

**EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**TERRITORY OF THE VIRGIN ISLANDS  
BVIHCVAP2015/0015**

**IN THE MATTER OF THE TELECOMMUNICATIONS ACT, 2006**

**BETWEEN:**

**TELECOMMUNICATIONS REGULATORY COMMISSION**

Appellant

and

**CARIBBEAN CELLULAR TELEPHONE LIMITED**

Respondent

**Before:**

The Hon. Dame Janice M. Pereira, DBE  
The Hon. Mde. Louise Esther Blenman  
The Hon. Mde. Gertel Thom

Chief Justice  
Justice of Appeal  
Justice of Appeal

**On written submissions:**

Mr. Brian Kennelly with Ms. Sinead Harris of Forbes Hare  
for the Appellant

Ms. Tana'ania Small Davis with Ms. Monique Peters of Hunte & Co  
for the Respondent

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2015: December 2.

Written reasons delivered December 16, 2015

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*Interlocutory appeal – Stay of Spectrum Award 2015 process - Rule 56.4(8) of the Civil Procedure Rules 2000 – Whether a ‘stay of proceedings’ under CPR 56.4(8) includes a stay of an administrative decision or process – Exercise of judicial discretion in granting interim relief – Interim injunction against public body – Assessing where balance of convenience lies – Determining risk of injustice*

The appellant, the Telecommunications Regulatory Commission (“the TRC”), is the body established under the Telecommunications Act, 2006<sup>1</sup> (“the TA”) to manage spectrum in the Virgin Islands which is used by internet and other electronic based communication

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<sup>1</sup> Act No. 10 of 2006, Laws of the Virgin Islands.

technologies. The respondent, Caribbean Cellular Telephone Limited (“CCT”), is the pioneer mobile services operator in the Virgin Islands and is one of three licensed mobile network operators (“MNOs”) in the Virgin Islands.<sup>2</sup>

In June and July 2015, the TRC engaged in consultation with the MNOs regarding the procedure to be adopted for the implementation of the ‘Spectrum Award 2015’, including the method for applying for the allocation of spectrum under it in the 700 MHz, 1900 MHz and AWS-1 MHz bands to MNOs in the Virgin Islands. Mobile spectrum is a finite resource, and as a result, the allocation of frequency along or within the spectrum is very valuable; accordingly, the Spectrum Award 2015 process is highly anticipated and is of significant importance to all telecommunications operators. The TRC notified the MNOs that applicants for spectrum allocation under the Spectrum Award 2015 would be required to show their compliance with the TRC’s regulatory obligations – in respect of their licenses, the telecommunications code, and any instructions issued by the TRC.

On 19<sup>th</sup> August 2015, the TRC published its rules governing the Spectrum Award 2015 in the final ‘Invitation to Apply for 700, 1900 and AWS-1MHz Spectrum’ (“the ITA”). The ITA had a number of provisions including a deadline for registration and the submission of applications and a mechanism whereby an MNO could demonstrate its commitment to bring itself into compliance with the TA and the TRC’s regulatory framework where the MNO could not be said to be materially in compliance with the TA. This mechanism was in the form of Undertakings from the MNO and was devised primarily to assist CCT who would not be able to come into compliance within the registration time frame. Discussions were held with each MNO on 19<sup>th</sup> August 2015, pointing out areas of non-compliance as far as the TRC was aware.

The deadline for registration was set for 14<sup>th</sup> September 2015 at 3:30 pm; but this deadline was extended to 18<sup>th</sup> September 2015 at 3:30 pm to allow the TRC more time to finalize any Undertakings. The TRC responded to comments received from CCT and sent a revised draft of the Undertakings to CCT by 14<sup>th</sup> September 2015 and made it clear to CCT that the Undertakings were required to be agreed by the TRC before the extended registration deadline in order for CCT to be allowed to register for the Spectrum Award 2015. By this time, CCT filed an application for leave to bring judicial review proceedings covering a number of issues in respect of the TRC’s conduct in relation to its operation, including the Spectrum Award 2015 process.

Following the registration deadline, CCT’s application for registration was rejected by the TRC as the TRC was of the view that CCT had failed to comply with the rules governing the ITA in that the application was received minutes after the deadline, and more importantly, that up to that point in time, CCT’s proposed Undertakings had not been seen, much less agreed to by the TRC. CCT contended however that the Undertakings were delivered to the TRC at 3:00 pm on 18<sup>th</sup> September 2015 and satisfied the purpose for which they were required.

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<sup>2</sup> The other MNOs are Digicel and LIME (Cable & Wireless).

Given the circumstances of the case, CCT's application came up for hearing before the learned judge in the court below on an expedited basis on 2<sup>nd</sup> October 2015. In its application, CCT also sought interim relief in the form of injunctions restraining the TRC from essentially taking any action in relation to the Spectrum Award 2015 process. In her oral judgment delivered on 7<sup>th</sup> October 2015, the learned judge granted leave to CCT to bring judicial review proceedings, and also ordered, purportedly pursuant to rule 56.4(8) of the Civil Procedure Rules 2000 ("CPR 2000"), that the grant of leave to bring judicial review proceedings shall operate as a stay of the Spectrum Award 2015 process pending the hearing and determination of the claim for judicial review. The learned judge however refused to grant the interim injunctions sought, having concluded that CCT was not entitled to the interim relief sought based on the balance of convenience on the evidence before the court.

The TRC is aggrieved by the grant of the stay of the Spectrum Award 2015 and appeals the judge's decision in that regard. The TRC contends that the learned judge erred as matter of law in granting a stay pursuant to CPR 56.4(8) which relates to a 'stay of proceedings' as distinct from a 'stay of an administrative decision or process'. Further, the TRC contends that the grant of a stay of the Spectrum Award 2015, which was not sought by CCT in any event, operates in all practical effect as an injunction against the TRC which the learned judge had refused to grant to the CCT on the evidence it adduced.

CCT has cross-appealed and contends in essence that the learned judge had the power to grant the stay under CPR 56.4(8), but more vigorously, that the learned judge misdirected herself in the exercise of her discretion in refusing the interim relief it sought, in that she applied the wrong approach in assessing the balance of convenience which led her into error in refusing the injunctive relief.

**Held:** allowing the appeal and setting aside the stay of the Spectrum Award 2015 ordered by the court below; dismissing the cross-appeal; and having regard to CPR 56.13(6), making no order as to costs, that:

1. The term "proceedings" as used in CPR 56.4(8) bears a narrow meaning and is to be confined to proceedings properly so called, before a lower court or tribunal exercising judicial or quasi-judicial functions. It would not encompass an administrative decision or action such as the decisions and actions of the TRC which are the subject of this appeal.

**Ministry of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd** [1991] 1 WLR 550 followed; **Cable & Wireless BVI Limited v The Telecommunications Regulatory Commission** BVIHCV2012/0179 (delivered 9<sup>th</sup> August 2013, unreported) approved.

2. In this appeal, CCT did not seek a stay, but rather it sought interim injunctive relief to restrain the TRC from implementing the Spectrum Award 2015. Accordingly, it was not open to the learned judge, having refused the interim injunctions, to grant, through the use of the purported stay pursuant to CPR 56.4(8), what in effect amounted to an injunction. Had the stay been permissible (which it was not), it

ought to have been refused for the same reasons that the injunctions were refused since the learned judge found that the evidence failed to meet the quality for the grant of the injunctions. It would similarly have failed the test for the grant of a stay as the tests for satisfying either are treated as essentially being the same. Consequently, there was no basis as a matter of law or discretion for the judge to grant, pursuant to CPR 56.4(8), a stay of the TRC's Spectrum Award 2015 process.

**Cala Homes (South) Limited v Secretary of State for Communities & Local Development** [2010] EWHC 3278 (Admin) referred; **The Queen on the Application of Walshaw Moor Estate Ltd v Natural England** [2012] EWHC 331 (Admin) referred.

3. The basis on which an appellate court will interfere with a discretion exercised by a trial judge is well established. Such an appeal will not be allowed unless the appellate court is satisfied that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

**Dufour v Helenair Corporation Ltd and Others** (1996) 52 WIR 188 applied; **Charles Osenton & Co. v Johnston** [1941] 2 All ER 245 applied.

4. When a court is dealing with restraining a public body whether from enforcing the law or from performing their public duties as required and contemplated by the law, the balance of convenience must be looked at more widely by taking into account the public interest in the performance of those responsibilities and duties with which the public body is tasked by the law and in seeking to arrive at a just result in all the circumstances. In this case, the learned judge in the court below in assessing the balance of convenience, placed undue emphasis in approaching the matter from the standpoint of a presumption requiring evidence of considerable weight, in essence, to rebut it. This was an error in principle which warranted interference by this Court and, exercising the discretion afresh, in assessing from the material placed before the judge, where the balance of convenience lies and determining which course would minimize the risk of injustice.

**Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2)** [1991] 1 AC 603 applied; **Belize Alliance of Conservation Non-Governmental Organizations v Department of the Environment and another** [2003] UKPC 63 considered.

5. In this case the TRC should not be restrained from undertaking and performing the duties with which it is tasked in serving the wider public interest by undertaking the Spectrum Award 2015 process which can only enhance the level and efficiency of

telecommunication services within the Virgin Islands. The balance of convenience does not favour CCT when considered in the wider context having regard to what the TRC had sought to accomplish given its mandate. Accordingly, allowing the TRC to proceed with the Spectrum Award 2015 process poses the least risk of injustice. Thus, exercising the discretion afresh, but approaching the question differently, this Court reached the same conclusion as the judge in the court below in refusing the interim relief sought by CCT.

**Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and others (No. 2)** [1991] 1 AC 603 applied; **Nation Commercial Bank Jamaica Ltd v Olint Corpn Ltd** [2009] 1 WLR 1405 referred.

## JUDGMENT

- [1] **PEREIRA CJ:** This is an interlocutory appeal following the grant of leave to appeal on 20<sup>th</sup> October 2015. The appeal arises from an order made by the trial judge on an application by the respondent, Caribbean Cellular Telephone Limited (“CCT”), for leave to apply for judicial review in respect of various decisions and actions of the appellant, the Telecommunications Regulatory Commission (“TRC”) in respect of the management and or allocation of spectrum and more specifically the implementation of the process for the allocation of mobile spectrum which includes spectrum in the 700 MHz range, termed as the Spectrum Award 2015, to existing licensed mobile network operators in the Virgin Islands. In granting CCT leave to bring judicial review proceedings, the learned judge also ordered, as appears from the official transcript of her oral judgment delivered on 7<sup>th</sup> October 2015, and expressed to be pursuant to rule 56.4(8) of the **Civil Procedure Rules 2000** (“CPR 2000”), that the grant of leave to bring judicial review proceedings shall operate as a stay, and in respect thereof, made an order in these terms: ‘further action taken by the TRC with regard to the award process for Spectrum Award 2015 will be stayed pending determination of the full hearing of the claim for judicial review’.<sup>3</sup>

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<sup>3</sup> Transcript of oral judgment in chambers (7<sup>th</sup> October 2015) at p. 25, lines 18 – 22.

[2] CCT, in its application for leave for judicial review had also sought interim relief by way of an injunction restraining the TRC from:

(a) rejecting CCT's application for registration or disqualifying it from participation in the Spectrum Award 2015;

(b) requiring CCT to vacate the 2X4 MHz band (834-838 MHz Uperlink, 879-883 MHz Downlink) in the 850 MHz spectrum by 14<sup>th</sup> September; and

(c) proceeding with the Spectrum Award 2015 process.

The learned judge concluded in her oral judgment that 'based on the balance of convenience...on [the] evidence before it, that it [CCT] is not entitled to the interim relief sought'<sup>4</sup> and thus refused to grant the interim injunctions sought.

[3] The TRC is aggrieved by the grant of the stay of the Spectrum Award 2015 process and contends that the learned judge erred as a matter of law in granting such a stay pursuant to CPR 56.4(8) which relates to a 'stay of proceedings' as distinct from a 'stay of an administrative decision or process' and thus she had no jurisdiction to do so. The TRC further contends that the grant of a stay of the Spectrum Award 2015 process, which in any event was not sought by CCT, in all practical effects operates as an injunction against the TRC, which the learned judge had expressly refused to grant to CCT on the evidence adduced.

[4] CCT has cross-appealed and contends in essence that the learned judge had the power to grant such a stay under CPR 56.4(8), but more forcefully, that she misdirected herself in the exercise of her discretion in that she applied the wrong approach in assessing the balance of convenience which led her into error in refusing the injunctive relief sought. CCT accordingly contends that the interim injunctive relief sought ought to have been granted.

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<sup>4</sup> Ibid, p. 25, lines 10 – 13.

## The Background

[5] A condensed version of the background is set out based on matters which are not in dispute:

(a) The TRC is the body established under the **Telecommunications Act, 2006**<sup>5</sup> (“the TA”) to manage the spectrum. The term ‘spectrum’ based on my understanding in the context of the TA, refers to the medium by which radio signals are transmitted by electromagnetic waves. Given the explosion in recent years in internet and other electronic based communication technologies through the use of such signals, the allocation of frequency along or within the spectrum is very valuable. The TRC says that mobile spectrum is a finite and very valuable resource. CCT, which is the pioneer mobile services operator in the Virgin Islands, says that the Spectrum Award 2015 has been highly anticipated and is of significant importance to all telecommunications operators. It is common ground that the Spectrum Award 2015 is of great importance as it will facilitate the provision of the highest quality telecommunications (mobile broadband), as a support for the financial services industry, the broader public interest in terms of high quality service to the end user in the Virgin Islands (residents and visitors alike) and thus of great importance and value to all existing mobile network operators who may be granted frequency allocations to operate within the spectrum to be released by the Spectrum Award 2015. The purpose of the Spectrum Award 2015 was to allocate to mobile network operators in the Virgin Islands, spectrum in the 700 MHz, 1900 MHz and AWS-1 MHz bands.

(b) The allocation of spectrum in the 700 MHz bandwidth is seen to be particularly valuable as it supports the use of high speed mobile broadband services (4G or LTE) which is not as easily delivered at higher

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<sup>5</sup> Act No. 10 of 2006, Laws of the Virgin Islands.

bandwidths. Accordingly, as technology develops, the push has been to use lower band frequencies. Thus, increased or higher numbers of permissions are being sought to operate within the lower bandwidth frequency. This in turn requires telecommunications regulators to design, manage and oversee fair processes in respect of competing network operators in the allocation of spectrum within a bandwidth and more so those where the concentration of permissions granted or to be granted to competing operators fall within a particular bandwidth. Here it is the 700 MHz bandwidth frequency which is considered to be highly desirable to facilitate/or enhance the use of 4G service or LTE technology.<sup>6</sup> Release of spectrum in this bandwidth would undoubtedly facilitate the highest quality telecommunications services in alignment with other major countries such as the United States and within Europe.

- (c) The TRC is charged under the TA with, among other things, the responsibility for the regulation of licensees and authorization holders and for ensuring fair competition among licensees, for determining applications for licences and frequency authorizations and to monitor, enforce and ensure compliance therewith and to issue instructions accordingly; to manage the spectrum and also to promote the systemic development of telecommunications throughout the Virgin islands.<sup>7</sup> Additionally, the TRC is tasked with the responsibility of allocating the uses of the spectrum 'in order to promote the economic, orderly and efficient utilization of frequencies for the operation of all telecommunications networks and provision of all telecommunications services, and to recover the cost thereof'.<sup>8</sup> Importantly, under section 35 of the TA, the TRC is empowered to allocate or re-allocate any frequency band for any particular use in accordance with the spectrum plan 'notwithstanding any other provision of

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<sup>6</sup> This is the main bandwidth used for broadband services in the United States and it appears in Europe and some countries around the world, as well as in some countries in the Caribbean.

<sup>7</sup> These duties are contained in section 6 of the TA.

<sup>8</sup> Section 34(1) of the TA.



[the TA] or any frequency authorization granted by the Commission [TRC].

- (d) There are currently three licensed mobile network operators (“MNOs”) in the Virgin Islands, one of which is CCT.<sup>9</sup> The TRC engaged in a consultation with the MNOs in June and July 2015 with regard to the procedure to be adopted for the implementation of the Spectrum Award 2015 including the method for applying for the allocation of spectrum in respect of the Spectrum Award 2015. This process, says the TRC, was in an effort to promote and ensure fairness in respect of all stakeholders and thus achieve an expeditious outcome beneficial to the public interest.
- (e) The TRC notified the MNOs that applicants for spectrum allocation in respect of the undisputed highly valuable Spectrum Award 2015 would be required to show their compliance with the TRC’s regulatory obligations – in respect of their licences, the telecommunications code, and any instructions issued by the TRC.
- (f) On 19<sup>th</sup> August 2015, the TRC published the rules governing the Spectrum Award 2015 in the final ‘Invitation to Apply for 700, 1900 and AWS-1MHz Spectrum’ (“the ITA”). The ITA provided a deadline for registration and the submission of applications and a mechanism whereby an MNO could demonstrate its commitment to bring itself into compliance with the TA and TRC’s regulatory framework in keeping with its responsibilities and duties under the TA where an MNO could not be said to be in material compliance with the TA. This demonstration of commitment to come into compliance took the form of Undertakings from an MNO. This mechanism TRC says was devised primarily to assist CCT who would not be able to come into compliance within the registration time frame. These Undertakings were required to be agreed with the TRC prior to registration. Discussions were held with each MNO on 19<sup>th</sup>

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<sup>9</sup> The other two operators are Digicel and LIME (Cable and Wireless).

August 2015, pointing out areas of non-compliance as far as the TRC was aware.

- (g) Draft Undertakings were submitted to CCT on 31<sup>st</sup> August 2015. The deadline for registration was set as 3:30 pm, 14<sup>th</sup> September 2015. This deadline date was extended however to 18<sup>th</sup> September 2015, at 3:30 pm to allow the TRC more time to finalize any Undertakings. The TRC responded to comments received from CCT and sent to CCT a revised draft of the Undertakings by 14<sup>th</sup> September 2015 and making clear in its correspondence that the Undertakings were required to be agreed by the TRC before the extended registration deadline date in order for CCT to be permitted to register for the Spectrum Award 2015.
- (h) Meantime, CCT filed its application for leave to bring judicial review proceedings covering several issues in respect of the TRC's conduct in relation to its operation including its complaint with respect to the Spectrum Award 2015 process which this appeal primarily concerns.
- (i) There is a dispute as to whether CCT's application for the Spectrum Award 2015 reached the offices of the TRC before 3:00 pm or a few minutes after the 3:30 pm deadline on 18<sup>th</sup> September 2015. It is not disputed however, that there had been no agreed Undertakings prior to that date or at least by 3:00 pm being the time that CCT asserts as the time that its application with Undertakings, as crafted by it, was delivered to the offices of the TRC. There is however, also a dispute as to whether the deadline for agreeing Undertakings was 3:30 pm on 18<sup>th</sup> September 2015, being the same point in time for registration, or whether the Undertakings were to be agreed prior to the registration deadline fixed for 3:30 pm on 18<sup>th</sup> September 2015.
- (j) CCT's application for registration was rejected as the TRC viewed CCT as having failed to comply with the rules governing the ITA which had been

finalized and published to the MNOs. TRC asserts that the application was received minutes after the deadline but more importantly that up to that point in time, CCT's proposed Undertakings had not been seen (still less agreed).

- (k) CCT does not seek to suggest that the Undertakings were in exact form and substance as had been last submitted by the TRC in its revised draft submitted to CCT on 14<sup>th</sup> September 2015. Rather, it says that the 'Undertakings' delivered to the TRC at 3:00 pm on 18<sup>th</sup> September 2015 (using its timeline) 'were adequate and reasonable and satisfied the purpose for which they were required'.
- (l) It was in these circumstances that CCT's application for leave came on for hearing on an expedited basis on 2<sup>nd</sup> October 2015 leading to the judge reading her decision thereon in her oral judgment on 7<sup>th</sup> October 2015.

### **The Appeals**

- [6] The issues arising for this Court's consideration are therefore whether it was open to the learned judge by use of CPR 56.4(8) to grant a stay of the Spectrum Award 2015 process and whether the TRC ought to have been restrained from proceeding or implementing the Spectrum Award 2015.

### **The Stay**

- [7] Part 56 of **CPR 2000** deals with administrative proceedings. CPR 56.4 deals with judicial review and the hearing of an application for leave. CPR 56.4(8) states that: 'Where the application is for an order (or writ) of prohibition or certiorari, the judge must direct whether or not the grant of leave operates **as a stay of the proceedings.**' (My emphasis).
- [8] The learned judge had this to say:

"I, however, state that as [it] is open to this Court and mandated by CPR 2000, Part 56.4(8), that even where there is no application, and I must

state whether the grant of leave operates as a stay. In this instant case I say that it does, and further action taken by the TRC with regard to the award process for Spectrum Award 2015 will be stayed pending determination of the full hearing of the claim for judicial review.”<sup>10</sup>

She later ordered as follows: ‘This decision, granting leave, shall operate as a stay regarding TRC’s further actions in the Spectrum Award 2015.’<sup>11</sup>

[9] It is therefore quite clear that the learned judge understood and applied CPR 56.4.(8) as having a much wider scope than proceedings and that it could extend to a stay of an administrative decision or process. It cannot be disputed that the TRC is not a tribunal or body with judicial or quasi-judicial functions. It is a body charged with administrative functions – that of managing and regulating the telecommunications activities in the Virgin Islands in a fair and efficient manner for the benefit of the people, businesses and economy of the Virgin Islands. It has not been engaged in the conduct of any proceedings of a judicial nature. The TRC accordingly contends that this course was not open to the learned judge as a matter of law. It relies on **Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and another**.<sup>12</sup>

[10] In **Vehicles and Supplies**, the Privy Council considered a provision of the Jamaica Judicature (Civil Procedure Code) section 564B(4) which is in pari materia to CPR 56.4(8). There, the minister had instructed an importer to order certain vehicles and to distribute them per the minister’s instructions. The importer obtained leave for judicial review and a suspension of the minister’s instruction to distribute by way of ‘a stay of proceedings’. The Privy Council, though setting aside the stay as a matter of discretion, opined that was in any event ‘every ground for challenging the order of a stay as a matter of law.’<sup>13</sup> The dictum of Lord Oliver is instructive as it relates to a direction of a stay of proceedings on the grant of leave for judicial review. He stated thus:

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<sup>10</sup> Transcript of oral judgment in chambers (7<sup>th</sup> October 2015) at p. 25, lines 16 – 22.

<sup>11</sup> Ibid, p. 26, lines 3 – 6.

<sup>12</sup> [1991] 1 WLR 550.

<sup>13</sup> Ibid, p. 556E.

“It seems in fact to have been based upon a fundamental misunderstanding of the nature of a stay of proceedings. A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place...It simply means that the relevant court or tribunal cannot, whilst the stay endures, effectively entertain any further proceedings except for the purpose of lifting the stay and that, in general, anything done prior to the lifting of the stay will be ineffective...”<sup>14</sup>

Lord Oliver, in reference to section 564B of the Judicature (Civil Procedure Code) continued thus:

“This makes perfectly good sense in the context of proceedings before an inferior court or tribunal, but it can have no possible application to an executive decision which has already been made...if it was desired...to compel the minister assuming this were possible, to revoke the allocation or issue counter-instructions, that was something which could be achieved only by an injunction either prohibitory or mandatory...”<sup>15</sup>

- [11] The appropriateness of ordering a stay of an administrative decision or action by utilizing the ‘stay of proceedings’ provision contained in CPR 56.4(8) was addressed by the High Court of the Virgin Islands fairly recently in a decision by Ellis J in **Cable & Wireless BVI Limited v The Telecommunications Regulatory Commission**.<sup>16</sup> There, Cable & Wireless had obtained leave ex-parte to apply for judicial review and had further obtained an order in the interim ‘suspending’ apparently by means of a stay, the TRC’s decision dated 1<sup>st</sup> June 2012 regarding LIME BVI’s pricing practices in relation to mobile calls made from the Virgin Islands to other Caribbean Islands. Ellis J, after referencing two English decisions<sup>17</sup> which decided that the courts may suspend the operation of an administrative decision pending an expedited judicial review hearing by the grant of a stay and thus giving a broad construction to ‘proceedings’ to include any process or procedure by which a public law decision is reached, opined:

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid, 556H to 557A.

<sup>16</sup> BVIHCV2012/0179 (delivered 9<sup>th</sup> August 2013, unreported).

<sup>17</sup> *Regina v The Secretary of State for Education and Science, Ex parte Avon County Council* [1991] 1 QB 558 and *In re M* [On appeal from *M. v. Home Office*] [1994] 1 A.C. 377.

“However for the British Virgin Islands...the legal position as regards a stay of proceedings was definitively prescribed by the Privy Council in **Ministry of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd** (24) [[1991] 1 W.L.R. 550].”<sup>18</sup>

After quoting from the judgment of Lord Oliver, she concluded at paragraph 106 that the narrow construction of the term “stay of proceedings”:

“[I]s the correct and applicable construction to be applied in this jurisdiction. There being no proceedings upon which stay could take effect...the grant of the relief was inappropriate and inapplicable in the circumstances. Now that injunctions are readily available, the Court is of the view...that interim relief in the form of a mandatory or prohibitory injunction should be sought rather than a stay, unless the decision actually involves proceedings narrowly construed.”

### Discussion

- [12] The decision in **M v Home Office**<sup>19</sup> having convincingly debunked the notion that it was not possible to obtain injunctive relief against Ministers of the Crown, courts no longer find the need to devise creative ways to arrive at a just result. Injunctions are now readily granted where the ends of justice so require.
- [13] CPR 56.4(9) says that the judge may grant such interim relief as appears just. This is a discretion set out in the broadest of terms. It is spelt out immediately after CPR 56.4(8) by which the court may grant a stay of proceedings where an application is for an order of prohibition or certiorari. It follows that if the direction for a “stay of the proceedings” was to be construed broadly so as to encompass a stay of an administrative decision, which for all practical purposes would achieve or operate so as to have the same effect as an injunction, it begs the question of the need for a specific provision providing for the court’s power to grant interim relief ‘as appears just’ if the same result is achievable by way of the grant of a stay of the decision or action of the public body complained with the effect that the decision or action is thereby suspended thus ceasing to be of any effect so long as

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<sup>18</sup> At para. 102.

<sup>19</sup> [1994] 1 AC 377.

the stay remains in effect. An interim injunction achieves practically the same the result.

[14] To my mind there is much force in the TRC's argument and I would approve of the dictum of Ellis J in **Cable & Wireless**, following the **Vehicles and Supplies** decision of the Privy Council that the term "proceedings" as used in CPR 56.4(8) bears a narrow meaning and is to be confined to proceedings properly so called, before a lower court or tribunal exercising judicial or quasi-judicial functions. It would not encompass an administrative decision or action such as the decisions and actions of the TRC with which we are here concerned. This appears to me to be the correct view in principle.

[15] Further, CCT never sought a stay but rather it sought interim injunctive relief seeking to restrain the TRC from implementing the Spectrum Award 2015. This was clearly the correct approach. However, it was not open to the learned judge, having refused the interim injunctions, to grant through the use of a 'stay' pursuant to CPR 56.4(8), what in effect amounted to an injunction. I agree with the TRC that this was internally inconsistent as a matter of law and logic. The 'stay' that was granted produced precisely the same effect as the injunctions sought which on the evidence had been refused. Assuming that such a stay was permissible (which in my view it was not) then as a matter of discretion, the stay ought to have been refused for the same reasons that the injunctions were refused. If the evidence failed to meet the quality for the grant of the injunctions, it would have similarly failed the quality test for the grant of a stay. The test for satisfying either in more recent times is treated as being essentially the same.<sup>20</sup> CCT has not sought to defend this approach in their submissions, in my view wisely.

## Conclusion

[16] For the reasons given, I conclude that there was no basis as a matter of law or discretion for the judge to grant, pursuant to CPR 56.4(8), a stay of the TRC's

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<sup>20</sup>See: *Cala Homes (South) Limited v Secretary of State for Communities & Local Development* [2010] EWHC 3278 (Admin); *The Queen on the Application of Walshaw Moor Estate Ltd v Natural England* [2012] EWHC 331 (Admin).

Spectrum Award 2015 which, in effect, operated as a prohibitive injunction as to which she had earlier found was not warranted based on the evidence before her. The order staying the Spectrum Award 2015 must accordingly be set aside as being improperly granted.

### **The cross appeal – whether injunctions ought to have been granted**

[17] The learned judge in the exercise of her discretionary powers as given under CPR 56.4(9) was not satisfied that the balance of convenience favored CCT. CCT says that she applied the wrong approach in assessing the balance of convenience and therefore erred in arriving at her decision refusing the injunctions. The basis on which an appellate court will interfere with a discretion exercised by the trial judge has been variously put. The locus classicus in our jurisdiction may be said to be the dictum of Floissac CJ in **Dufour v Helenair Corporation Ltd and Others**<sup>21</sup> where he stated it this way:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”<sup>22</sup>

Viscount Simon LC in **Charles Osenton & Co v Johnson**<sup>23</sup> put it this way:

“The Appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations...then the reversal of the order on appeal may be justified.”

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<sup>21</sup> (1996) 52 WIR 188.

<sup>22</sup> At p. 189 – 190.

<sup>23</sup> [1941] 2 ALL ER 245 at p. 250



With this in mind, it is necessary to examine whether the learned judge erred in any respect as contended.

### **The Applicable Test in the Context of Judicial Review**

[18] It is well established as to be considered as trite, that the principles by which a court is to be guided in the exercise of its discretion in granting interim relief are those set out in the seminal case of **American Cyanamid Co. v Ethicon Ltd.**<sup>24</sup>

They may be distilled from the speech of Lord Diplock in the House of Lords thus:

- (a) The court must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious issue to be tried;
- (b) It is no part of the court's function at this stage to engage in a mini trial and seek to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may depend or seek to decide difficult questions of law. These are matters to be dealt with at trial.
- (c) Unless the material available to the court at the hearing of the application for an interim injunction fails to disclose that the claimant has any real prospect of succeeding on his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interim relief that is sought. This in turn will involve a consideration as to the adequacy of either party being compensated in damages and of course the financial position of the party in being able to pay.
- (d) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both that the question of the balance of convenience arises. The matters to be taken into consideration in carrying out this balancing exercise are not exhaustive and will vary from case to case including the relative weight to be

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<sup>24</sup> [1975] AC 396.

attached to them. There may be other special factors to be taken into consideration in the special circumstances of the case.

- (e) Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as will preserve the status quo.
- (f) The relevant strength of each party's case in assessing where the balance of convenience lies may only be taken into account in circumstances where it is apparent from the facts disclosed on the evidence as to which there is no credible dispute, that the strength of one party's case is disproportionate to that of the other party. However, resort to assessing relevant strength of the cases is only to be addressed where the extent of the uncompensatable disadvantage to each party would not differ widely; in essence, where the scales on this aspect may be said to be more or less evenly balanced.

[19] The above principles guide the approach of the court in private law cases. In public law matters however, the authorities suggest that the **Cyanamid** principles are to be modified as appropriate to the public law element of the case. This is so having regard to the public functions and duties with which public bodies are charged in the wider public interest. This principle was accepted by the Privy Council in **Belize Alliance of Conservation Non-Governmental Organizations v Department of the Environment and another**<sup>25</sup> (BACONGO). In that case Lord Walker stated that "[t]he public law element is one of the possible "special factors" referred to by Lord Diplock in that case [Cyanamid] (at p 409)."<sup>26</sup> The Board concluded that in determining whether to grant an interim injunction it had a wide discretion to take the course which seems most likely to produce a just result or minimize the risk of injustice. This broad discretion given to the court is

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<sup>25</sup> [2003] UKPC 63.

<sup>26</sup> At para 35.

captured in section 24 of the **Supreme Court Act**<sup>27</sup> which says the court may grant an injunction if it is just and convenient to do so.

[20] In **Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No.2)**,<sup>28</sup> Lord Goff of Chieveley in speaking of the stages of the test as expounded by Lord Diplock in **Cyanamid**, explained that:

“...an authority acting in the public interest cannot normally be protected by a remedy in damages because it will itself have suffered none. It follows that, as a general rule, in cases of this kind involving the public interest, the problem cannot be solved at the first stage [by assessing the adequacy of damages] and it will be necessary for the court to proceed to the second stage concerned with the balance of convenience.”<sup>29</sup>

He went on further to say this in relation to the balance of convenience in public law cases:

“Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that “one must look at the balance of convenience more widely and take into account the interests of the public in general to whom these duties are owed.”...This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of the law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest what is on its face the law, and so to...render it just or convenient to restrain the authority for the time being from enforcing the law.”<sup>30</sup>

He then went on further to say:

“In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, *prima facie*, so firmly based as to justify so exceptional a course being taken.”<sup>31</sup>

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<sup>27</sup> Cap. 80, Laws of the Virgin Islands 1991.

<sup>28</sup> [1991] 1 AC 603.

<sup>29</sup> At p. 673.

<sup>30</sup> Ibid.

<sup>31</sup> At p. 674.

[21] In the note of the transcript of the oral judgment, the learned judge seems to suggest that CCT did not strenuously urge the grant of interim relief.<sup>32</sup> Counsel in essence says that it was, although not expansively due to the tight time constraints imposed by the court. But even so, the application for such relief had never been withdrawn and thus required full consideration. This complaint may have had more force had the learned judge failed to address the question whether she ought to grant interim relief but she in fact did and it is to her observations in this regard to which I now turn.

[22] In speaking of the modified **Cyanamid** approach she spoke of counsel for the TRC submitting 'that there is, in fact, a presumption that an injunction ought not to be granted against the Respondent unless the claimant can place matters of considerable weight to outweigh the desirability of enforcing the law as it stands.'<sup>33</sup> After agreeing that the modified **Cyanamid** principles ought to apply in the instant case, she went on to quote and adopt a passage from the BVI High Court decision, the **Cable & Wireless** case, where Ellis J after reviewing such decisions as **Factortame** and **R v Secretary of State for Trade and Industry Ex parte Trades Union Congress**<sup>34</sup> opined at paragraph 113 thus:

"Case law generally reveals that there is a strong presumption against interim relief in public law matters because it is in the public interest that decisions of public bodies are respected unless, and until, they are set aside....while the grant of permission [for leave to bring judicial review] is pegged as a starting point it is by no means the case that interim relief will be appropriate merely because permission has been granted."

The learned judge in the court below then went on to say as follows:

"What is of more importance is the balance of convenience as between the parties. There has to be, in order to dislodge the presumption, rebuttable, though, it is, against granting interim relief, matters of considerable weight put into the scales to shift the balance towards the applicant before the Court."<sup>35</sup>

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<sup>32</sup> Transcript of oral judgment in chambers (7<sup>th</sup> October 2015), p. 21, lines 4 – 14.

<sup>33</sup> Ibid, p. 21, lines 17 – 22.

<sup>34</sup> [2001] 1CMLR 8

<sup>35</sup> Transcript of oral judgment in chambers (7<sup>th</sup> October 2015), p. 22, lines 16 – 22.

She then referred to the evidence proffered by CCT which may have been considered as ‘matters of considerable weight to tip the scales’<sup>36</sup> in favour of CCT. She then spoke of the evidence relied on ‘to discharge this heavy burden’.<sup>37</sup> She continued:

“It may be considered when one reads the nature of the claims being [brought], that without injunctive relief, the matters may be rendered academic. But it cannot be where they (sic) burden to dislodge the presumption against the brunt of interim relief in instances such as these that it can be left to the Court’s interpretation and not boasted (sic) by evidence of the parties seeking to enforce that jurisdiction of the Court.”<sup>38</sup>

She concluded thus: “I, however, find that based on the balance of convenience that the Claimant [CCT] on evidence before it, that it is not entitled to the relief sought.”<sup>39</sup>

[23] CCT has accordingly taken issue with the learned judge’s view that:

“...there is, in fact, a presumption that an injunction ought not to be granted against the Respondent [TRC] unless the Claimant [CCT] can place matters of considerable weight to outweigh the desirability of enforcing the law as it stands.”

CCT says that the learned judge’s dicta runs counter to the approach set out in **BACONGO** and **Factortame** and that she appeared to treat the ‘presumption’, if there was such, as a fetter on her discretion.

[24] It would seem to me, having reviewed the authorities that treating public law cases from the standpoint of a presumption against granting an injunction against a public body may be placing the bar too high and may not lead to a proper assessment of the balance of convenience. The approach as set out by Lord Goff in **Factortame** is to be preferred. It seems to me correct in principle that where one is dealing with restraining a public body whether from enforcing the law or

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<sup>36</sup> Ibid, p. 23, lines 8 – 9.

<sup>37</sup> Ibid, p. 24, lines 10 – 11.

<sup>38</sup> Ibid, p. 24, lines 12 – 20.

<sup>39</sup> Ibid, p. 25, lines 10 – 13.

from performing their public duties as required and contemplated by the law, the balance of convenience must be looked at more widely by taking into account the public interest in the performance of those responsibilities and duties with which the public body is tasked by law and in seeking to arrive at a just result<sup>40</sup> in all the circumstances.

[25] CCT has sought to draw a distinction as it relates to a challenge to the law itself which is not the case here. However, I can see no qualitative difference between seeking to restrain a public body from enforcing the law as it stands, and one sought to be restrained from exercising the functions and performing the duties with which that public body is tasked.

[26] To my mind, the learned judge in assessing the balance of convenience may have placed undue emphasis in approaching the matter from the standpoint of a presumption requiring evidence of considerable weight to, in essence, rebut it. The criticism that she may have fettered her discretion in so viewing the matter is well founded. It may be said that this was an error in principle which warrants interference by this Court and, exercising the discretion afresh, in assessing from the material placed before the judge where the balance of convenience lies and in determining which course would minimize the risk of injustice.

[27] CCT puts forward these matters as being relevant in determining where the balance of convenience lies and contends that it lies in favour of CCT:

(a) the allocation of spectrum in the Spectrum Award 2015 process would only be made to persons whose applications to register have been accepted;

(b) CCT had built a 700 MHz band spectrum LTE network and had applied for frequency authorization to upgrade the telecommunication

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<sup>40</sup> See: *National Commercial Bank Jamaica Ltd v Olint Corp'n Ltd* [2009] 1 WLR 1405.

services from 2G to 4G LTE, so that preventing it from registering and participating in Spectrum Award 2015 by which 700 MHz spectrum is to be allocated to successful applicants will result in significant losses to its business operation and further erosion of market share in the mobile telecommunications market;

- (e) The absence of any prejudice to the TRC if the Spectrum Award 2015 is delayed;
- (f) That consumers in the Virgin Islands currently have access to high speed wireless broadband including 4G and LTE and thus no prejudice will be suffered by the wider public;
- (g) That the Spectrum Award process was in the initial stages. That it was at a stage where it was far less prejudicial to stop the process as it would only be for a short while pending the hearing of the judicial review claim;
- (h) The fact all three MNOs were interested in obtaining spectrum (at least 2x10) in the 700 MHz band and thus there was excess demand which then will be allocated to those MNOs who had successfully registered.

[28] The TRC puts forward as relevant to assessing the balance of convenience and in demonstrating that the balance of convenience favours the TRC:

- (a) the particular public interest in the Spectrum Award 2015. The allocation of the spectrum in question would not only make more effective mobile broadband services available, it would encourage competition between the MNOs in the provision of such services. The rules governing the allocation are designed to maximize such competition (e.g. avoiding the clustering of most such spectrum in the hands of a single operator). The

TRC points out that currently CCT by virtue of its historic incumbent or pioneer status, enjoys a greater share of the sub-1GHz spectrum (best suited to mobile broadband) than LIME or Digicel;

- (b) CCT has not tendered any evidence as to specific harm it would suffer if the Spectrum Award 2015 were to proceed while its judicial review claim was pending, nor has it asserted that any such harm would not be remediable by damages;
- (c) the extreme weakness of CCT's underlying claim in view of the TRC's powers and duties under sections 34 and 35 of the TA, and the extensive public consultation conducted by the TRC in advance of the deadline for registration to participate in the Spectrum Award 2015;
- (d) the immediate harm to third party MNOs who have complied with the lawful requirements imposed by the TRC for participation, and the fact that the opportunity to obtain new spectrum and compete is delayed significantly.
- (e) the delay will likely require restarting the process of the Spectrum Award 2015 after the determination of the judicial review proceedings which will result in the information currently submitted in the applications to become stale, thereby necessitating replacement, revision or reconsideration all at further costs, time and effort on the part of the MNOs and the TRC;
- (f) the TRC says in essence that it is not the case that CCT will be shut out from ever obtaining spectrum within the Spectrum Award 2015 since on the documents before the court it showed that 6 spectrum packages offered in three lots and as described in the ITA each applicant would be eligible for at most one lot from each of the three spectrum bands offered in the Spectrum Award 2015. Thus the TRC says that of the three lots in



the 700 MHz band only two may be granted in CCT's absence; the third presumably remaining available for CCT upon application at a later date.

## **Discussion**

- [29] Firstly, I do not consider that it is accurate to say that the learned judge recognized that if injunctive relief was not granted the judicial review claim would be rendered academic. In the excerpt of her oral judgment set out above, it is clear that she made no such finding. Even were it taken to mean as CCT suggests, I do not accept that the failure to grant the relief claimed will have any such result. CCT raises several issues on which it seeks judicial review. As it relates to the Spectrum Award 2015 process itself, CCT does not complain about the process in and of itself. Rather, its complaint is focused more as to the basis on which it ought to be allowed to participate.
- [30] I have already alluded to the powers and duties of the TRC above. It is tasked with ensuring fair competition among licensed network operators. It also has the responsibility of allocating the uses of the spectrum 'in order to promote the economic, orderly and efficient utilization of frequencies for the operation of all telecommunications networks and provision of all telecommunications services...'<sup>41</sup> An ancillary and necessary power in discharging this responsibility must be the power to allocate or re-allocate any frequency band in accordance with a spectrum plan. The Spectrum Award 2015 is such a spectrum plan which went through a full consultation process in advance of implementation. The importance of this spectrum to the MNO's and to the public at large and the economy of the Virgin Islands as a whole is not disputed. This to my mind is an important factor to be weighed in the balance.
- [31] The question then is whether the public at large is to be deprived of the benefit of MNO's operating and offering services within that spectrum being awarded in the Spectrum Award 2015 because one MNO may be considered not to have qualified

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<sup>41</sup> Section 34(1) of the Telecommunications Act, 2006.

for participation in the Spectrum Award 2015. There is no suggestion that the ITA rules applicable to all the MNOs were unfair or weighted in favour of a particular MNO. Whether CCT has or has not qualified is clearly for the substantive hearing of the claim and I refrain from expressing any view thereon. Is the TRC to be restrained from undertaking and performing the duties with which it is tasked in serving the wider public interest by undertaking the Spectrum Award 2015 process which can only enhance the level and efficiency of telecommunication services within the Territory? I think not.

- [32] I am not satisfied that the balance of convenience favours CCT when considered in the wider context having regard to what the TRC has sought to accomplish given its mandate. In my view the least risk of injustice (if I may phrase it that way) is to allow the TRC to proceed with the Spectrum Award 2015 process. There is nothing suggesting that CCT is forever shut out therefrom based on the way in which the Spectrum Award 2015 has been structured. Accordingly, exercising the discretion afresh, I also, although approaching the question differently, would refuse the interim relief sought by CCT.

### **Conclusion**

- [33] For the reasons given, I would allow the appeal and set aside the stay of the Spectrum Award 2015 ordered by the court below. I would also dismiss the cross-appeal. Having regard to CPR 56.13(6), I would make no order as to costs.

**Dame Janice M. Pereira, DBE**  
Chief Justice

I concur.

**Louise Esther Blenman**  
Justice of Appeal

I concur.

**Gertel Thom**  
Justice of Appeal

