IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G115 OF 2015

BETWEEN:

CARIBBEAN UTILITIES COMPANY, LTD.

PLAINTIFF

AND

WESTTEL LIMITED T/A LOGIC

DEFENDANT

IN CHAMBERS

Appearances: Mr. Peter McMaster Q.C. and Mrs. Jane Hale-Smith of Appleby for the Plaintiff
Mr. Kyle Broadhurst, Ms. Yvonne Mullen and Mr. Peter Broadhurst of Broadhurst for the Defendant

Heard: 30 July 2015, 14 August 2015

Before: Justice Ingrid Mangatal

Date of Judgment: 14 August 2015

Date Circulated: 19 August 2015

RULING

1. The Plaintiff Caribbean Utilities Company, Ltd. ("CUC") is the public electricity utility company for Grand Cayman and the Cayman Islands; it is the sole provider of electricity services in the Cayman Islands and owns electricity poles situated across the islands. CUC is regulated by the Electricity Regulatory Authority.

2. The Defendant Westtel Limited trading as Logic ("Logic") is licensed by the Cayman Islands Information and Communication Technology Authority ("ICTA") to provide information and communication services to residents of the Cayman Islands. Logic offers television, telephone and internet services to customers across Grand Cayman.

3. DataLink, Ltd. ("DataLink") is a wholly owned subsidiary of CUC.

4. On 30 July 2015 I heard an application by CUC seeking an interim injunction against Logic.

BACKGROUND

5. According to the Affidavit of David Watler, Vice President, Transmission and Distribution, employed by CUC, filed 17 July 2015 in support of CUC's application for the injunction, CUC owns approximately 18,000 transmission and utility poles located across Grand Cayman which it uses for the purposes of electricity transmission. Those poles are sometimes situated on land belonging to third parties, and the poles are installed and maintained on that land with the consent of the landowners. The poles themselves belong to, and are the property of, CUC.

6. Each utility pole holds electrical cables, which CUC uses for electrical transmission and distribution. The section of the pole where these electrical cables are attached is termed the "Electrical Space". The utility poles are also capable of being used to carry aerial cables used by telecommunication service providers. Mr. Watler's affidavit continues that

further attachment to utility poles cannot take place without express authorization. Unauthorized attachments can have safety, structural and other implications, and there are arrangements in place for permission to be sought, applications to be granted, and payment of fees. The telecommunications cables are attached in an area called the "Communication Space". The communication space is a vertical length of the utility pole, 3 feet deep from top to bottom, within which the telecommunications providers may attach their aerial cables and associated equipment to the utility poles. The communication space is located immediately below the "Safety Space". The safety space is the clearance between the electrical space and the communications space as defined by the National Electrical Safety Code (NESC) published by the Institute of Electronic Engineers. The safety space for a typical utility pole is 40 inches.

7. Before 2012, it was CUC itself that made arrangements for receiving applications to attach in the Communications Space, reviewing them and granting permits. Since 2012 this function has been performed by DataLink. There is in existence an agreement between CUC and DataLink dated 20 March 2012 ("the DataLink Agreement") which sets a framework within which DataLink can apply for and obtain permission to attach to certain of CUC's poles aerial cables and other associated equipment for the purposes of communication and data transmission and pursuant to which DataLink may grant sub-licenses allowing other information technology providers on the island to attach to the poles in the Communication Space.

8. Mr. Watler states that a review of the DataLink Agreement shows that CUC has retained all of its rights of ownership in the Communication Space and has granted DataLink a mere license to attach in that space, coupled with a power to grant sub-licenses to others. Pursuant to that arrangement DataLink has entered into agreements with communication providers under which those communication providers may seek permission to attach to the poles by submitting applications with a view to permission to attach being granted. The submission of an application triggers a process of review. Where further work on the pole is required before an attachment can safely be made that work is termed "Make Ready Work".

9. DataLink entered into one such agreement with Logic, a Master Pole Joint Use Agreement, dated 18 July 2013 ("the Logic Agreement").

10. On 8 July 2015 CUC filed an Amended Writ of Summons and very brief Amended Statement of Claim in which it alleged that Logic has attached apparatus for use in its business to the Plaintiff's poles without permission. Further, that the process of mounting and attaching are a trespass to CUC's poles and that despite CUC's licensee DataLink asking Logic in writing to desist and provide confirmation that it will not attach apparatus except with permission, Logic has refused so to do. CUC's pleading continues that it fears that the attachments will continue unless restrained by the court's order. CUC claims an injunction restraining Logic from attaching anything to its poles without permission and damages.

11. I note that CUC's pleading does not refer to the DataLink Agreement or Logic Agreement. It is only in the Affidavit of David Watler, in support of the application for an interim injunction that the agreements, which set the framework and backdrop against which the allegation of trespass occurs, are fleshed out. In any event, I shall return to this later.

12. On 15 July 2015 CUC filed a Summons seeking an interim/interlocutory injunction in the following terms:

> "An order (until trial or further order in the meantime) restraining the Defendant by itself, its servants, agents or independent contractors from:
>
> (a) Ascending any pole owned by the Plaintiff;
>
> (b) Making any attachment to any pole owned by the Plaintiff; and
>
> (c) Carrying out any work of any nature on any pole owned by the Plaintiff;
>
> unless in relation to that pole the Defendant has been issued with a permit pursuant to Article VI of the Master Pole Joint Use Agreement between the Defendant and DataLink Limited."

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13. On the 28 July 2015 Logic filed a Summons seeking, amongst other relief, the following:

> "(1) this action be stayed, pursuant to section 9 of the Arbitration Law (2012 Revision) on the grounds that there is a written mediation and arbitration agreement between the Plaintiff and the Defendant in respect of the matters that are the subject of this claim: alternatively for an order that;
>
> (2) this action be stayed or struck out with a direction that the dispute resolution procedures do commence between the Plaintiff and the Defendant on the grounds that there is a written mediation and arbitration agreement covering the subject matters of this claim between the Plaintiff and the Defendant."

14. This Summons had not yet received a date at the time when CUC's Summons for the interim injunction came on for hearing. However, Counsel for Logic, Mr. Kyle Broadhurst, sought to have the Summons for the Stay heard first. This was opposed by Mr. McMaster Q.C. on behalf of CUC.

15. I ruled that CUC's Summons should be heard first, and agreed with Mr. McMaster Q.C., for directions to be given for the hearing of the Summons for the Stay. It was accepted that any order made on CUC's Summons for an injunction would, in the circumstances, have to be made until the resolution of the application for a stay or striking out, as opposed to being until the trial of the action or until further order. Mr. McMaster Q.C. asked me to deal with CUC's application in such a way as to decide whether, as he submitted, there is no defence to the action and only if I decided that there was a serious issue to be tried, that he then be allowed to file further evidence in relation to the balance of convenience. However, I indicated that I was not prepared to truncate the hearing of an interlocutory injunction that way, certainly that that would not be a usual course. Learned Queen's Counsel then indicated that he was electing to proceed on the evidence as filed.

16. I decided that CUC's Summons should be heard first for a number of reasons, including the fact that it was filed first and had been properly listed for the time of the fixture before me, that the alleged existence of an arbitration or mediation clause does not, without more, oust the Court's jurisdiction to grant interim relief, and that section 9(3) of the Arbitration Law indicates that even where the Court stays the proceedings it can make orders in relation to any property that forms part of the dispute, for the purpose of

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preserving the rights of the parties. Further, that section 54(1) of the Arbitration Law indicates that the court has the same right to grant interim measures in relation to arbitration proceedings as it does in relation to proceedings in court. Additionally, Article 6(7) of the International Dispute Resolution Procedures Rules, to which Rules reference is made in the Logic Agreement also acknowledges that the request by a party to a court for interim judicial measures is not inconsistent with an agreement to arbitrate.

17. It is to be noted that CUC does not concede, indeed, it denies that there is any agreement to arbitrate extant in respect of this dispute and Logic. Although contesting the application for the interim injunction Logic fully and clearly expressed its position as being completely without prejudice to its position that this matter should be stayed and that it will continue to rest upon that position.

The Logic Agreement

18. There are a number of provisions of the Logic Agreement that are relevant to these proceedings. Some of the definitions in the Logic Agreement are a little confusing, and could in my view have been more clearly drafted, for example the definitions of "Owner Utility" and "Attaching Utility". The provisions of relevance are Part VI, Permit Application Procedures, Part XIV, Unauthorised Occupancy or Access and Part XXIV. Part XXIV is worthy of reading in full, but it is long and I need not set it out word for word here. The provisions are as follows:

> *"PART VI. PERMIT APPLICATION PROCEDURES*
>
> *A. <u>Permit Required</u>. Attaching Utility shall not install any new Attachments, Overlash existing Attachments, or perform Substantial Construction or*

Modification on any Pole without first applying for and obtaining a Permit pursuant to the applicable requirements of Appendix B. No Permit shall be required for prior existing authorized Attachments, OVERLASHING OR Service Drops on Active Joint Use Poles or on Poles for which a Permit has already been granted to the Attaching Utility……

B. *Review of Permit Application. Upon receipt of a properly executed Application for Permit (Appendix B), including the Pre-Permit Survey, Owner Utility will review the Permit Application and discuss any issues with Attaching Utility, including engineering or Make-Ready Work requirements associated with the Permit Application. Owner Utility acceptance of the submitted design documents does not relieve the Attaching Utility of full responsibility for any errors and/or omissions in the engineering analysis.*

C. *Review Period. Owner Utility shall review and respond to "Minor" Permit Applications-less than ten (10) Attachments/Poles-within ten (10) days of receipt. Owner Utility shall review and respond to "Major" Permit Applications- ten (10) or more Attachments/Poles-within fifteen (15) days of receipt.*

D. *Expedited Review. In instances where Attaching Utility notifies Owner Utility of an immediate need to make new Attachments, Overlash Existing Attachments or perform Substantial Construction or Modification on a Pole, and provides information as to the need for an expedited review process, the Owner Utility shall make its best reasonable efforts to review and respond to Permit Applications within five (5) days of receipt. Owner Utility reserves the rights to charge Attaching Utility for any overtime or other applicable costs that it incurs in meeting a request for an expedited review.*

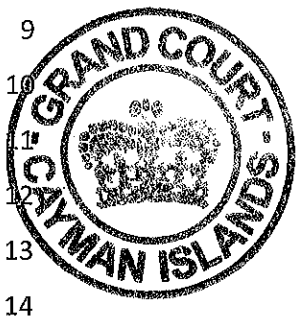
E. *Performance of Make Ready Work. If Make Ready Work is required to accommodate Attaching Utility's Attachments, Owner Utility or its contractors shall perform such work pursuant to Article VII.*

F. *Permit as Authorisation to Attach.* *After receipt of payment for any necessary Make Ready Work, Owner Utility will sign and return the Permit Application, which shall serve as authorization for Attaching utility to make its Attachment(s).*

....

PART XIV. UNAUTHORISED OCCUPANCY OR ACCESS

A. *Penalty Fee.* *If after the initial joint inventory any of Attaching Utility's Attachments are found occupying any Pole for which no Permit has been issued, Owner utility, without prejudice to its other rights or remedies under this Agreement, may assess an Unauthorised Attachment Penalty Fee as specified in Appendix A, Item 2. In the event Attaching Utility fails to pay such Fee within (60) sixty calendar days of receiving notification thereof, Owner Utility has the right to remove such Facilities at Attaching Utility's expense.*



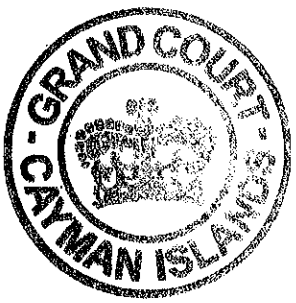
B. *Service Drop Exclusion.* *Service Drops on Owner Utility's Poles will not be considered Unauthorised Attachments when discovered. Owner Utility, will, however, expect Attaching Utility to apply to and receive from Owner Utility appropriate Permits to document these Service drops.*

C. *No Ratification of Unlicensed Fee.* *No act or failure to act by Owner Utility with regard to said unlicensed use shall be deemed as ratification of the unlicensed use and if any Permit shall be subsequently issued, such Permit shall not operate retroactively or constitute a waiver by Owner Utility of any of its rights or privileges under this Agreement or otherwise; provided, however, that Attaching Utility shall be subject to all liabilities, obligations and responsibilities of this Agreement in regards to said unauthorized use from its inception.*

.....

PART XXIV. DISPUTE RESOLUTION

A. *Unresolved Disputes.* *A dispute between the Parties regarding any matter relating to the administration of this Agreement or the breach thereof*



shall be resolved in a fair, expedient and reasonable manner. The Parties acknowledge that achievement of the purpose and intent of this Agreement shall require each party to act in good faith and fair dealing. In order promptly to resolve any misunderstandings, conflicts or disputes that may interfere in the achievement of the principal goals and objectives of the parties, the Parties shall escalate such misunderstandings, conflicts or disputes in the manner set out below.

B. *Initial Meeting*.....

C. *Alternative Dispute Resolution*

i. *Appointment of Mediator*

ii. .....

iii. *Unresolved Disputes*

The parties involved in the dispute shall participate in good faith in the mediation to its conclusion as designed by the Mediator. If the parties are not successful in resolving the dispute through mediation, then either Party may on notice to the other Party, elect to finally resolve the dispute by arbitration.

D. *Binding Commercial Arbitration*

In the event the procedures of this Article, Paragraphs B and C do not resolve the dispute, and the parties agree to resolve the dispute by binding arbitration, the dispute shall be resolved under this Paragraph rather than by litigation. The following procedures and requirements shall apply to any arbitration hereunder."

19. Appendix A to the Logic Agreement is headed "Pole Attachment Fees". Item 5 "Determination of Total Number of Attachments" deals in part with unauthorized attachments and clause D states:

"Any discrepancies between the inventory amounts and the Permit amounts shall be resolved at Owner Utility's sole discretion by any of the following actions:

1. *Revision of the Attachments specified in a current approved Permit;*
2. *Approval of a new Permit for the previously unrecorded Attachments; or*
3. *Removal of the Unauthorised Attachments at the Attaching Utility's expense, provided that Owner Utility shall give Attaching Utility at least 10 business days' notice of its intention to do so."*

20. The Logic Agreement is also signed by CUC and Clause XXX states that the Electric Utility has executed this Agreement solely for the purpose of receiving the benefit of the indemnities and other protections set out in this Agreement. I think it is also useful to note the following clause XIX E in the DataLink Agreement, dealing with Assignment and Sublicensing:

E. *Enforcement of the Sublicense. In relation to any permitted sublicense, the Attaching Utility must enforce the performance and observance by every sub-licensee of the provisions of the sub-license, and must not at any time either expressly or by implication waive any breach of the covenants or conditions on the part of any sub-licensee or any sublicense, or without the consent of the Owner Utility, whose consent may not be unreasonably withheld or delayed vary the terms or accept a surrender of any permitted sublicense."*

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CUC's Case

21. The application by CUC is also supported by the Affidavit of Karan Sylvester, ("KS") Network Engineer employed to DataLink in that capacity since 1 April 2014. The affidavit was filed on 17 July 2015.

22. KS states that in 2005 there were only two telecommunications providers using the Communications Space on CUC's poles, i.e. Lime and Infinity. However, over time,

requests were made for space for additional attachments. In 2011, prior to the grant of an ICT license to DataLink, the ICTA requested that matters be arranged so that up to four providers could attach to any given pole. In order to accommodate four attachments on a pole, DataLink needs to conduct an inspection of the pole and to quote for any work that needs to be carried out by DataLink to ensure the additional attachments will not compromise the structure of the pole, or raise any safety issues; this is the Make Ready Work. Each telecommunications service provider is allocated a certain position on the poles, at a specific height above the ground.

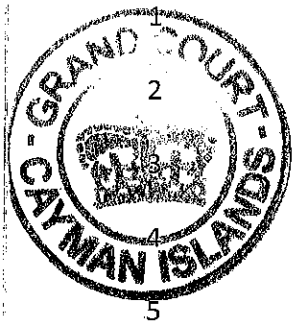
23. KS indicates that as part of work with DataLink, she has been responsible since July 2014 for maintaining a record of all requests for permits to attach to CUC's poles made to DataLink by the telecoms service providers in Grand Cayman. She also keeps a record of whether those permits have been approved. KS indicates that since July 2014, unauthorized attachments have been made to CUC poles by a number of providers, including Logic.

24. A report was done by KS resulting from the large number of unauthorized attachments, drawn from information from 29 audits carried out on specific streets in Grand Cayman, as well as information from random-checks, during the period 24 July 2014 to 10 June 2015. The Report covered 1,483 poles and showed that of that number, 937 contained unauthorized attachments by Logic on the date that the particular audit was carried out. This Report was exhibited, and shows in the final two columns whether, subsequent to the date of the audit, the Make Ready Work has been completed and/or permits issued.

KS indicates that DataLink has completed the necessary engineering and make ready work on numerous poles where permits have not been issued, as a result of the safety concerns associated with unauthorized attachments. However, permits will not be issued until the telecommunications service provider has paid for the necessary work in accordance with the Logic Agreement.

25. KS states that the process by which Logic is required to apply for a permit is set out at section VI of the Logic Agreement. Upon receipt of a properly executed application for permit, which must include a pre-permit survey, DataLink will review the application and discuss any issues with Logic, which includes whether any engineering or Make Ready Work is required. As part of the permit process, checks are carried out to ensure that the specific pole is able to accommodate the requested attachments structurally, and what work is necessary to ensure that the pole complies with the required safety standards.

26. KS states that there are a number of potentially significant safety issues with unauthorised attachments. The first relates to the structural integrity of the poles themselves. She indicates that unless DataLink is given the opportunity to inspect the relevant pole and determine whether any work is necessary before the attachments are made, there is a real risk of structural integrity of the poles being weakened. It is often necessary, the evidence continues, to attach guy-lines to the poles, suspension wires which are used to counter-balance the attachment and strengthen the infra-structure. Pursuant to Appendix D of the DataLink Agreement (Standards to be used to determine Capacity), CUC is required to maintain poles which would withstand winds of 110 mph



and other loading with a safety factor of 1 1/3 based on the 2007 NESC Code. KS opines that the unauthorized attachments weaken the structure, with the real risk that poles with unauthorized attachments may not withstand the design wind loading and other loading such as weight loading of conductors and pole mounted equipment. Such unauthorized attachments also pose a serious risk of harm to the general public and their property.

27. KS states that secondly, by failing to submit a permit application, Logic is depriving DataLink of the opportunity to inspect the relevant pole and action any engineering or structural changes which need to be made to ensure that the applicable standards are adhered to. KS indicates that certain types of non-adherence can lead to a real risk of electric shock and/or arc clash to those making the attachments, or the starting of fires, which can in turn present grave risks to the general public.

28. By way of an example, KS referred to an email and incident report on 12 May 2015 from Geraude Holness, whose role is Supervisor Line Services within T&D Operations at CUC. The report states that the telecom wires of another telecommunications service provider and Logic should not have been on poles that were not ready for them to be attached. KS indicates that Mr. Holness observed that there were areas of the lines where Logic and other entity's support wires were tangled together and in one span the Logic line was pulled so tight causing it to contact the secondary line which energizes it. He confirmed that when the communications lines were energized it caused the pole to catch fire and burn. In order to fix this problem, power had to be cut to clear the lines. On the same day, Mr. Holness had to attend at another scene where the Cayman Fire Service had

extinguished a pole fire caused by the same problem. The pole was seriously damaged and needed to be replaced. I note that the affidavit states that it was an incident in 2015. However, the correct date appears to be 2014.

29. In his affidavit, Mr. Watler states that CUC's application is being made in circumstances where Logic has been asked to desist from the practice of attaching to poles without any permit being in place, and has refused. He refers to the fact that Appleby on 5 June 2015, wrote to Logic directly, on behalf of DataLink, noting that Logic's persistent making of unauthorized attachments is a flagrant breach of the Logic Agreement and a trespass to poles owned by CUC. An undertaking was sought in the terms that Logic would not install any new attachments, or perform any substantial construction or modification on CUC's poles without first applying for and obtaining a permit from DataLink, as required by the Logic Agreement. Appleby put Logic on notice that if the undertaking was not provided, they would be instructed to make an immediate application to the Court for an injunction forbidding Logic from making attachments.

30. Broadhurst responded on behalf of Logic, by letter dated 5 June 2015. The letter states, amongst other matters, that the matters raised need to be resolved through the auspices of the dispute resolution provisions of the ICTA Laws and Regulations, and not through the Grand Court. Alternatively, that the dispute needs to be resolved and dealt with in accordance with the Dispute Resolution provisions in the agreement between the parties. In the Broadhurst letter, it is stated:

> *"These issues are categorically denied on behalf of our client. In point of fact we understand that the breaches are occurring as a result of your*

client not processing Permits. Our client has made all applications and paid all fees. Your client is simply not performing."

31. On 26 June 2015 Appleby wrote in response to Broadhurst, denying the assertion that Logic had made all of the applications and paid all fees. The letter again warned that injunctive relief would be sought through the Court and that Logic could seek to limit the costs consequences of such action by giving an undertaking in the form sought. The letter states, amongst other matters:

> "*Our client has issued 456 estimates for make-ready work to your client since September 2014, which has not been paid. Without the estimates being paid, the make-ready work cannot be commenced and a permit cannot be issued. It is your client that is not performing.*
> *To make matters worse, your client is attaching to poles without make-ready work being done and is, therefore, making unsafe attachments and weakening the infrastructure."*

32. On 2 July 2015 Broadhurst responded by email stating that the injunctive procedures being threatened were not called for and that the issues needed to be determined by the regulatory body, not the Grand Court. The regulatory body to which Broadhurst was referring was the ICTA. However, the ICTA does not regulate CUC. No undertaking was given.

33. On 2 July 2015 Appleby again wrote to Broadhurst, this time on behalf of both CUC and DataLink. The letter stated the following:

Caribbean Utilities Company

"Your client claims to believe that it has the right to attach its apparatus to CUC's poles without permission. We have already pointed out that this is a trespass to the poles. It is indefensible.

It is also a breach of the contract with DataLink. As we have pointed out, no dispute resolution process deprives either CUC or DataLink of its rights to apply for an immediate interlocutory injunction to restrain your client.

Our current instructions are to apply for an injunction inter partes. Please confirm that your firm has instructions to accept service of process in relation to this claim."

34. Broadhurst then wrote back on the same day stating that Logic would be prepared to sign the undertaking provided by Appleby provided that the words "except for the provisioning of service drop" could be added. Service drops allow for customers to connect and use attachments that are in place.

35. Appleby responded on 3 July 2015, again on behalf of CUC and DataLink, indicating that the terms of the proposed undertaking were unacceptable as it would enable Logic to continue to make attachments on poles where no permit had been granted and stating this would aggravate existing trespasses. Suit was filed on July 8 2015.

Logic's Case

36. Logic in response to the application for an injunction, filed the Affidavit of Pauline Byron, who is Logic's Technical Project Manager. Ms. Byron states that as Technical Project Manager she is one of the principal people involved in the expansion of Logic's fibre network in the Cayman Islands.

37. The ICTA is responsible for the regulation and licensing of telecommunications and broadcasting. Ms Byron states that the ICTA has the power to issue conditions on its licenses and one of the requirements of Logic's license is that it was required to roll out fibre to all residents of the Cayman Islands, and the condition requires Logic to complete that roll out by February 2017.

38. The evidence continues that a key component of Logic's roll out strategy was the use of the CUC poles. Initially Logic had worked directly with CUC with respect to the expansion of its fibre network on the poles and Ms. Byron states that that relationship had been an effective one.

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39. Reference was next made to the subsequent transfer of the management of the poles to DataLink from CUC and to the Logic Agreement.

40. The Logic Agreement sets out a permit process. Immediately after the Logic Agreement was entered into, Logic began making permit applications. Ms. Byron states that whilst hundreds of applications were submitted in 2013, Logic did not formally begin its infrastructure build until January 2014.

41. Ms. Byron states that DataLink was, and remains, extremely slow in responding to Logic's application for permits. She states that presently, Logic has 3,700 outstanding permit requests. According to Ms. Byron, as a result of DataLink's inability to process permit applications in a timely manner, when Logic commenced its infrastructure build it

quickly installed on the poles it had received permits for. Ms. Byron states that Logic then continued to install on the poles for which it had made permit applications but for which the permits had not yet been granted.

42. Ms. Byron states that whilst Ms. Sylvester suggests that Logic made attachments without submitting a permit application, to the best of her knowledge and belief, this rarely occurred. The only exception is where attachments were made to service poles for the purpose of a service drop and the Logic Agreement expressly excludes a Service Drop from the definition of an unauthorized attachment. Ms. Byron states that she is in the process of doing an audit of all attachments, and in her review thus far, she has uncovered only one attachment in respect of which no permit request was made. In all other instances that she has reviewed thus far, Ms. Byron states that applications were made, but DataLink in many instances failed to respond to the permit applications or process them in a timely manner.

43. While it was performing the roll out, Logic states that it regularly sent information to DataLink outlining exactly which poles it had made applications for, what permits it had received, and which poles it had made attachments to. Reference was made to emails sent to Ms. Sylvester. Ms. Byron states that it should be clear from these communications that DataLink was kept informed of Logic's progress in making the attachments. She states that there was no attempt made by Logic at any point to hide or conceal its actions.

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44. Ms. Byron states that even apart from these regular updates already referred to by her, DataLink and CUC were in regular contact with Logic. As the roll out took place, Logic requested certain assistance from CUC. Ms. Byron cites as an example of this a request Logic made on 3 June 2014 for the placement of half poles to be placed to accommodate service cabinets needed by Logic to support the fibre network it had attached in certain areas. Half poles, she states, are installed upon request and provide a service distribution point. They are put in place after the surrounding infrastructure is complete. Reference was made to an email chain in which Logic requested and received the placement of the half poles by CUC. Essentially CUC facilitated the service deployment into an area where Logic had made attachments, which had not yet received a permit from DataLink. There can be no doubt that all parties were aware of those attachments, states Ms. Byron.

45. Ms. Byron also exhibited to her affidavit a spreadsheet setting out all attachments that Logic has made. She states that the document shows that it has not been uncommon for DataLink to issue a permit well over a year after the application was made and months after the attachment was made.

46. The spreadsheet correctly records, Ms. Byron states, that attachments were made prior to permits being obtained. DataLink sent Logic invoices for those attachments for which permits had not yet been obtained. Logic paid those invoices. Ms. Byron states that in some instances, permits have now been issued for those attachments. She further states that whilst many permit applications remain outstanding, no permits have yet been refused for any of the poles which Logic has attached to.

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47. Ms. Byron states that subsequent to August 2014, the only attachments that Logic has made for which a permit has not yet been granted relate to the San Sebastian development. That attachment (12 poles) took place on 15 March 2015. Ms. Byron states that Logic applied for the permit for those poles on 14 February 2014, however, she says that DataLink has not yet provided a substantive response to that application.

48. Ms. Byron makes a number of criticisms of the spreadsheet exhibited to Ms. Sylvester's affidavit, claiming it has omitted certain important pieces of information. For example, she states that the first ten entries omit to mention that Logic was granted permits for those poles. Similarly, the spreadsheet refers to poles being audited by DataLink in 2015, which she says gives the impression that these are recent attachments or that DataLink had only recently become aware of them. Ms. Byron repeats that Logic had provided notification of these attachments.

CUC's Submissions

49. Learned Queen's Counsel Mr. McMaster made a number of submissions on behalf of CUC. Amongst them was that Logic has committed clear acts of trespass. Further, that CUC has standing to bring the claim because CUC although it has granted a License to DataLink to attach in the space and to grant sub-licenses, CUC retains its rights as owner and possession of the poles. It was submitted that there is no defence to claim and that in these circumstances the usual guidance in the well-known ***American Cynamid Co. v Ethicon Ltd.*** [1975] A.C. 396 does not apply. Reliance was placed upon a number of

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authorities, including ***Patel v Smith*** [1987] 1 WLR 853 and ***Official Custodian for Charities v Mackey*** [1985] Ch 168.

Logic's Submissions

50. Mr. Broadhurst made a number of submissions opposing the granting of an interlocutory injunction. He submitted amongst other matters, that there were serious issues to be tried.

RESOLUTION OF THE ISSUES

51. Time does not permit a long discussion since this is an injunction application and I feel the need in fairness to the parties to deal with this matter swiftly and to provide reasons for my decision at the time of delivering it. However, it is trite that an injunction is a discretionary equitable remedy. So, for example concepts of delay, laches, acquiescence, coming to the court with clean hands, the notion that he who seeks equity must do equity, these all apply. It baffles me why DataLink Ltd. is not a party to this claim. When I asked about it at the hearing, it appeared that it was not felt that they were a necessary party. However, as Mr. Broadhurst argued, pursuant to the DataLink Agreement, DataLink is required to enforce the performance and observance of its sub-licensees. Prior to Suit, letters were written on behalf of DataLink demanding undertakings, yet DataLink is not a Plaintiff. I agree with Mr. Broadhurst that in effect CUC's claim effectively requires the Court to determine whether there is a breach of the Logic Agreement by Logic. I cannot help but feel that a chunk of the story is not fully before the Court. Even though pleadings may need to be less all-encompassing than they

used to be, and these matters are dealt with to some extent in the affidavit evidence, it is puzzling that, in addition to DataLink not being a party to the claim, the claim is pleaded as a trespass claim simpliciter without any pleading of the DataLink Agreement and the Logic Agreement, both of which CUC is a party to. This case is not as simple as that.

52. Further the Logic Agreement appears to provide its own commercial remedies and indeed, seeks that the parties resolve any dispute in a fair, expedient and reasonable manner. All the Amended Statement of Claim says about DataLink is that "The Plaintiff's sub-licensee DataLink Ltd. has asked the Defendant in writing to desist and confirm that it will not attach apparatus except with permission". The pleading does not state from when these unauthorized attachments were being placed. It is only in the Affidavit evidence that the DataLink and Logic Agreements are discussed and that one sees any reference to time. It is only from the affidavits that one can discern that some of these unauthorized attachments were going on from June 2014. DataLink, as provided for in the Logic Agreement, has billed for some of the attachments and Logic states that it has paid the fees for the invoices rendered by DataLink in respect of attachments.

53. It is plain that because of the nature of the Logic Agreement the parties agreed on certain commercial ways of dealing with a problem which it was clearly contemplated would occur during the life of the Agreement. Logic's evidence is that in order to complete the roll out obligations Logic has reserved space on over 16,000 poles. It states that it pays for that space until it has been granted or refused a permit or until 31 December 2018, whichever occurs first.

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54. Logic is blaming DataLink for failing to comply with its own contractual obligation to review and respond to the permit applications, in a short time. Further, the Logic Agreement in addition to providing that DataLink can bill money for the unauthorized attachments, also says that CUC can remove the attachments. However, where Logic makes unauthorized attachments and DataLink bills for it, it is only if the penalty fee is not paid within 60 days of receipt that the attachment may be removed. Logic is also stating that since August 2014, the only attachments that it has made for which a permit has not been granted relate to the San Sebastian development. That attachment took place on 15 March 2015, although Logic say that they applied for the permit on those poles from as far back as February 2014.

55. The classic guidance in respect of interlocutory injunctions is that set out in ***American Cynamid***. These are generally:

a. Whether there is a serious issue to be tried;

b. Whether damages are an adequate remedy;

c. If not, where does the balance of convenience lie?

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56. In the context of the Logic Agreement and how the parties have conducted themselves over time, I cannot say that the attachments made in advance of a permit being granted are plainly to be regarded as a trespass. In my view there are serious issues to be decided. The defence, weak or strong, is in essence that attaching in advance of receiving the permit is Logic's only commercially practical remedy for DataLink's alleged breach of contract in delaying the permits, which otherwise would frustrate Logic's contractual

rights. That is how I view the use of the word "breach" in respect of Logic's actions in Broadhurst's letter dated 10 June 2015. In its email to Appleby dated 2 July 2015, Broadhurst put the matter thus:

> *"Our client's business plan is suffering by the behavior being exhibited by your client; the lack of expedient pole attachment requests and approval is causing it to be incapable of achieving the role out obligations it is committed by ICTA. It is, in fact, our client who may well be suffering irreparable harm".*

57. In addition, there is the outstanding summons seeking a determination whether a stay should be granted or the matter struck out based upon the Logic Agreement's provisions regarding dispute resolution and arbitration.

58. With regard to the question whether damages would be an adequate remedy if CUC were to succeed at trial in establishing a right to a permanent injunction, it seems plain to me that damages would be an adequate remedy for the Plaintiff in all of the circumstances. There is no evidence directly about Logic's financial means. However, there is nothing to suggest that Logic would not be able to pay damages in the event that CUC were to suffer damage in the event that the injunction is refused. As stated in ***American Cynamid*** by Lord Diplock at page 408C-D:

> *"If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage".*

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59. Damages would also seem to be an adequate remedy for Logic if the injunction were to be granted and CUC would be in a position to pay those damages. I note that whilst the Defendant's Attorneys in their written submissions and correspondence say that Logic would suffer irreparable harm I cannot trace seeing any actual evidence of this presented on behalf of Logic, though it is clear that if the injunction is granted it may lose a certain amount of business. However, in any event, the Plaintiff's application did not ask that Logic not be permitted to attach; the application is for Logic not to do so without permits.

60. As stated above, given that damages would in my view be an adequate remedy for CUC, I would not need to go on to consider the balance of convenience. However, in the event that I am wrong about that, I will go on to discuss the balance.

61. In relation to the balance of convenience the evidence as to safety issues is the matter that has given me the most pause. However, it is true that as Mr. Broadhurst points out, none of CUC's engineers or safety officers have given evidence indicating safety risks. Further, the evidence given by KS as to safety concerns is mainly of a generalized nature and the incident described in KS's affidavit does not plainly attribute any fault to Logic, as opposed to another provider. Indeed, Logic claims to have received compliments from CUC's Safety Specialist for the work that it has performed. Importantly, there is no evidence that there have been any attachments by Logic without a permit within the last year that have given rise to any safety concerns. It is quite important to have specific evidence of safety issues as opposed to taking a broad brush approach to the matter.

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62. One of the points Mr. McMaster Q.C. sought to argue was that even if DataLink has billed and been paid for unauthorized attachments, that is irrelevant because CUC is not seeking an injunction in respect of existing or previous attachments, and is seeking that Logic be restrained from future attachments without permit only. However, it seems to me that this leads to another consideration. That is that if there really was a pressing safety concern, one would expect CUC to be asking this Court to have all the present unauthorized attachments removed.

63. It is a counsel of prudence to preserve the status quo where other factors appear even. It was not until June 2015 that action was threatened, and this is almost a year after some of the unauthorized attachments complained about first commenced. The status quo prior to the filing of the Writ of Summons and injunction application was that the attachments were taking place to the knowledge of the parties and in some cases, DataLink has sent invoices pursuant to the Logic Agreement and been paid.

64. It is for the Plaintiff to satisfy me on a balance of probabilities that the course likely to involve the least risk of irremediable harm is to grant the injunction. CUC has not succeeded in doing so, there has been no demonstration of any need for urgency requiring an injunction to be granted until trial.

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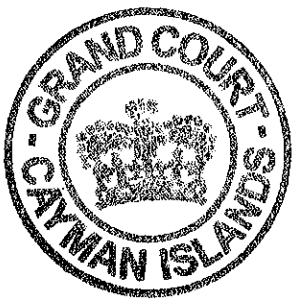
66. My commercial instincts and my weighing of the foregoing considerations lead me to the view that the application for an interlocutory injunction ought to be refused. Question of costs reserved for further argument.

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JUDGE OF THE GRAND COURT