

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2024/0328

BETWEEN:

**FLOYD “HERITAGE” BURNETT
DBA TOLA RADIO VI**

Applicant

AND

CARIBBEAN CELLULAR TELEPHONE LTD. (“CCT”)

Respondent

Appearances: Akilah Anderson, Counsel for the Applicant
Sydney Bennett KC and Anthea Smith, Counsel for the Respondent

**2024: November 22nd
November 27th**

DECISION

[1] **FELIX-EVANS J:** By *ex parte* notice of application filed on 8th November 2024, the Applicant seeks an interim injunction order:

- (i) compelling the Respondent to forthwith restore the power supply to the Respondent’s Cell Towers at Jost Van Dyke and Peter Island, British Virgin Islands, to enable the Applicant to resume broadcast services on its FM Platform;
- (ii) restraining the Respondent from harmful interference with the Applicant’s business and from touching and/or otherwise interfering with any of the Applicant’s equipment and especially its transmitters, receptors and related equipment of any kind and in consequence the Applicant’s right to operate and broadcast, pending a resolution of the dispute either by the Telecommunications Regulatory Commission (the TRC) or the court;

- (iii) restraining the Respondent, until judgment or further order, from touching or otherwise interfering with any of the Applicant's equipment and especially its transmitters, receptors and related equipment in the jurisdiction or otherwise, except with the prior written consent of the Applicant;
- (iv) restraining the Respondent from insisting on the payment of the unilaterally imposed monthly rent of \$5,000.00 pending agreement of the parties or a resolution of the dispute;
- (v) restraining the Respondent from in any way taking any steps that have or will interfere with the Applicant's ability to operate and broadcast, pending a resolution of the dispute.

- [2] The Applicant complains that the Respondent has breached its statutory right under the BVI Telecommunications Act, No. of 2006 ("the **Act**"), to access to its (the Respondent's) facilities on reasonable terms and right to protection from harmful interference and its common law right to, among other things, sufficient notice of termination of their agreement. Accompanying the Notice of Application were a Certificate of Urgency, Applicant's First Affidavit with a Certificate of Exhibits, Applicant's Supplementary Affidavit with a Certificate of Exhibit and Skeleton Arguments. Upon reviewing these documents, the Court, on 11th November 2024, gave a Directions Order for the *inter partes* hearing of the application on 22nd November 2024.
- [3] Pursuant to the Court's directions, the Respondent filed a First Affidavit from its Chief Executive Officer with a Certificate of Exhibits, and Submissions and Authorities. The Applicant filed Reply Submissions and Authorities.
- [4] The Application was heard on 22nd November 2024. During arguments, although the Parties maintained their respective position, it appeared that they were open to reaching a compromise. Following the hearing of the arguments, the Court gave them an opportunity to see if they could reach agreement for a consent interim injunction order that would address their individual immediate to short/medium term concerns. Regrettably, the parties did not reach agreement.

- [5] In coming to its decision, the court has considered all the evidence filed and the submissions made both in writing and orally.
- [6] The court exercises its discretion to refuse to grant the interim relief sought.

Chronology of the facts

- [7] The parties are generally in agreement on the facts. The Applicant is licensed under the Act to operate a radio broadcasting station on the FM Platform. The Respondent is a locally incorporated BVI company and one of the three or four leading telecommunication providers that offer telecommunication services within the BVI and together with this, operates cellular towers on Jost Van Dyke and Peter Island. In July 2021, the parties entered into a written Exchange of Services Agreement under which the Respondent provided the Applicant with tower space for antenna placement on Jost Van Dyke and Peter Island (colocation services), electric power, telephone and internet services, free of charge, in exchange for the Applicant advertising the Respondent's products and services on its radio station. The parties are agreed that the value of the Respondent's services to the Applicant was over \$60,000.00 annually. The written agreement between the parties was renewed annually until its last renewal in June 2023. The 2023 written agreement expired in May or June 2024 after which the parties' business relationship continued as before but without a written agreement in place.
- [8] By letter of 31st July 2024, the Respondent gave the Applicant notice of termination of their agreement with immediate effect, informing that it would continue to provide its services (colocation services, electric power, telephone and internet services) to the Applicant for one month to allow him to transition (the termination letter). In the termination letter, the Respondent requested the Applicant to (a) immediately stop all the Respondent's advertising on its radio, (b) remove all its equipment from the Respondent's premises by 31st August 2024, (c) advised the Applicant that if it retained any services, including internet and telephone services, it will be invoiced from 1st September 2024, and (d) to refrain from making defamatory or libelous comments about it "*as it will no longer be tolerated*".

- [9] By email sent to the Respondent's Chief Executive Officer on 19th August 2024, Subject: Apologies and Plee for Extension, the Respondent apologized for his *"unprofessional behaviour"*, acknowledged that the Respondent had had it with him and that *"an apology is not an easy fix"*, requested the Respondent to give him *"one more chance"* and requested an extension of time to the end of year to *"seek financial aid and figure out a new location and tower-sharing agreements"*.
- [10] The Applicant continued to use the Respondent's facilities free of cost past 31st August 2024. According to the Respondent's evidence, on 1st October 2024 the Applicant and its Chief Executive Officer had a meeting at which the Applicant was informed that the Respondent had already given him one extra month and would give him the additional month of October 2024 to arrange alternative accommodation and then vacate, so that in all the Respondent would have been given him three months to vacate its premises. The Applicant's evidence was that he and the Respondent continued to communicate after 31st August 2024.
- [11] On the 15th October 2024, the Respondent's Chief Executive Officer sent a letter to the Applicant referencing the termination letter, the Applicant's email of 19th August, and their meeting on 1st October, and requesting the Applicant's removal of its equipment from the Respondent's premises by 31st October 2024. The Chief Executive Officer informed that the Respondent would stop supporting the Applicant's equipment on its premises on 1st November 2024 if they were not removed by that date and that it would invoice the Applicant for internet and telephone services from 1st November 2024, if the Applicant retained these services.
- [12] The Respondent's evidence is that after the Applicant received the letter of 15th October 2024, he went on the public airways and made *"further extremely disparaging comments"* about the Respondent's business, ownership, management, and staff and issued threats of violence against its staff. These alleged threats were reported to the Royal Virgin Islands Police and the Telecommunication Regulatory Commission for their respective investigation. The Respondent's evidence is that its Board of Directors held an emergency meeting on the evening of the 16th October 2024 following which they wrote to the Applicant by letter dated 17th October 2024. In their letter to the Applicant, the Board condemned his attacks on the Respondent and called for its immediate cessation, failing which the Respondent would immediately suspend its services to the Applicant and

pursue legal action against him. In same letter, the Board offered to allow the Applicant to continue to use the Respondent's services on commercial terms, i.e., a monthly payment of \$5,507.00. As to the payment terms the letter stated:

"Invoicing & Payment"

- *Further to our previous correspondence Caribbean Cellular Telephone will invoice Tola Radio VI for broadband internet and telephone services, from November 1, 2024 if you retain these services (i.e. \$508 per month due on the 22nd of each month).*
- *Additionally, if you choose to continue using our facilities for tower colocation and electric power we will require monthly payment in advance, beginning November 1, 2024 for these services (i.e. \$5,000 per month due on the first of each month).*

....

Failure to comply with any of these requirements or make payments when due will cause immediate termination of any and all services."

("the facility letter")

- [13] On 18th October 2024, the Respondent issued a press statement on the situation between the parties. On 21st October 2024, the Applicant issued a press statement in response.
- [14] The Respondent's evidence is that after receipt of the facility letter, the Applicant continued to make disparaging public comments about the Respondent's business, ownership, management and staff.
- [15] By letter dated 25th October 2024, the Applicant notified the TRC of a dispute with the Respondent and requested it to take immediate steps to mediate and seek to resolve same to avoid disruption of his broadcast services. The Applicant's main, if not sole, complaint in that letter was about the financial terms offered in the facility letter, which he neither found *"to be commercially viable nor in line with prevailing industry practice, norms and or rates"*.
- [16] By letters dated 30th October 2024, the Applicant wrote to the Respondent's Chief Executive Officer and Chairman of its Board of Director, separately. In these letters, the Applicant indicated his interest in reaching agreement with the Respondent on mutually beneficial and viable terms and described the Respondent's proposal in the facility letter as *"exorbitant"* and/or *"not in line with prevailing*

industry rates, practice and norms". He requested the Respondent to hold off from insisting on the payment of the \$5,000.00 for the colocation services effective 1st November 2024 and taking any steps which would cause a disruption to its broadcasting services and undertook to pay the monthly \$507.00 for telephone and internet services when they became due on 22nd of each month.

- [17] On 1st November 2024 the Applicant did not pay the \$5,000.00 for colocation services and electric power as offered in the facility letter if the Applicant retained these services after 31st October 2024. The Respondent cut off the electric power supply to the Applicant's equipment at Jost Van Dyke and Peter Island on 2nd November 2024 and 3rd November 2024, respectively.
- [18] By letter dated 3rd November 2024, delivered to the Respondent's offices on 4th November 2024, the Applicant tendered cheque payment of \$5,000.00 under cover of a letter which stated, in part, that the *"payment is enclosed as a good faith payment while we continue to negotiate"*. In that letter, the Applicant again described the \$5,000.00 a month as being exorbitant and not in line with prevailing practice and rates. The Applicant requested the immediate restoration of the Respondent's services in consideration of its tendering of the payment.
- [19] By letter dated 4th November 2024, the Applicant sought the intervention of the TRC on an urgent basis.
- [20] Under cover of letter dated 5th November 2024, the Respondent's Counsel return to the Applicant the cheque of \$5,000.00 informing that the Applicant's statement in his letter of 3rd November 2024 that *"payment is enclosed as a good faith payment while we continue to negotiate"* showed that the Applicant had not accepted the offer in the facility letter and the parties had not come to an agreement. Counsel's letter advised of the withdrawal of the Respondent's offer contained in the facility letter and requested the Applicant to make arrangements to remove his equipment from his client's premises.
- [21] The TRC replied to the Applicant on 8th November 2024. They declined to intervene in the dispute on the grounds that the Applicant was not a public supplier under the Act and therefore the Respondent was not obligated under the Act to provide the Applicant access to its facilities; the

Respondent's conduct did not meet the statutory definition of "harmful interference" under the Act; and the Applicant's complaint of high rate for the colocation services and electric power was outside the scope of the TRC's authority as it did not pertain to the telecommunications network or service of the Respondent.

[22] The Applicant filed this application on 8th November 2024.

The Applicant's Submissions

[23] The Applicant contends that the injunction should be granted as there are serious issues to be tried, damages will not be an adequate remedy for him if the injunction is not granted and he succeeds at trial whereas damages would be an adequate remedy for the Respondent if the injunction is granted and it succeeds at trial; and the balance of convenience lies in favour of granting the injunction. The Applicant framed the serious issues to be tried as follows though not in that order:

- (a) Whether the Respondent has a statutory obligation to give the Applicant access to its facilities on reasonable terms for the Applicant to continue its regulated activity of broadcasting;
- (b) Whether the Applicant had a right to sufficient notice of the Respondent's purported termination of the Respondent's express agreement or implied licence that he could continue to use the cell tower facilities on a month-to-month basis and if so, what period of notice would have been reasonable;
- (c) Whether the Respondent is entitled to disconnect the Applicant's power supply at its towers or otherwise interfere with the Applicant's right to broadcast using its cell tower infrastructure in circumstances where it established a course of conduct since July 31, 2024 whereby the Applicant could continue to use its facilities;
- (d) Whether the Respondent is entitled to disconnect the Applicant's power supply or interfere with the Applicant's right to broadcast using its cell tower infrastructure in circumstances where it took payment of \$5,000.00 for the Applicant to continue using the same;
- (e) Whether the Respondent may enforce the new "agreement" dictated by its July 31, 2024 letter, where such terms are unconscionable to wit the requirement of payment of \$5,000.00 per month for continued access or where the Respondent has not dealt fairly in all of the circumstances.

The Respondent's submissions

- [24] The Respondent contends that there is no serious issue to be tried. For the Applicant to show that there is a serious issue to be tried, he must show that he has an arguable case that some substantive right vested in him has been or is likely to be violated. He has not shown that.

Applicable principles

- [25] The court's power to grant an injunction is discretionary and depends on all the facts of the case.
- [26] An interim injunction is a provisional measure taken at an early stage in the proceedings, before the court has had an opportunity to hear and weigh fully the evidence on both sides.¹
- [27] In the recent judgment of **Notre Dame Investments Ltd et al v Rowntry Trading Limited et al**² (*delivered on 19th June 2024*) the Court of Appeal described an interim injunction as a remedy granted to regulate the position until the parties' rights are determined at trial. The court in **United States of America v Abacha**³, stated that an interim injunction is designed to "hold the ring" pending determination of the dispute on the merits or otherwise.
- [28] The Court of Appeal in **National Commercial Bank of Anguilla Ltd v National Bank of Anguilla (Private banking and Trust) Limited (in administration)** (*delivered on 28th February 2017*) accepted that the principles for the granting of a mandatory injunction are the same as for a prohibitory injunction and what is important is the court's view of the risk of irremediable harm to one party or the other depending on whether or not the injunction is granted.⁴

¹ **Bean on Injunctions**, 13th Edition (2018) page 3, paragraph 1-01.

² NEVHCVP2022/0009

³ [2014] EWHC 993

⁴ [15]

[29] The guidelines to be considered in applications on notice for the grant of an injunction where the facts are in dispute are well-known.⁵ The questions to be asked are:

- (i) Is there a serious question to be tried?
- (ii) (*if there is*) are damages adequate to either side?
- (iii) (*if in doubt*) does the balance of convenience lie in granting or refusing to grant the injunction?

Analysis

[30] In contending that the Respondent has a statutory obligation to give the Applicant access to its facilities on reasonable terms, the Applicant addressed the purpose of the Act and various sections thereof, more specifically section 2 (Interpretation), section 5 (Establishment of the Telecommunications Regulatory Commission), section 6 (Functions of the Commission), section 15 (Requirement for a Licence), section 26 (Interconnection) and section 27 (Access to Facilities). The Applicant relied on sections 26 and 27 for his submission that the Respondent had an obligation to provide the Applicant access to its facilities. Section 26 provides for the obligations of a public supplier to provide interconnection on such terms as the TRC may specify and section 27 provides for access to facilities and utility installation through negotiations between and among public suppliers and public utilities on a non-discriminatory and equitable basis. The Applicant contends that it was granted a licence under section 15(1) of the Act which stipulates that no person shall operate a telecommunications network or provide a telecommunications service without a licence granted by the Commission and that under the Act there is no separate licencing provision for radio broadcasters. The conjoint effect of sections 26 and 27 and 6(d), (e), (f), (k), (l), (m) and (o) is that the Applicant is entitled to the protection of access at reasonable rates and to the intervention of the TRC to mediate any the dispute arising from the Respondent's breach of that right.

[31] The Respondent's resists this argument on the ground that the Applicant is not a 'public supplier' to whom sections 26 and 27 apply. Instead, the Applicant provides a 'programme service' as defined in the Act and according to section 3(a) of the Act, the Act does not apply to him. The Respondent further contends that even if the Applicant were a 'public supplier' as defined by the Act, his cause

⁵ **American Cyanamid v Ethicon** [1975] 1 ALL ER 504

of action would have to be against the TRC, not the Respondent, and the Applicant would have to pursue his cause of action by judicial review proceedings. In that case, the Respondent could be an interested party.

- [32] The TRC's letter directly addresses the provisions of the Act under which the Applicant sought its intervention. The TRC explained that the Applicant as a provider of a broadcasting service is not entitled to the protection of the Act, the action of the Respondent in cutting off electricity to the Applicant's equipment does not constitute harmful interference as defined in the Act and the Applicant's complaints lie outside of its jurisdiction as it does not pertain to telecommunications network or service.
- [33] Having considered the provisions of the Act and the TRC's letter, the Court finds that the question of whether the Applicant has a statutory right of access to the Respondent's facilities on reasonable terms is not a serious question to be tried.
- [34] Neither is the question of insufficient notice of termination of agreement a serious question in this matter. A copy of the written agreement was not in evidence. Both parties indicated that they could not find their copy of the agreement. The Parties are agreed that their written agreement had already expired when the letter of termination was issued. The Respondent contends that a month-to-month agreement ensued and so it was entitled to give no more than one month notice, which it did. The Applicant's position is that what ensued was not a month-to-month agreement, but even if it was, the notice was insufficient in view of the type of agreement. The termination of that type of agreement would require more than a month's notice as the Applicant would require time to make alternative arrangements and remove its equipment.
- [35] The Court notes that the letter of termination gives the reason, though not explicitly, why the relationship between the parties which had continued after the expiration of the written agreement was being brought to an end. Paragraph d) of the termination letter states, "*Please refrain from making defamatory or libelous comments about Caribbean Cellular Telephone, as it will no longer be tolerated.*" Although the letter stated that the Applicant was being given a month to continue to use the Respondent's services before he was required to remove his equipment from the

Respondent's premises, the Applicant was in fact given three months' allowance, during which time it neither advertised for the Respondent nor paid any monetary consideration for the services provided by the Respondent. According to the Respondent, during this period, the Applicant continued to make disparaging comments about its business, management and staff and on one occasion, the Applicant issued threats to its staff, which caused the Respondent to make a report to the police and the IRC.

[36] The evidence supports a month-to-month agreement between the parties after the expiration of their written agreement in May/June 2024. The undisputed evidence is that the Respondent allowed the Applicant to use its services, without the Applicant giving any consideration therefor, for a period of three months after the letter of termination. In these circumstances, the issue of notice being insufficient is not a serious question to be tried. The fact that the stated and actual period of notice may have been very inconvenient to the Applicant does not elevate the issue of sufficiency of notice to a serious question to be tried.

[37] The Applicant also argues that the Respondent was not entitled to disconnect its power supply because it had established a course of conduct since July 31, 2024 whereby the Applicant could continue to use its facilities. The evidence does not support that argument. What the evidence shows is that upon receipt of the letter of termination, the Applicant by email of 19th August 2024 acknowledged his complained-about conduct, apologized and requested an extension of time to the end of year. Following the 31st August deadline, the Respondent allowed the Applicant to continue to use its services free of charge in September and on 1st October, its Chief Executive Officer met with the Applicant to inform him that the Respondent would give him an additional month until end of October. By letter of 15th October 2024, the Respondent's Chief Executive Officer formally requested the Applicant to remove his equipment on the Respondent's premises by 31st October 2024 failing which, the Respondent would stop supporting the Applicant's equipment on 1st November 2024. Two days later, the Respondent's Board of Directors wrote to the Applicant warning about his alleged continuing "defamatory and libelous comments" about the Respondent and threatening immediate suspension of the Respondent's services to the Applicant and legal action, if such conduct continued. In the same letter, the Board offered to continue to provide the Applicant with its services on financial terms commencing 1st November 2024. Nothing in the evidence above

could have given rise to any reasonable expectation by the Applicant that he would be allowed to continue to use the Respondent's services until the end of the year, as he had requested, or such other time as suited him, without any consideration flowing from him.

[38] Whether the Respondent's receipt of payment of \$5,000.00 from the Applicant constituted a new contract between the parties thereby prohibiting the Respondent from disconnecting the Applicant's power supply on 2nd and 3rd November is not a serious question to be tried. On the undisputed evidence, the Respondent disconnected the Applicant's power supply after 1st November 2024, the date stipulated in the facility letter for the Applicant to make the payment of \$5,000.00 if he chose to continue using the Respondent's facilities for tower colocation and electric supply, and before 4th November 2024, the date the Applicant delivered the \$5,000.00 payment to the Respondent's offices. On the undisputed evidence, the Respondent's counsel wrote to the Applicant by letter dated 5th November 2024, which the Applicant admitted he received on 6th November 2024, declining to accept the payment and returning the uncashed cheque on the basis that the Applicant's letter indicated that the parties had not reached agreement. In these circumstances, no new agreement could have been constituted. A receipt issued by the Respondent's offices for the payment does not constitute acceptance of the payment by the Respondent. The receipt merely constituted an acknowledgment that the payment was received by the Respondent's offices.

[39] The Court finds that question whether the Respondent may enforce the new "agreement" dictated by its July 31, 2024 letter, where such terms are unconscionable, to wit, the requirement of payment of \$5,000.00 per month for continued access or where the Respondent has not dealt fairly in all of the circumstances, is not a serious question to be tried. The evidence does not support any agreement between the Respondent and the Applicant for \$5,000.00. The evidence shows that the Respondent offered to continue providing colocation services and electric power to the Applicant for the monthly payment of \$5,000.00 and that the Applicant did not accept this proposed term. The Applicant wanted to continue negotiations, hopefully to achieve a lower monthly payment. There was no obligation on the Applicant to accept the Respondent's offer and the Applicant did not. The Respondent immediately withdrew its offer. The issue of unconscionability and unfairness therefore does arise as no contract was concluded.

- [40] The court's attention has not been drawn to any law, statute or common law, that allows it to compel the Respondent to engage in negotiations with the Applicant until the Applicant is satisfied that the terms are reasonable. Where parties cannot reach agreement which satisfies their individual interests, they are free to walk away from the negotiating table.

Conclusion

- [41] The Court finds that the Applicant has not crossed the threshold of establishing that there is a serious question to be tried. In the circumstances, the Court cannot go on to consider the other limbs of the guidelines laid down in **American Cyanamid**.
- [42] The application for interim injunctive relief is therefore dismissed with costs to the Respondent to be assessed, if not agreed.

**Heather Felix-Evans
High Court Judge (Ag.)**

By the Court

Registrar