

BARBADOS

No. 392 of 2007

IN THE SUPREME COURT OF BARBADOS

HIGH COURT

CIVIL DIVISION

BETWEEN

TELE (BARBADOS) INC PLAINTIFF

AND

**CABLE AND WIRELESS (BARBADOS)
LIMITED DEFENDANT**

Before the Honourable Mr. Justice Christopher Blackman, G.C.M.

Judge of the High Court

2007: March 13,14

: March 21,

Mr. Andrew Thornhill and Miss S. Murrell for the Plaintiff

Mr. Patterson Cheltenham Q.C., Mr. Alrick Scott and Miss Hanna Chrystosym for the Defendant.

Decision in Skeletal Form

[1] This application by the Plaintiff is for an interlocutory mandatory injunction commanding the Defendant to forthwith restore certain Services to facilitate the operation of the Plaintiff's ISP Service and its TeleBarbados Calling Card Service, until after the trial of this action or until further Order.

[2] In support of the application, Affidavits have been sworn by Patrick Hinkson the Vice President and Chief

Financial Officer of the Plaintiff Company and Dr. Blaine Gilles an Economist and Telecommunications Consultant.

- [3] The undisputed facts of the matter may be found in paragraphs 1 to 4, and 14 to 17 of the Plaintiff's Written Submissions (WS). The areas of contention between the parties lie in the construction placed on certain provisions in the Interconnection Agreement dated 16 May, 2006. These have been articulated by the Defendant in the following manner: Whether the Plaintiff in offering an International Calling Card Service and Internet Call-up service is acting in conformity with the Interconnection Agreement, or whether as alleged by the Defendant, the Plaintiff's actions constitute a direct violation of that agreement. In addition, the Plaintiff has contended that an inability to continue to market its calling cards would have serious adverse financial consequences for its continued existence.
- [4] Mr. Richard Small, Manager, Domestic Carriers and Service Providers of the Defendant Company swore an Affidavit in reply to that sworn by Mr. Hinkson, contending at paragraph 9 that outgoing international services were specifically not included in the May 16, 2006 Agreement. In a further Affidavit, Mr. Small's sought to refute the opinions expressed by Dr. Gilles in his Affidavit, particularly those recorded in the two paragraphs both numbered 8 thereof.
- [5] Mr. Small, at paragraph 14 of his March 14th Affidavit observed that "the Laws of Barbados does not contemplate 'indirect access' which accommodates or allow a customer of one provider to access or use the outbound international services of the other provider." In support of this, the Telecommunications (Numbering) Regulations of 2003 (SI 96 of 2003) has been exhibited.

THE ISSUE

- [6] It is common ground between the parties that there is a serious question to be tried, so meeting the first criteria set by the Courts when considering an application for an interlocutory injunction, whether mandatory or prohibitory. [see *American Cyanamid*] and dicta of **Lord Diplock** at 408. The sole issue therefore for determination is **'Where does the greater risk of injustice lie, in granting or refusing the injunction.'**
- [7] The common thread in the several cases relied upon by Mr. Thornhill, Counsel for the Plaintiff, and Mr. Cheltenham, Counsel for the Defendant may be found in the dicta of **Hoffman J** [as he then was] in **Films Rover Ltd v. Cannon Film Sales Ltd** [1986] 3 All E.R. 772; [1987] 1 W.L.R. 670 at page 680 where he observed that:

"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

[8] **Chadwick J** in **Nottingham Building Society v Eurodynamics Systems PLC and others** [1993] F.S.R 468 at page 474 commented that:

“This being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong.”

[9] See also **Phillips L.J** in **Zockoll Group Ltd v Mercury Communications Ltd** [1998] F.S.R 354 at page 366; and the dicta of de la Bastide CJ in **East Coast Drilling and Workover Services Ltd v. Petroleum Co of Trinidad and Tobago Ltd** [2001] 58 WIR 351 at page 360.

[10] In the Canadian case of **Hardman v. Alexander** [1998] N.SJ No. 562 **Hood J** adopted the following extract from the text on **“Injunctions and Specific Performance”** (2nd ed., 1998, Canada Law Book) by Justice Robert J Sharpe, where at p.2-42 he said:

“an interlocutory mandatory injunction will be more readily granted ‘where the Defendant was compelled not to embark on a fresh course of conduct ... but to revert to a course of conduct pursued before the occurrence of the acts or omissions that provoked the litigation.” (quoting from **Business World Computers Pty Ltd v. Australian Telecommunications Commission (1988) 82. A.L.R (Aust. Fed. C.A at p.503).**

[11] In the instant case the occurrence of the acts that provoked the litigation followed the launch of the Plaintiff’s Call Card Service on February 16, 2007. The Affidavits of both Mr. Hinkson and Mr. Small detail the series of events which ensued after February 16, 2007.

[12] On the basis of the information disclosed in the respective Affidavits, and without in any pre-determining the substantive issue, it seems to me that in tune with the principles espoused in the **Business World Computers** action cited above, the parties should:

“revert to the course of conduct pursued before the occurrence of the acts or omissions that provoked the litigation.”

[13] Moreover in determining where did the greater risk of injustice lie, in granting or refusing the injunction, I am conscious that notwithstanding the contentions of the Plaintiff, as to the damages it was likely to suffer if the Injunction was refused, no evidential material has been placed before me to support its position. On the other hand, Mr. Small in his Affidavits of March 14, 2007 was quite specific as to the known harm already sustained by reason of the Plaintiff's alleged breach of contract and the likely consequences were it to continue.

[14] In the result, without in any way prejudging the issue, I am of the view that the greater risk of injustice lies in granting the injunction sought to the Plaintiff. The application is therefore dismissed.

[15] It is in the interests of the parties that this matter is resolved as quickly as possible, and as urged by Counsel for the Defendant, in consonance with the decision of **de la Bastide C J in East Coast Drilling**, I now issue the following directions for the future conduct of the action:

1. [a] the Plaintiff to deliver its amended statement of claim on or before 4 April, 2007;
 - [b] the defence to be delivered on or before 18 April, 2007;
 - [c] reply (if any) to be delivered on or before 25 April, 2007
 - [d] summons for further directions to be filed on or before 2 May, 2007 and made returnable on or before May 18, 2007;
 - [e] all interlocutory matters to be dealt with at the hearing of the summons for further directions; and
 - [f] the case be included in the cause list for hearing in June 2007, and listed for trial that month.
2. Both parties have liberty to apply.

Christopher Blackman
Judge of the High Court