IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
(COMMERCIAL COURT)
2017: No. 231

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW UNDER THE RULES OF THE SUPREME COURT 1985 ORDER 53 RULE 3

AND IN THE MATTER OF THE REGULATORY AUTHORITY ACT 2011

AND IN THE MATTER OF THE ELECTRONIC COMMUNICATIONS ACT 2011

BETWEEN:

ONE COMMUNICATIONS LTD.
(FORMERLY KEYTECH LIMITED)

First Applicant

LOGIC COMMUNICATIONS LTD.
(TRADING AS ONE COMMUNICATIONS)

Second Applicant

BERMUDA DIGITAL COMMUNICATIONS LTD.
(TRADING AS ONE COMMUNICATIONS)

Third Applicant

CABLE CO. LTD

Fourth Applicant

- v -

REGULATORY AUTHORITY

Respondent

-and-

BERMUDA TELEPHONE COMPANY LIMITED

TELECOMMUNICATIONS (BERMUDA WEST INDIES) LTD

Interested Parties

RULING

(in Chambers)

Costs-failure of Regulatory Authority to complete market review of telecommunications sector within prescribed time limit-limited declaratory relief granted to applicant-whether applicant achieved substantial success

Date of hearing: February 19, 2018
Date of Ruling: March 5, 2018

Mr John Wasty Appleby (Bermuda) Limited, for the Applicants
Mr Alex Potts, Kennedys Chudleigh Ltd, for the Respondent (the "RA")
Mr Jeffrey Elkinson, Conyers Dill and Pearman Limited, for the Interested Parties

Introductory

1. By a Judgment dated November 14, 2017, I granted the Applicants declaratory relief in respect of an alleged failure by the Respondent to comply (within the prescribed time limits) with section 59(2) of the Regulatory Authority Act 2011 and sections 23(6)(a) and 24(5) of the Electronic Communications Act 2011. I summarised the outcome as follows:

> "*64. As I have already noted, the correct legal position lies in the middle of the positions contended for by the parties. The consequences of non-compliance with the market review time-limit is not that the SMP Order is wholly unenforceable, having regard to both (a) the fact that it is still generally in force as a matter of law, and (b) the fact that it has not been established that the impugned obligations are wholly redundant in practical and regulatory efficacy terms. The consequence of this finding is not, in turn, that the RA is entitled to enforce all of the relevant obligations, including those which may be wholly redundant in practical and regulatory efficacy terms. I find that the Applicants are entitled to declarations substantially in the following terms:*
>
> > '*1. The Regulatory Authority has failed to comply with the time limit imposed by section 23(6)(a) of the Electronic Communications Act 2011 which required it to complete a market review within four years of the initial market review which was completed on 29 April, 2013.*
> >
> > *2. any attempt by the Regulatory Authority to initiate enforcement action for non-compliance with any ex ante remedies provided for in the Regulatory Authority's*

> *'Obligations for Operators with Significant Market Power (Consultation Summary, Final Decision, Order and General Determination)', dated 7 August 2013 is ultra vires, unlawful and invalid, but only to the extent that such enforcement action relates to an alleged failure to comply with any of the said remedies which are no longer* '*necessary to prevent or deter anti-competitive effects*' *as required by section 24 (1) of the Electronic Communications Act 2011*.' *...*
>
> *66. …The Applicants have accordingly achieved a significant measure of success. The uncertainty of which the Applicants complained of the outset of the present proceedings has been reduced rather than eliminated altogether….*
>
> *67….Nevertheless the RA has also achieved an important measure of success in defeating the claim for a declaration that the SMP Order is wholly unenforceable. Its broad position that it is not enough for the Applicants to make generalised complaints of commercial prejudice has to a material extent been vindicated….*"

2. Mr. Wasty, supported by Mr Elkinson, assumed the burden of persuading me that the Applicants had achieved substantial success and that the following characterisation of the primary controversy between the parties was wrong. In the introductory segment of the Judgment, I described the issues in dispute as follows (emphasis added):

> "*6. Putting to one side the subsidiary dispute about precisely when the RA was required to complete its second market review (i.e. when the 4 year time limit for completing the review expired), the central dispute was what consequences flowed from a failure to comply strictly with the statutory time limit which had clearly (by the date of the hearing) occurred. An analysis of this narrow question touches upon not just the true object and purpose of the wider statutory scheme, but also involves at least cursory consideration of what alternative remedies are available to the Applicants within this legislative scheme.*"

The governing principles

3. The governing principles were not in controversy. Mr Wasty placed various authorities before the Court. There is a strong presumption that costs should follow the event. In deciding which party has succeeded, even in a case which is disposed of by consent, the Court is required to decide which party has achieved "*substantial or real-life success*": *First Atlantic Commerce Ltd-v- Bank of Bermuda Ltd.* [2009] Bda LR 18 at paragraph 64 (Evans JA). Where it is not obvious or it is controversial as to which party has won, the outcome for the

purposes of assessing the incidence of costs must be determined in a practical "real-life" manner.

The issues in dispute

4. Mr Potts was content to accept that the Judgment merely supported the conclusion that each side should bear their own costs. The Applicant did not apply for costs until more than two months after the Judgment was delivered. The issues in dispute must be analysed against the following background:

    - the Applicants were "Significant Market Power" ("SMP") service providers made subject to regulatory obligations designed to promote competitiveness and resultant consumer benefits;

    - the Interested Parties were competitors of the Applicants, but also SMP providers;

    - the application was designed to advance the commercial interests of the Applicants, not to advance the public interests of good administration;

    - the present proceedings were not preceded by a letter before action. But the Respondent made no attempt in correspondence to define or narrow the issues in dispute either.

5. Whether the time period for commencing the next Market Review had expired was not in dispute. The issue of when it expired was clearly subsidiary to the central question of what consequences flowed from non-compliance. That issue was decided in the Applicant's favour. The protagonists adopted essentially the following broad positions on the main issue:

    (1) the Applicants contended that the ex ante remedies they were subject to fell away altogether as a result of the Respondent's non-compliance with the time-limit;

    (2) the Respondent contended that the ex ante remedies continued to have full legal force and effect.

The result

6. The result on this main issue was patently partial victory for each side. The Applicants succeeded in establishing that the Respondent could not enforce any ex ante remedies which no longer had any policy rationale. The Respondents succeeded in establishing that non-compliance with the statutory time-limit did not nullify the ex ante remedies altogether. The pivotal decision was in large part based on the concession creditably made by the Respondents in a Consultation

Document published a few days before the hearing. It is not likely (based on the Judgment) that the Applicants would have obtained the declaration they ultimately obtained based on the evidence filed up to that point. In the Consultation Document, it was admitted that:

(1) most the existing ex ante remedies had lost market relevance; and

(2) the Respondent did not intend, pending the completion of the next Market Review, to enforce those unidentified remedies which had lost their utility.

7. In my judgment it is impossible to fairly conclude that the Applicants succeeded in 'real life' terms on the main issue in controversy. The most just result in the exercise of my discretion is to make no order as to costs.

Conclusion

8. Having regard to the proportionality dictates of the overriding objective, I would summarily make no order for the costs of the present costs application. I have sought to look at the position overall, including balancing the success achieved by the Applicants on the subsidiary issue of when the time limit expired (for which the Applicant has not been rewarded in costs) with the Respondent's success on the narrow costs issue.

9. Each side (including the Interested Parties) shall therefore bear its own costs in respect of the entire proceedings.

Dated this 5th day of March, 2018

IAN RC KAWALEY CJ