

BARBADOS

No. 974 of 2005

IN THE SUPREME COURT OF JUDICATURE

CIVIL DIVISION

BETWEEN:

DIGICEL (BARBADOS) LIMITED PLAINTIFF

AND

CABLE AND WIRELESS (BARBADOS) LIMITED DEFENDANT

Before the Honourable Mr. Justice W. LeRoy Inniss Judge of the High Court

Mr. Garth Patterson, Attorney-at-Law for the Plaintiff

Mr. Patterson Cheltenham Q.C. and Mr. Alrick Scott Attorneys-at-Law for the Defendant

2005: May 18, 19

DECISION

-

The Legislation

-

[1] The Long Title to the Fair Competition Act, Cap 326C (The Act) states that the purpose of the Act is (inter alia):

- (a) to “prohibit the prevention, restriction or distortion of competition and the abuse of dominant positions in trade in Barbados ...”
- (b) “to ensure that all enterprises irrespective of size have the opportunity to participate equitably in the market place”.

[2] Section 16 of the Act, prohibits the abuse by an enterprise of its dominant position. Subsection 2 sets out the criteria for the determination of dominance as follows:

“An enterprise holds a dominant position in the market if

by itself or together with an affiliated company, occupies such a position of economic strength as will enable it to operate in the market without effective competition from its competitors or potential competitors”.

Subsection 3 provides that an enterprise abuses its dominant position:

“if it impedes the maintenance or development of effective competition in a market”.

[3] Subsection 3 further outlines particulars of such abuse including the following situations:

“(b) when an enterprise prevents or deters any enterprise from engaging in competitive conduct in that or any other market; and

(c) “when an enterprise limits production of goods or services to the prejudice of consumers;”

The Background

[4] Both Digicel (Barbados) Limited (Digicel) and Cable and Wireless (Barbados) Limited (Cable and Wireless) are licensed under the Telecommunications Act of Barbados to provide mobile telecommunications services to the public of Barbados. There are existing between the two companies, certain agreements which provide for access to each other’s customers so that all users in Barbados of mobile telephones may communicate with one another, no matter which service provider they choose.

[5] Under Regulation 4 of the Telecommunication (Declaration of Dominance) Regulations, 2003 made in pursuance of the Fair Competition Act. Cable and Wireless was declared to be the dominant carrier of mobile telecommunications services in Barbados.

[6] Digicel is the sponsor of a talent search competition known as the “Rising Stars” competition in which competitors perform on television and are judged by members of the public who dial a short code to record a vote for the performer of their choice. Cable and Wireless has refused to configure its cellular infrastructure so as to allow its customers to dial the short code and connect to Digicel’s cellular network to participate in the competition.

[7] In this action, Digicel complains that Cable and Wireless as the dominant provider of Mobile Services uses its dominance to prevent competition by Digicel and seeks a mandatory injunction compelling Cable and Wireless to facilitate voting by that company’s customers in the competition. It also seeks damages pursuant to the Fair Competition Act for losses sustained by reason of the Defendant’s

abuse of its dominant position in the cellular telecommunications market in Barbados and other parts of the Caribbean contrary to section 16 (1) of the Act.

[8] Counsel for Digicel submits that the injunction ought to be granted since, in the event the injunction is granted and Digicel is eventually unsuccessful Cable and Wireless could be compensated in damages; while on the other hand if the injunction is not granted and Digicel is eventually successful it cannot accurately assess its loss so as to determine adequate compensation.

[9] The matter is not as simple as this. In American **Cyanamid Co. vs Ethican Ltd. 1975 IAER 504** it was held that when the court is requested to grant an interlocutory injunction, a major consideration is wherein lies the balance of convenience. When the injunction sought is a mandatory injunction, however, the consideration goes far

beyond the balance of convenience.

[10] The effect of a mandatory injunction is more drastic than in the case of a prohibitory injunction, consequently, the courts are extremely reluctant to grant such an injunction. Before granting a mandatory injunction the court must be reasonably certain that the final outcome is likely to be in favour of the applicant.

[11] In **Shepherd Homes Ltd. v. Sandham** [1971] 1 Ch 340, **Megarry J**, stated the test thus:

“the court is far more reluctant to grant a mandatory

injunction than it would be to grant a comparable

prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction”.

He also observed that **“the case must be unusually strong and clear before a mandatory injunction will be granted”.**

[12] The high standard expected in the granting of a mandatory injunction was also referred to by **Campbell J** in **Esso Standard Oil SA Ltd. v. Chan** (1988) 25 JLR 110 at page 112 when he stated:

“The principle applicable to the grant of a mandatory injunction which is comparable in its nature and function to a *mandamus* is that it will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established, and also the right sought to be protected is clear”.

[13] The rationale behind the creation of this extremely high standard is that the primary consideration of the court is to avoid injustice. There is generally, a greater risk of injustice if the Court granting a mandatory injunction has got it “wrong”, than would be the case where a prohibitory injunction is sought.

[14] The considerations to be applied in the granting of a mandatory injunction are well set out by **Chadwick J.** in **Nottingham Building Society v. Eurodynamics Systems plc and others** [1992] F.S.R. 468, at page 474 as follows:-

“Firstly, 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’...

Secondly, in considering whether to grant a mandatory injunction the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action....

Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a higher degree of assurance that the plaintiff will be able to establish his right at trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk

of injustice if the injunction is granted.

But finally, even when the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweighs the risk of injustice if it is granted”.

The Issue

- [15] In this case, The plaintiff wishes the court to order the defendant to permit its customers to participate in a competition which is due to come to an end within 48 hours of the filing of the application. A decision in favour of the plaintiff would virtually bring the matter to an end since the plaintiff would have obtained exactly what it wants.
- [16] There is no question that Cable and Wireless has refused to facilitate its customers’ voting in the “Rising Stars” competition but is the action taken by Cable and Wireless a result of its dominant position, and unfair as Digicel complains?
- [17] Cable and Wireless agrees that there are interconnection agreements with Digicel in which the company must permit access by its customers to Digicel’s network but contends that these agreements do not apply to the competition organised by Digicel.
- [18] Before launching the contest, Digicel had entered into negotiations with Cable and Wireless with a view to having Cable and Wireless’ customers participate in the contest. After giving the matter some consideration Cable and Wireless declined to participate even though by so doing it would suffer some loss of revenue.
- [19] The consumer legislation is designed to prevent unfair business practices. It prevents a dominant player from using its position of dominance to prevent legitimate competition. The legislation is not designed, however, to compel a dominant player to assist a minor player in competing against it. This is not a case in which Cable and Wireless has used its dominant position to prevent its customers from communicating with Digicel’s customers and thus deny them the full benefits of telephone communication with other users of telephones in Barbados. Such an act would definitely have the effect of impeding competition in the market.
- [20] The Digicel “Rising Stars” competition is not a means of general communication between subscribers of competing telecommunication providers. It is no more than an advertising and public relations exercise designed by Digicel to promote its product and/or increase its revenue. Every time a “caller” dials the short code the “caller” knows that he is calling in to a Digicel competition. The contest itself is viewed by a television audience which is exposed to the Digicel advertisements throughout the shows.
- [21] Indeed some Digicel customers may regard the “Rising Stars” competition as being a competition among the Digicel family and may even consider the ability to participate in it as one advantage of using that provider’s mobile services.
- [22] Cable and Wireless has a similar talent competition and Digicel has the facility to prevent its own customers from participating in that competition if it so desires. It is a matter for Digicel to decide if it wishes to exercise that option.
- [23] The court must be careful not to become involved in the legitimate contractual arrangements which companies seek to make and use its coercive powers to impose legal

obligations on one party if there is a breakdown in negotiations.

[24] There is another aspect of this application that is worthy of note. The specific event with which this summons is concerned lasted for approximately three months. During that period no action was brought until the day before the competition was due to come to an end. Delay in bringing an action such as this may deprive a claimant of injunctive relief on the ground that if the matter was really urgent, then the application would have been brought earlier.

[25] In **Societe Francaise d'Applications Commerciales et Industrielles SARL v. Electronic Concepts Limited and others [1976] 1 W.L.R. 51**, Oliver J, reviewing the court's discretion to grant injunctive relief stated the following, which although expressed obiter provides some guidance in the present action:

“...where a plaintiff is dilatory in prosecuting a motion for interlocutory relief, the motion should be dismissed... If there is going to be such a request, it should be made at the earliest possible moment and the court in considering what should be done, should have regard to all the circumstances, including the conduct of the parties and any dilatoriness in prosecuting the main action”.

[26] In **Bravingtons v. Barrington Tennant [1957] R.P.C 183** there was a delay of three months in bringing the application for an interlocutory injunction. The plaintiffs' delay was fatal. The court held that the plaintiffs had not acted with sufficient speed in commencing the proceedings and therefore interim relief could not be granted.

[27] Digicel has given no reason for the delay in making the application not even the fact that most revenue may be generated on the last day of the competition can justify seeking this injunction at this late stage now that the competition is virtually at an end.

[28] Finally I cannot accept counsel's submission that in the event Digicel is eventually successful, damages would not be an adequate remedy since the company would not be able to accurately assess its losses. It is not beyond the capability of the court to assess the approximate loss of income in case the injunction is not granted and the plaintiff is eventually successful. The Court is called upon on a regular basis to make similar decisions with respect to loss of earnings and loss of profits.

[29] I am not satisfied that in all the circumstances of this case the mandatory injunction sought is justified. The application is therefore dismissed and the plaintiff is to pay the costs of the defendant.

W. LeRoy Inniss

Judge of the High Court

