

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 576 OF 2005

BETWEEN:

VODAFONE FIJI LIMITED

PLAINTIFF

A N D:

THE MINISTER FOR INFORMATION,
COMMUNICATIONS & MEDIA RELATIONS

FIRST DEFENDANT

THE ATTORNEY-GENERAL OF FIJI

SECOND DEFENDANT

Mr. S. Lateef with Mr. J. Mangal for Plaintiff

Mr. C.A. Sweeney with

Mr. I. Tamata with Ms M. Rakuita for 1st and 2nd Defendants

Date of Hearing: 15th December 2005 and 20th December 2005

Date of Decision: 19th January 2006

DECISION

By an originating summons (filed ex-parte but made inter parte on my orders) the plaintiff seeks for the purposes of this decision an interim injunction restraining the first defendant from awarding any mobile telephony licence to any person or entity for the operation of mobile cellular telecommunications system within Fiji.

The matter was listed for 15th December 2005 when the defendants were ready to argue the matter on basis of whatever documents were filed. Mr. Lateef ran into difficulty, as he did not know what was the basis of defendant's objections. Accordingly the defendants agreed to start their submissions first.

The plaintiff's case is this: that in 1989 Fiji Posts & Telecommunications Ltd (FPTL) was granted an exclusive licence to establish, operate and maintain a telecommunication system in Fiji for a period of 25 years commencing 1st January 1990. It further says that in 1993 FPTL assigned to it, with the first defendant's consent, the right to establish and operate a mobile cellular telecommunication system in Fiji. Therefore it says it enjoys an exclusive licence to provide such systems in Fiji until 2014 but the first defendant is now threatening to introduce others into the market by granting licences to others.

The first hurdle the plaintiff has to overcome is the provisions of Section 15 of the Crown Proceedings Act which provides that *"(1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require : Provided that – (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties"*.

SCOPE OF SECTION 15:

Section 15 applies to civil proceedings. The words *"civil proceedings"* in Section 15 is not used in its popular sense of civil proceedings as opposed to criminal proceedings. The scope of *"civil*

proceedings by or against the Crown" is provided in Section 18(1) and (2) which provide :

"(1) Subject to the provisions of this section, any reference in this Part to civil proceedings by the Crown shall be construed as a reference to the following proceedings only :

(a) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by any such proceedings as are mentioned in paragraph 1 of the First Schedule;

(b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action at the suit of any Government department or any officer of the Crown as such;

(c) all such proceedings as the Crown is entitled to bring by virtue of this Act,

and the expression "civil proceedings by or against the Crown" shall be construed accordingly.

(2) Subject to the provisions of this section, any reference in this Part to civil proceedings against the Crown shall be construed as a reference to the following proceedings only :

(a) *proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by any such proceedings as are mentioned in paragraph 2 of the First Schedule;*

(b) *proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action against the Attorney-General, any Government department, or any officer of the Crown as such; and*

(c) *all such proceedings as any person is entitled to bring against the Crown by virtue of this Act, and the expression "civil proceedings by or against the Crown" shall be construed accordingly."*

The use of the word "*only*" suggests that the list is an exhaustive list. The limitation placed on injunctions against the Crown are confined to the three types of proceedings. The first is proceedings, which before the passing of Crown Proceedings Act were filed against the Crown (the Queen) by way of petition of right. Earl Jowitt in "*the Dictionary of English Law*" explains the '*petition of right*' as "*one of the Common Law methods of obtaining possession or restitution from the Crown of either real or personal property, or compensation or damages for breach of contract, the Crown formerly not being liable to an ordinary action at the suit of a subject ...*"

Section 1 of Crown Proceedings Act provides that any action, which may have been enforced by petition of right, may now be enforced under the Act like an ordinary action. Secondly, proceedings which a person could have taken against the Attorney General or any Government Department or any officer of

the Crown under the repealed legislations and the abolished proceedings set out in the schedule. Thirdly, proceedings which a person can bring against the State due to the passing of the Act and instances of which are specified in Section 3, 4 and 5 of the Act such as tort etc.

The present claim arises out of an alleged breach of contract hence would be covered by Section 18(2)(a) of the Act in my provisional view.

Further Section 32 of the Act states that "*civil proceedings*" include proceedings in the High Court for the recovery of fines or penalties but do not include proceedings of a nature such as in England are taken on the Crown side of the Queen's Bench Division.

This means that Section 15 does not cover proceedings on the Crown side and judicial review fell on the Crown side – Davidson v. Scottish Ministers - (2005) UKHL 74. Section 15 therefore applies to other proceedings.

CAN COURT MAKE INTERIM DECLARATIONS?

Under the provisions of Section 15 a court can make a declaration in lieu of an injunction as the state normally takes heed of declarations. However can the court make an interim declaration? An interim declaration by its very nature is an order where a court declares with finality the respective rights, duties or obligations of parties. Because a declaration is a final order of the court, such orders are made after the court has fully heard the parties and the court is able to make conclusive orders: International General Election Company of New York Ltd. v. Commissioners of Customs & Excise – 1962 1 Ch. 784 and Inland Revenue Commissioners & Another v. Rossminster Ltd. & Others – (House of Lords) (1980) AC 952 at 1027C per Lord Scarman where he states "*... where the Crown is defendant or respondent, relief analogous to an interim injunction is not available ... I find absurd the position of a court declaring one day in Interlocutory proceedings that an applicant has certain rights and upon a later day that he has not*".

Mr. Lateef met this by referring to the decision of Justice Byrne in Fiji Television Ltd v. Minister for Information, Broadcasting, Television and Telecommunication 43 FLR 164 where he granted interlocutory orders against the defendant in somewhat similar circumstances as the present except that that case was a judicial review matter and the applicant held a licence directly from the Minister and not by way of sub-licence. In the present case there is no direct licence from the Minister, only a consent to assign. The issue whether the plaintiff holds a licence according to law is a live issue in these proceedings.

I was referred to by the plaintiff to the House of Lords decision M. v. Home Office 1994 1 AC 377 which ruled that there was jurisdiction at common law to issue injunctions against the Ministers and officials who represent the Crown as executives. M. v. Home Office suggests that the principle that coercive orders of mandamus, prohibition, specific performance or injunction may not lie against the Crown protects only the Crown or her personal representative the Governor General. It found that a finding of contempt could not lie against the Crown directly; it could lie against a government department or a Minister in his ministerial capacity. Lord Woolf at pages 415 to 416 suggests that in the past prerogative orders of prohibition and mandamus had been granted against the Ministers in their official capacity.

However the House of Lords in Davidson v. Scottish Ministers 2005 UKHL 74 clarified that Section 15 limitation did not apply to applications for judicial review as these were proceedings which formerly fell on the Crown side of the King's Bench Division and M. v. Office should be considered in the context of judicial review proceedings.

Both M. v. Home Office & Davidson are judicial review proceedings and what the Law Lords said there ought to be confined to judicial review proceedings. I do not consider that M. v. Home Office was in any way

suggesting courts have general power to make coercive orders against the Ministers of the State in all proceedings.

The present proceedings have been brought by way of originating summons seeking three orders as follows :

- “(a) A declaration that the first defendant has no power or authority under the Posts and Telecommunications Decree 1989 to grant mobile telephony licenses to any other operator other than the plaintiff;*
- (b) In any event an injunction to restrain the first defendant and/or her servants whatsoever from awarding any mobile telephony license to any person or entity for the operation of mobile cellular telecommunication system within Fiji; and*
- (c) An interim injunction pending the determination of this matter.”*

Section 7 sub-section 1, 2 and 3 of the Posts and Telecommunications Decree 1989 which are relevant to these proceedings provide :

- “7. – (1) A licence may be granted by the Minister for the running of any such telecommunication system as is specified in the licence or is of a description so specified.*
- (2) A licence granted under this section shall be in writing and, unless previously revoked in accordance with any term in that behalf contained in the licence, shall continue*

in force for such period as may be specified in or determined by or under the licence.

(3) A licence granted under this section may be granted either to all persons, to persons of a class or to a particular person and in the case of a licence granted to a particular person, may confer upon that person an exclusive privilege to provide any service specified, in any area or all areas of Fiji, and subject to such conditions, exceptions and other limitations as the Minister sees fit."

DOES THE PLAINTIFF HAVE A LICENCE?

The original licence was granted to FPTL on 29th December 1989. FPTL is not a party to these proceedings. That licence in Clause 19.1 provided that FPTL shall not without the written consent of the Minister assign or dispose of any of its rights and obligations under the licence. The FPTL assigned its right to establish a public mobile cellular telecommunication system to Fiji Cellular Limited now known as Vodaphone Fiji Limited. The consent of the Minister was granted on 17th September 1993.

Annexure E is what purports to be a Licence agreement dated 4th May 1994 between FPTL and the plaintiff. Paragraphs 3 and 4 of the recitals to the agreement state :

"FPTL is willing to grant to the Company the sole and exclusive right and licence to establish and operate a cellular mobile telephone system in Fiji and to provide telecommunications services by means of the system.

The Government of Fiji has approved and authorized the grant of the aforesaid licence."

The agreement grants to the plaintiff a licence which "*shall continue indefinitely*" – paragraphs 2.2.

The plaintiff is relying on this agreement plus the consent to make its claim. Under Section 7 of the Telecommunication Decree only the Minister can grant licences and not a licensee even though the licensee holds a valid licence. FPTL appears to have usurped the powers of the Minister. Further FPTL had exclusive licence granted to it for a period of 25 years from 1989. So the basis and the logic on which it could in turn grant a licence for an indefinite period is difficult to comprehend. Indefinite period could also stretch beyond 25 years.

The plaintiff (see paragraph 10 of Pradeep Lal's affidavit) alleges its licence is a sub-licence. Annexure G is Telecom's response to Minister's letter. Telecom's response on page 3 para 2 states that "*VFL's mobile license is a sublicense owned by TFL and therefore TFL will oppose any modification of that license ...*". Hence a debateable issue is who owns the sub-licence – the plaintiff or FPTL.

On the other hand the plaintiff has operated and traded in Fiji for over a decade. The State was aware of it. The Government of Fiji's ATH Share Offer at page 23 shows the plaintiff is the exclusive service provider for mobile telephony in Fiji. The share offer therefore recognizes this exclusive service.

Even though the document does not say the plaintiff is the sole licensee, the fact remains that the Minister had consented to the assignment subsequent to which the plaintiff alleges it spent substantial sum of money in the region of \$100 million in order to obtain an appropriate return on its capital. There are serious implications for investor confidence if the State is allowed to take incongruous decisions on the lawfulness of the licence. In 1993 those who advised the government were not troubled by the form the licence took. Now more than a decade later, a change in government sees a change in stand on the lawfulness of plaintiff's licence.

This issue of licence needs a close examination and is a serious issue for consideration at trial.

CONSTITUTIONAL ISSUE – Does exclusive licence infringe freedom of expression provision of constitution?

The defendants also submitted that the exclusive licence system was unconstitutional as it was in contravention of Section 30 of the Constitution – the right to Freedom of Expression. Section 39(1) provide : *“Every person has the right to Freedom of speech and expression including (a) freedom to seek, receive and impart information and ideas.”*

The defendants rely on Cable and Wireless (Dominica) Limited v. Marpin Telecom & Broadcasting Company Limited - Privy Council Appeal 15 of 2000 (a copy of which was helpfully provided to the court). The case dealt with Section 10 of the Constitution of Commonwealth of Dominica a somewhat more detailed provision than our Section 30. As the matter was not fully argued before me, it would be unwise of me to express any conclusive view on a constitutional issue. All I say at this stage is that it is a debateable matter and much will depend on evidence as to efficiency, accessibility, price and whether the limitation on licensing is reasonable and justifiable in a free and democratic society.

I am of the view that issue whether the plaintiff holds some form of exclusive licence is a serious issue. If further licences are granted, then the plaintiff is likely to suffer damages for certain but it would be well nigh impossible to calculate such damages for the next ten years or so as the market for mobile telephony may be an ever increasing one. In that way damages may not be an adequate remedy. On the other hand the defendants are unlikely to suffer any losses should the grant of licences be put on hold temporarily pending trial. Even though the balance of convenience obviously favours a grant of interlocutory injunction as the interest of third parties namely the employees of the plaintiff and the public which uses its services

need to be maintained and protected, for reasons given in considering the provisions of Section 15 of State Proceedings Act, I am unable to make the interim orders sought. All I need to say is it would be unwise for the defendants while the proceedings are pending to grant any further licences.

Given that the matter is of significant national importance, I direct that the plaintiff files and serves a full statement of claim within the next 14 days and the matter proceed henceforth strictly according to time frames laid in the High Court Rules 1988, in particular Order 18 Rules 2, 3 and 19 and Order 25 Rule 1.



[Jiten Singh]

JUDGE

At Suva

19th January 2006