

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

2/08
 OA 108 A

IN THE MATTER

of Sections 2, 3 and/or section 9 of the
 Declaratory Judgments Act 1994

AND

IN THE MATTER

of an application for a Declaratory Order

BETWEEN

MERVIN COMMUNICATIONS LIMITED a
 duly incorporated company having its
 registered office at Rarotonga

Applicants

AND

TELECOM COOK ISLANDS LIMITED a
 duly incorporated company having its
 registered office at Rarotonga

Respondent

Hearing date: 28 May 2008

Counsel: Mr Little for Applicant
 Mr Arnold for Respondent

Decision: 29 October 2008 (New Zealand time)

JUDGMENT OF GRICE J

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Introduction

1. The Applicant ("*Mervin*") seeks a declaratory order pursuant to s.2, 3 and/or 9 of the Declaratory Judgments Act 1994 declaring that the Applicant is:

"not required pursuant to s.4 and 5 of the Telecommunications Act 1989 ("the Act") to enter into an agreement with the Respondent for the purposes of operating an uplink and downlink from the Applicant's property from an earth station directly to an overhead satellite for the purpose of transmitting telecommunication signals and that nothing in the Act prevents same..." (sic)

2. Counsel indicated, at the end of the hearing that they would attempt to further refine the declaration. If able to do so by consent, they would file a memorandum setting out those terms. In the event counsel were unable to agree and instead I received written submissions from both counsel, each putting forward different suggestions. I will therefore consider the form of declaration set out in the Second Amended Application for Declaratory Order which was the subject of the hearing.

Telecommunications Act 1989

3. The Telecommunications Act 1989 has as its preamble:

"An act to regulate the law relating to telecommunications and connected purposes".

Part II of the Act is headed "Network". Section 4 in that part provides:

"4. Protection of Network

- (1) *No person other than the Company shall erect, construct, establish, operate or maintain any network.*
- (2) *Every person who contravenes this section commits an offence, and shall be liable on conviction to a fine not exceeding \$1,000 for each day during which the offence continues.*

(3) *The High Court may order that any revenue earned by a person in the course of committing an offence against this section be forfeited to the Crown. Every such order shall specify the amount to be forfeited.*

(4) *Nothing in this section shall prohibit the operation of any telecommunication links by a person other than the Company who owns the links, where the operation is in accordance with an agreement with the Company”.*

4. The “*Company*” is defined in s.2 as meaning Telecom Cook Islands Limited, the Respondent (“*Telecom*”).

5. “*Network*” is defined in s.2 as meaning:

“A system comprising of telecommunication links to permit telecommunications, other than any system used solely for broadcasting (as defined in the Broadcasting Act 1989).”

6. This case is not concerned with a broadcasting system.

7. Two other definitions in s.2 of the Act are relevant::

“Telecommunications” means any transmission, emission or reception of information of any nature including signs, signals, impulse, written matter, images, sounds, instruction, information or intelligence of any kind by wire, radio, optical or other electromagnetic systems.

“Telecommunication Service” is the offering of a telecommunication facility.

Declaratory Judgments Act 1994

8. Section 3 of the Declaratory Judgments Act 1994 allows an application for a declaratory order determining any questions as to the construction of an enactment where any person has done or desires to do any act the legality of which depends on that construction.
9. Under s.4 any declaration has the same effect as a like declaration in a judgment and so binds the person making the application and all persons on whom the application has been served.
10. The jurisdiction to grant the declaration is discretionary. The Court may, on any grounds which it deems sufficient, refuse to give or make the order.
11. It is not necessary for there to be a subsisting cause of action for the Court to have declaratory jurisdiction, but the jurisdiction is not an advisory jurisdiction. It is confined to declaring rights between the parties:

“... it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else” Gouriet v Union of Post Office Workers (1978) A.C. 435 at 501 per Lord Diplock.
12. The present issue relates to the construction of an enactment and in particular its effect on a specific proposal by Mervin, which will affect the position of Telecom. The issue is therefore appropriate for the declaratory procedure.

The Applicants Case

13. Mervin submits that the legislation does not give Telecom a monopoly to operate telecommunications in the Cook Islands. Mervin seeks to operate an “uplink and downlink” from an earth station to an overhead satellite for the purpose of transmitting telecommunication signals. Mervin submits that the Act does not prevent this because:
 - i. It will operate a satellite “link”, not “links”. Only links in the plural are prohibited;

- ii. The proposal does not amount to a "network" under s.5 as the proposal provides for one link comprising a single upward link to an overhead satellite and a single downward link from the same satellite. This arrangement is a single link.
- iii. The proposed link is on Mervin's own property and does not run over any public thoroughfare, therefore it is permitted either under or by analogy to the provision under s.5 that permits a telecommunications line so long as it is on the same person's property.

14. William Framhein, a Director and the Company Secretary of the Applicant company, Mervin Communications Ltd states in his affidavits in support of the application that:

- Mervin has filed an application with the Cook Islands Business Trade and Investment Board to be registered as a foreign enterprise.
- Mervin proposes establishing on its land an Uplink/Downlink Earth Station: to transmit and receive signal directly to and from one of the three satellites G23 situated at 172E, NSS5 situated at 177W or Intelsat 701 situated at 180E.
- The signal will be audio, data and visual.
- Details are commercially sensitive.
- The Earth Station will not be connected to the Respondent's network.
- The customers will not be from the Cook Islands with the exception of Mervin's subsidiary company which will transmit a signal via the Earth Station to the overhead satellite.
- The earth station will receive audio, video and data from an overhead satellite and then retransmit a signal by the Mervin's subsidiary, Matariki FM radio station, from the earth to the overhead satellite. The retransmission will be relayed to another country.
- The connection between Matariki FM and the Earth Station will be a physical line of its own on Mervin's property.

The Respondent's Case

15. Mr Davies, the Chief Executive Officer of Telecom, came to the Cook Islands in 1972 as a radio technician seconded to the Cook Islands Post Office. In his

affidavit he covers the history of telecommunications and his view of the present arrangements with Telecom:

- When he arrived and through until mid 1980's international communications was by High Frequency (HF) radio. Communication between Rarotonga and the outer islands used voice and morse code by radio.
- An english company Cable and Wireless PLC under contract with the Cook Islands Government introduced satellite communication.
- The headquarters of Telecom is situated in the earth station complex built and commissioned by Cable and Wireless.
- The High Frequency radio transmissions used for the outer islands were unreliable and in the nature of a single line, that is that only one party can talk at one time, but not both at the same time. Generations of Cook Islanders learnt to communicate with the outer islands using radio protocol such as "over" and "over and out".
- Satellite communications with the outer islands was uneconomic. Mr Davies was Director General of the Cook Island Post Office in the late 1980's when the then Prime Minister, Sir Geoffrey Henry decided to bring satellite communications to the outer islands. Cable and Wireless were unwilling to do this.
- Proposals were sought for the restructure of telecommunications and Telecom New Zealand made a successful proposal. Ultimately the assets of Cable and Wireless were compulsorily acquired and it was compensated for those assets. Telecom New Zealand and the Cook Islands Government incorporated the Company in which the former holds a 40% interest and the latter a 60% interest.
- Telecommunications have been upgraded over the last 15 years, including the installation of fibre optic cable around the island of Rarotonga. These initiatives have been costly and the Company has continued to invest in what it terms "social services" including the latest broadband technology.
- Satellite communications were extended to the outer islands by Telecom. All the outer islands, except for Atiutaki, have proved unprofitable for Telecom. It views the installation as part of the company's social responsibilities.

16. Mr Davies says that it is clear the Company would not embark on the huge capital expenditure on unprofitable services unless it had a monopoly. His view is that given the statutory obligations of Telecom it was never considered acceptable that individual businesses should be able to opt out in the manner sought by Mervin. If so, he says, the Telecommunications Act would need to be changed.
17. Mr Davies also comments that in his view the satellite communications proposed by Mervin are comprised of two links: an uplink on a completely different frequency to the downlink. He says this is the case on all commercial communication satellite bands. By using two separate links for the transmission path, it allows the transmit path and the receive path to be amplified separately and travel without interference with each other. This is different from a single frequency network where the same frequency is used for both paths and the speaker must say "over" to indicate he has finished talking and allow the circuit to be switched over to allow the other person to speak.

Interpretation

18. The modern trend in statutory interpretation of legislation is toward a "*purposive*" interpretation. The words are to be read in their context and, with a view to giving effect to the purpose of the legislation. However the actual words remain the most important single factor in statutory interpretation. The most natural meaning of those words in their context taking into account their purpose should be sought. (Burrows, JF, Statute Law In New Zealand, 2nd Ed. Butterworths. 1999. Wellington at p.119).
19. The words "*satellite*" and "*earth station*" are not words which actually appear in the Telecommunications Act 1989.
20. In any event new developments, especially technological often overtake the relevant Act. Normally an "*ambulatory*" or "*updating*" approach is applied as long as the developments are within the purpose of the Act.

21. For instance the New Zealand Copyright Act 1962 was held to apply to computer source codes as being within the scope of "*literary works*" (International Business Machines Corp v Computer Imports Limited [1989] 2 NZLR 395).
22. According to Mr Davies' affidavit evidence, the international satellite communication and earth station had been established by the time the Telecommunications Act 1989 was passed. However at that time there was no satellite communication with the outer islands.
23. The other general provision in relation to statutory interpretation that I consider of relevance here is set out in s.4 of the Acts Interpretation Act 1924. Where not inconsistent with the context and unless excluded or restricted s.4 provides:
- "Words importing the singular number include the plural number, and words importing the plural number include the singular number..."*
24. For instance, in R v Blackburn (1907) 1NZLR 143 "hearing" in s.31 (3)(a) of the Misuse of Drugs Act 1975 was capable of meaning "hearings".

Application of the Act

25. The proposal by Mervin involves the transmission of telecommunications, as defined under the Act.
26. Mervin's proposal, as outlined in the application and submissions, contemplates transmission of the signals from the Earth Terminal to the Satellite as well as a downlink to transmit from the satellite back to earth. Mr Little, in his submissions for Mervin, gave an analogy of a telephone connection: a person makes a telephone call to another person and a conversation takes place, with both using one single telephone line or telecommunications link. He also produced an extract from Wikipedia which provided a definition of an uplink as being the portion of a communications link used for the transmission of signal from an earth terminal to a satellite and of a downlink as being the link from a satellite to a ground station. The definition was produced without opposition. Mr Little advised from the bar that Wikipedia is a free Internet based encyclopaedia, accessible by

anyone who logs onto the Internet and connects to the Wikipedia site. Information in the Wikipedia can be added or varied by any persons. I note here that usually I would not rely for authority on any entry in Wikipedia given the ability of anyone to access and add to or vary definitions. However in my view this definition does not take the matter any further than do the explanations in the affidavit evidence and submissions.

27. Mr Arnold, for Telecom also produced a definition taken from a technical publication which defined an uplink as a unidirectional radio link for the transmission of signals from a UE to a base station.
28. As a matter of common sense and without going into technical detail it seems to me that there are two signals, one for the downlink and one for the uplink. Both the uplink and downlink must operate in terms of Mervin's proposal. My view is that for the purposes of the definition of "Network" in the Act these are two links.
29. The proposal by Mervin therefore involves the transmission of telecommunications using more than one link as part of an arrangement for sending and receiving telecommunication transmissions. This is prohibited by the act under s.4 (1) of the Act.
30. Mervin's proposal comes within the definition of a "network", in that the downlink and the uplink make up a system comprising of links to permit telecommunications. If I am wrong about the proposal containing links not a single link, for the purposes of s.4 of the Act the reference to link includes plural links. This is a consistent interpretation pursuant to s.4 of the Acts Interpretation Act 1924.
31. The exception under s.4(4) allows the operation of telecommunication links "*by a person other than the Company who owns the links, where the operation is in accordance with agreement with the Company*". This provides for Telecom to reach agreement with a third party enabling it to operate telecommunication links, without breaching the prohibitions in the Act. It is of course open to Mervin and the Company to come to an agreement if they wish to do so.

32. Section 5 of the Act provides that s.4 does not apply to a line on a property wholly owned by a person or persons, as long as it is not normally connected to Telecom's network. Section 2 defines "line" as meaning a wire or wires or a conductor of any kind (including fibre optic cable). Satellite downlinks and uplinks as proposed by Mervin do not fall within the definition of "line" and therefore are not permitted under s.5. The heading in that part of the Act of "Telecommunication Links" does not extend the meaning of "line" to include transmissions by medium other than wire.
33. I am therefore of the view that the Mervin's proposal is prevented by the Act and if it wishes to pursue the proposal it must enter into an Agreement with Telecom.

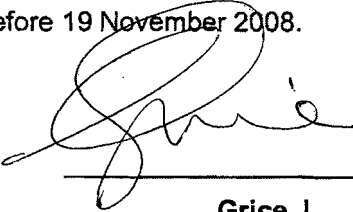
Declaratory Orders

34. The Court makes the following Declaratory Orders:
- i. Sections 4 and 5 of the Telecommunications Act 1989 prevent the Applicant from establishing and operating an uplink and downlink from the Applicant's property from an earth station directly to an overhead satellite for the purpose of transmitting telecommunication signals; and
 - ii. Pursuant to s.4(4) of the Telecommunications Act 1989 the Applicant may operate the telecommunications uplink and downlink as proposed, if it is in accordance with an agreement with the Respondent.

Costs

35. I propose making an order for costs in favour of the Respondent. If Counsel wish to make any submissions as to costs. They should be filed and served as follows:

- By the Respondent on or before 7 November 2008.
- By the Applicant on or before 14 November 2008.
- In reply by the Respondent on or before 19 November 2008.

A handwritten signature in black ink, appearing to be 'Grice J', written over a horizontal line.

Grice J