained from suspending, terminating, altering or compromising the facilities the defendant has supplied to the plaintiff pursuant to its All Island Telephone Licence issued under the Telephone Act preserved by the Telecommunications Act 2000, for a period of fourteen (14) days from the date hereof.
3. That plaintiff give the usual undertaking as to damages.
4. The cost occasioned by this application be costs in the cause.

By the next morning, on the 13th April, 2000, the defendant filed in the Registry of the Supreme Court, a summons seeking an order that the **ex-parte** order made the day before be stayed or discharged.

Because of the importance of the matter, with the consent of the parties, I commenced the hearing of this summons that same morning. The affidavit of the vice-president for Regulatory Affairs of the defendants company Miss Minnett Palmer was filed in support of the summons.

Miss Phillips began her submissions by setting out reasons why the interim injunction ought not to have been granted. What was the urgency that would justify the **ex-parte** application, she asked? The plaintiff's writ was dated the 12th of April, 2000, while the affidavit in support is dated the 6th of April, 2000. This was an irregularity. The plaintiff's complaint was because of action taken by the defendant on the 31st March, 2000. The parties had been in continuous communication up to February, 2000. On the basis of the New Telecommunications Act, the orders made on the **ex-parte** summons ought not to have been made.

The plaintiff admits that they were conducting these actions before 31st March, 2000. However, subsequent to March 2000, the Telecommunications Act states that certain activities known as voice on internet and voice over I.P. which the plaintiff contends that it ought to be able to provide for its customers, cannot be so provided after the Act, as it is prohibited by the statute. The plaintiff is using the assistance of the court in the commission of an offence (see sec. 9).

Section 9 provides:-

1. "A person shall not
 - a. own or operate a facility in Jamaica unless that person is the holder of a carrier licence granted under section 13;

- b. provide services to the public by means of that facility unless the person is also the holder of a service provider licence granted under section 13;
- c. sell, trade in or import any prescribed equipment unless that person is the holder of a dealer licence granted under section 13;
- d. engage in bypass operations"

"Bypass operations" means operations that circumvent the international network of a licensed international voice carrier in the provision of voice services". See section 2 (1) of the Act.

In its affidavit sworn to on the 6th of April, 2000, the plaintiff sets out in paragraphs 2-6, 16, 20, 22, 25-27 and 29 the type of activities it is engaged in providing for its customers, including voice over internet.

On the subject of the mandatory injunction granted Miss Phillips submitted that the threshold of satisfying the court that a legal right is being infringed has been described by high authority that the court must be satisfied to a high degree of assurance. In the instant case the plaintiff is saying it wishes to continue to provide voice over internet and voice over I.P. both of which are illegal acts.

Counsel pointed out that a person engaged in bypass operations is liable on conviction to a fine of \$3 million or 4 years or to both such fine and imprisonment. Voice over I.P. and voice over internet are bypass operations and the action taken by the defendant was pursuant to section 51 of the Act which states:-

"A carrier or service provider may on application to the office and on such terms and condition as the office may specify:-

- a. discontinue the provision of specified services to any person, or

b. disconnect any facility from that carrier's facility or another facility used to provide that service providers specified services,

If that carrier or service provider believes on reasonable grounds, that the person who owns or operates that facility or person to whom those specified services are provided, is engaging in bypass operations or in conduct in respect of international services that is prohibited or regulated by the international service rules.

Counsel submitted that the plaintiff is not an international voice carrier but is an internet service provider to carry voice.

Section 9 (d):- A person shall not engage in bypass operations.

Counsel pointed out that before the Act came into operation, the plaintiff had applied for a licence. The application was not considered as the applicant had failed to comply with section 11 of the Act. Having regard to the admissions of activities being conducted by the plaintiff, the defendant threatened withdrawal of lines to Infochannel. Following correspondence between the parties, the defendant had written to the plaintiff informing it that certain services were disconnected and that it had one way dialing functionality only. The plaintiff had been acting in breach of its V sat licence and was now acting in breach of the statute.

The plaintiff well know that it's activities in relation of the provision to voice over IP and voice over internet were circumscribed and it was only to exist until statute come into place. The statute was now here.

Section 11 of the Act provides for applications for licenses giving certain undertaking Section 78 (2)(c)(II); authorizes the minister to grant service provider licenses only authorizing the licensees to provide services (excluding voice services) to the public in relation to internet access through the use of facilities owned and operated by the existing telecommunications carrier.

Counsel submitted that in the past Cable and Wireless had contended that the activities by the plaintiffs were in breach of its V. sat licence and it is the claim by Cable and Wireless now that the plaintiff continues to act in breach of its licence but more importantly in breach of the statute. In fact, it was in an effort to put to bed any difficulty that could arise in relation to the classification and categorization of these activities as to whether they were unlawful, the provisions in the statute were to bring clarity to the industry.

Counsel for the defendant next dealt with the law involved. Reference was made to the case of Shepherd Homes LTD. vs. Sandham (1970) 3 A.E..R. pg. 402 at page 407. Megarry J., at letter (i), pointed out the reluctance of the court to grant an injunction on motion if it is mandatory than if it is prohibitory. He referred to 21 Halburys Laws (3rd edition) page 369, paragraph 774. There the matter is stated thus:-

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not be granted on motion. If however, the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant, after express notice, has committed a clear violation of an express contract, or where the defendant, on receipt of notice that an injunction is about to be applied for, hurries on the work in respect of which complaint was made, so that when he receives notice of an interim injunction, it is completed, a mandatory injunction will be granted on an interlocutory application."

Counsel pointed out that the plaintiff had only that day 20/4/2000 filed a summons for interlocutory injunction seeking a continuation of the interim injunction granted by me on the 12th of April, 2000 until trial.

Reference was also made to the local case of David Rudd vs. Crowne Fire Extinguisher Services LTD & Others. (1989) 26 J.L.R. page 565 where it was held by the court of appeal that the principle on which a mandatory injunction should be granted is that there should be a strong case.

Localbail International Finance Ltd. vs. Agro-export & Others:- (1986) 1 AER page 901. Held by the Court of Appeal – “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases.... Before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

In the case of a prohibitory injunction, counsel referred to the well known case of American Cyanamid Co. vs. Ethican Ltd. (1975) 1AER page 504 where Lord Diplock said at page 510, that the court must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious issue to be tried; the court should go on to consider whether the balance of convenience lies in favor of granting or refusing the interlocutory relief that is sought. As to this, the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by a award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application and the time of the trial. Lord Diplock suggested also that where other factors appear to be easily balanced that it is a counsel of prudence to take such measures as are calculated to preserve the status quo. The court should however, not embark on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either parties case.

See also Cayne & Another vs Global Natural Resources (1984) 1 AER 225. In

this case it was held that where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavor to avoid injustice and to balance the risk of doing an injustice to either party. In the instant case, counsel submitted that the plaintiff's application for injunction should not be granted. The plaintiff has not said that it is entitled to provide voice over IP, or voice over internet, nor has it assured the court that it is not engaged in by pass operations.

See S.C.C.A. No. 19/86 W.D. Miller and W. Parkes vs. Oniel Cruickshank.

Reference was also made of the case from the Supreme Court of Bermuda – No. 249/93. E. Michael Liverstock vs. Cable and Wireless: where that court held that it would never lend its authority to compel the defendant to assist the plaintiff commit a breach of the licensing requirement of the 1986 Act, which in itself is an offence nor would it compel the defendant to facilitate a breach of its own exclusive privileges granted under the authority of a statute. In that case the court had found that the plaintiff was providing a public telecommunication service in Bermuda which was unlicensed and in contravention of section 9 of the 1986 Act and hence was unlawful.

Counsel for the defendant referred to the plaintiff's affidavit filed on the 18th of April, 2000, claiming in paragraph 3 (1) that "internet services", voice over internet and "voice of I.P." are not defined in the Telecommunications Act of 2000. This she says is incorrect as the statute does define these services. See the interpretation section giving meaning of bypass operations." And 'Voice Service' which mean

(a).....

(b).....

and includes services referred to as voice over the Internet and voice over IP;

Miss Phillips submitted that the plaintiff had failed to disclose to the court in the application for the interim injunction that the proforma licence would not have permitted the plaintiff to offer voice over internet services to the public under sections 7 and 8 of the act which deals with restrictions.

Counsel summarised the case in the following way.

The dispute which existed between the parties whereby the plaintiff claimed that it was providing as part of its full internet services voice over IP. and voice over Internet as against basic voice telephony which it said it did not have the capacity to provide. This has now been resolved by the Telecommunications Act 2000 which now makes it clear that if plaintiff is engaged in these services and in bypass operations it is unlawful.

There is no longer a matter of new technicalities arising as the Act now clarifies that. Section 9 speaks specifically to bypass which is made unlawful. On any literal interpretation of the statute, the defendant was entitled to act as it did pursuant to section 51 and on application to the office, the O.U.R. changed the lines from bi-directional to uni-directional functionality.

The court ought not to readily set aside the approval given by O.U.R. which is charged with the responsibility to monitor the players in the industry over which it has jurisdiction. This body has technical expertise.

There is no serious question to be tried and the court ought not to go to the balance of convenience, if it does, it is clearly in favor of the defendant.

The plaintiff claims loss of \$2 million per month. Damages will suffice and the defendant is in a position to pay. The court should look at evidence that the defendant's clients are complaining of quality of service they are getting as a result of interference by the plaintiff. The application ought to be refused.

There are two summonses before the court. The first one by the defendant to stay or discharge the injunction because the law requires one to come to court quickly.

There has been material non-disclosure, mainly in relation to the proforma license and the agreement between Cable and Wireless and Infochannel of 19th of August, 1999. The court, should discharge the interim injunction and the 2nd summons by the plaintiff for interlocutory injunction should be refused.

PLAINTIFF'S SUBMISSIONS

In response to the defendant's complaint, Dr. Barnett presented the plaintiff's reply in writing which is attached hereto: In paragraph 8 it was counsels opinion that prior to the Act of 2000," no license was required for internet services as such".

Miss Phillips disputes this. She said in her written response at paragraph 2 that this was never resolved by a court and therefore the plaintiff cannot claim to have a determined right.

Counsel referred to a number of cases. The Bermuda case of Liverstock is essentially different from the instant case.

American Cyanamid vs. Ethican - This provides general principles on interlocutory injunction.

Shepherd Homes vs. Sandham - this concerning mandatory injunction. Esso Standard Oil vs. Chan (1988) David Rudd vs. Crowne Fire Exl. (1989) Locabail Informational Finance vs. Agro-export (1986) page 906 – 907 Cayne and Another vs. Global NATURAL Resources (1984) 1 AER 225. Where grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action. Luganda vs. Service HOTELS ltd. (1969) w.l.r. 1056 Films Rover Informational Ltd. and Others vs. Cannon Film Sales LTD. The court was required to feel a high degree of assurance that the plaintiff would succeed at trial before an injunction would be granted. Infochannel Ltd. vs. Cable & Wireless Jamaica Ltd. (Suit No. E014/99). Similar relief claimed as in instant case. The Cruickshank Case.

Submit that the plaintiff has a licence which has a considerable period still to run.

As a matter of law, a statute is not to be interpreted as taking away vested rights unless it is in expressed terms. The present service contract between the plaintiff and the defendant does not authorize the action taken by the defendant. Section 51 requires certain pre-conditions to be satisfied before it can be invoked.

Miss Phillips in reply refers to the case of Digital Express NETWORK Ltd. vs. Telecom S.A. Limited High Court of South Africa. In order for the applicant to succeed with the application he must establish that he has a lawful right.

In the 1999 Infochannel case vs. Cable & Wireless. This was before the new act came into operation so different procedure applies. The judgment ought not to be relied on now as the new Act makes different provisions. The new Act makes it absolutely clear – definition careers all aspects.

The South Africa case is unhelpful - it does not deal with transitional provisions.

FINDINGS

The writ of summons in this action was filed on the 12th April 2000. On the same day an **ex-parte** summons was issued, the plaintiff applying for an interim injunction to restrain the defendant from interfering with the facilities the defendant had supplied to the plaintiff and also to restore certain facilities enjoyed by the plaintiff prior to 31st March, 2000. It is to be noted that the new Telecommunications Act came into operation on the 1st of March, 2000, just about 6 weeks before this action was filed. To the best of my information, this was the first case coming before the court for consideration under the new act.

In order to satisfy a court to grant an injunction there are certain conditions that an applicant needs to fulfill. They are all set out in the well know American Cyanamid case of 1975 reported at 1 A.E.R page 504.

The question that has to be asked now is what is the right that the plaintiff is seeking to protect. Is it the right to engage in bypass operations? This is now illegal under section 9 of the new act and is attended by a sentence of \$3 million or 4 years imprisonment. Is it a right to voice over IP or voice over internet? This area is not yet settled and is hotly contested but may incur penalty of \$500,000 or 12 months imprisonment. Is it the right to operate for up to 90 days after the commencement of this new act-the transitional period? In any event that period has long passed.

As in the previous 1999 Infochannel case, I find that there are serious issues to be tried. The plaintiff has said his loss, because of the defendant's interference, is about \$2 million per month together with other losses which could not be satisfied in monetary terms. In these circumstances would the court be justified in granting an order for mandatory injunction? I think not.

"Before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction" See Locabail International Finance Ltd. vs. Agro-export and others (supra).

I do not now have that high degree of assurance. The claim for prohibitory injunction also fails. If the plaintiff succeeds at trial, I am of the view that damages will suffice and that the defendant is in a position to satisfy such a judgment.

Accordingly, the interim injunction granted on the 12th of April is discharged and the plaintiff's application for an Interlocutory Injunction is refused and the summons is dismissed.

Costs to be costs in the cause.

Certificate for one counsel granted.

Leave to appeal granted.

Application for stay is refused.