

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

3
4
5 **CAUSE NO. 448 of 2010**

6
7 **IN THE MATTER OF AN APPLICATION BY CABLE AND WIRELESS**
8 **(CAYMAN ISLANDS) LIMITED T/A LIME FOR JUDICIAL REVIEW**
9 **PURSUANT TO ORDER 53 OF THE GRAND COURT RULES**

10
11 **AND**

12
13 **IN THE MATTER OF THE INFORMATION AND COMMUNICATIONS**
14 **TECHNOLOGY AUTHORITY LAW (2006 REVISION)**

15
16 **BETWEEN: CABLE & WIRELESS (CAYMAN ISLANDS) LIMITED t/a LIME**

17 **PLAINTIFF**

18
19 **AND: THE INFORMATION AND COMMUNICATIONS**
20 **TECHNOLOGY AUTHORITY**

21 **DEFENDANT**

22
23 **Appearances: Mr. Hector Robinson and Mr. Nicholas Fox of Mourant Ozannes**
24 **for the Applicant**

25
26 **Mr. Graham Ritchie Q.C. & Mr. David Collier**
27 **of Charles Adams Ritchie & Duckworth for the Respondent**

28
29
30 **Before: Hon. Justice Henderson**

31
32
33 **Heard: June 9, 2011**

*Judgment – Cable and Wireless (Cayman Islands) Limited t/a LIME v. The Information and Communications
Technology Authority Cause No. 448 of 2010 09.06.11*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

JUDGMENT

1. The Information and Communications Technology Authority of the Cayman Islands (to which I will refer as "the Authority") has established a committee known as the Local Number Portability Consortium for the purpose of planning and implementing local number portability in this country. Members of the Consortium are four in number. They are each service providers in the industry and I understand that they comprise the four active organisations in the industry at the present time. These consortium members are acting partly in the public interest, but for the most part they are representing and advocating their own private commercial interests in the business of the consortium.

2. Each consortium member has a single vote on issues which fall to be considered. Because the consortium members are four in number, it is of course expected that they may be deadlocked on some issues. On September 3, 2010, all four members of the Consortium submitted to the Authority a dispute between themselves as to how decisions should be voted upon when there is no consensus. This has been referred to in argument as the "Voting Rights Question".

3. Before I come to discuss the resolution of that question by the Authority, I need to refer to certain Regulations made under the *Information and Communications Technology Authority Law 2002* which govern dispute resolution by the

1 Authority. Section 2 of the Regulations defines a "dispute" as any dispute which
2 is the subject of a determination request. There is also a definition of
3 "determination request". It means a written and signed submission made to the
4 Authority by any person including a licensee and an interested party. The Voting
5 Rights Question was submitted in the form of a determination request to the
6 Authority.

7

8 4. Section 5 of the Regulations contains an itemised list of what a determination
9 request should contain. Section 8 specifies the various ways in which the
10 Authority itself may resolve a determination request. It reads in part as follows:

11 "Upon receipt of a determination request, the Authority may take
12 one or more of the following actions:

13

14 (a) request such other information from any other person as may
15 be affected by the dispute as it may deem necessary;

16

17 (b) direct the parties to commence or continue reasonable efforts to
18 resolve the dispute;

19

20 (c) decline to determine the dispute on the basis of one or more of
21 the grounds set out in regulation 10;

22

23 (d) issue a notice for a public hearing...;

24

25 (f) appoint a mediator or arbitrator to deal with the dispute and in
26 such event may establish the terms of reference of any
27 mediator or arbitrator which shall include:

28

29 (i) whether the outcome of any such mediation or arbitration
30 will be binding;

31

32 (ii) the procedures for such mediation or arbitration;

33

34 (iii) any dates by which the mediation or arbitration process
35 will be concluded;

35

- 1 (iv) guidelines for the allocation of costs amongst the parties;
- 2 (g) act as adjudicator of the dispute and where it decides to do so it
- 3 shall establish its own terms of reference and procedures; or
- 4
- 5 (h) such other course of action as it considers necessary to resolve
- 6 the dispute.”

7

8 5. Section 10 of the Regulations contains a list of those circumstances which will
9 justify the Authority in declining to deal with a determination request. They refer
10 to such things as lack of jurisdiction or a determination request which is, in the
11 view of the Authority, vexatious or an abuse of process. Section 11 of the
12 Regulations is an exhortation to the Authority to act expeditiously in determining
13 disputes.

14

15 6. The Authority did indeed act expeditiously. Its decision on the Voting Rights
16 Question was given just one week later. It began by determining that each
17 member of the Consortium would have a single vote and that a majority of 50 per
18 cent plus one of the votes would be required to reach a decision. That is to say,
19 assuming the membership remains the same, three votes would be required for a
20 decision. The Authority went on to say that in the event of a tied vote the
21 Consortium must hold a second vote within 24 hours, giving the members an
22 opportunity to reassess their positions.

23

1 7. At this point, the Authority addressed the question of an issue which was still
2 unresolved because of deadlock in the following words. I read from paragraphs
3 26, 27 and 28 of the decision:

4 “26. The Authority notes that the members of the Consortium, in their
5 respective submissions, did not recommend any mechanism to be used in
6 the event of a tie. This would not be helpful to the Consortium and would
7 not satisfy the timeliness requirement.
8

9 27. In order to rectify this deficiency, the Authority believes that the
10 following tie-breaking mechanism is necessary. In the event of a tie, the
11 consortium should hold a second vote within 24 hours. This will give
12 members an opportunity to reassess their positions in light of the apparent
13 deadlock. If the second vote again results in a tie, a casting vote will be
14 assigned by randomly drawing the name of one operator from a “hat”
15 containing the names of all members of the Consortium. (A practical
16 implementation of this might make use of the random list generator at
17 www.random.org/lists).
18

19 28. The Authority recognises that this tie-breaking mechanism is arbitrary.
20 However the Authority considers that the use of a tie breaking method is
21 essential to bring some finality to Consortium decision making. After
22 careful consideration, the Authority has therefore determined that the
23 benefits of this method outweigh its disadvantages.”
24

25 8. On this judicial review application, I am asked by the Applicant, Cable &
26 Wireless (Cayman Islands) Ltd. (referred to during argument as LIME) to set
27 aside that portion of the decision I have read which makes the ultimate tie
28 breaking provision the result of a random process, i.e., by random selection of a
29 member of the Consortium (all of whom have their private commercial interests
30 to advocate) and assigning to it the right to break the tie. The argument is that this
31 tie breaking process is contrary to law, is irrational, and is unreasonable within the
32 Wednesbury definition of reasonableness. The request is for an order of certiorari.
33

1 9. The Applicant also says that it was not accorded a reasonable opportunity by the
2 Authority to make its views known on the question of how such a deadlock
3 should be resolved. There is no merit in this latter submission. On September 3rd,
4 2010, LIME wrote to the Authority under the heading "Decision Making in the
5 LNP Consortium". It knew at that time that the deadlock issue was on the table.
6 Obviously, with only four members the consortium could be expected to split
7 evenly on some issues. LIME must have understood on September 3rd that the
8 deadlock issue was to be resolved by the Authority in the immediate future. It
9 could have made a submission on that question as well as upon the other related
10 matters such as the one member, one vote issue. It had an adequate opportunity to
11 be heard before the Authority released its decision.

12
13 10. As for rationality, the Authority says that three important policy goals underlie its
14 decision, which was a considered one. First, decisions must be made in a timely
15 fashion and the random selection process achieves that. Second, it is desirable to
16 avoid cost. The process described above does that. Third, the Authority intends to
17 encourage the members of the consortium to reach their own decisions and the
18 tie-breaking procedure should induce them to make every effort to agree.

19
20 11. I accept that these three virtues are present in the mechanism chosen by the
21 Authority. The question is whether, notwithstanding these advantages, the
22 randomness of the process renders the mechanism and a decision resulting from it
23 unreasonable and irrational.

1

2 12. In *GCHQ* [1985] AC 374, Lord Diplock provided this oft-quoted definition of
3 "irrationality":

4 "By irrationality I mean what can now be succinctly referred to as
5 Wednesbury unreasonableness ... it applies to a decision which is so
6 outrageous in its defiance of logic or of accepted moral standards that no
7 sensible person who had applied his mind to the question to be decided
8 could have arrived at it. Whether a decision falls within this category is a
9 question that judges by their training and experience should be well
10 equipped to answer or else there would be something badly wrong with
11 our judicial system."

12

13 13. In commenting upon this passage in *Streeter v Immigration Bd.* [1998] CILR 366,
14 Smellie CJ said:

15

16 "The tests of irrationality and illegality require a close consideration of the
17 Board's decision and if found to be present are not to be excused by the
18 assertion or incantation of public morals as that may be perceived by the
19 Board. The test of irrationality is a high and stringent test. It was originally
20 defined more than 50 years ago in *Associated Provincial Picture Houses*
21 *LTD v. Wednesbury Corporation* and now has its more modern
22 enunciation by the House of Lords in the words of Lord Diplock in
23 *Council of Civil Service Unions v. Minister for Civil Service, the GCHQ*
24 *case.*"

25

26 14. Acknowledging as I do the high and stringent test referred to by the Chief Justice,
27 I am nevertheless of the view that a random selection between two competing
28 alternatives is irrational and unreasonable where important public policy
29 considerations may well be engaged. Other much better alternatives are set out in
30 the Dispute Resolution Regulations. Since the members' votes will be cast at least
31 partly on the basis of their own self-interest, a tie-breaking process becomes a

1 useful opportunity to have the ultimate decision made by an independent person
2 or body acting solely in the public interest. There are a number of ways in which
3 this could be achieved. The use of a single expert arbitrator at the ultimate
4 expense of the consortium members is one such mechanism to which the
5 Authority might resort when it considers that it would be inappropriate for reasons
6 of policy to make the decision itself.

7

8 15. One hallmark of rational decision making is predictability. Where a rational
9 process exists, a reasonable observer, in possession of all material facts and a
10 good understanding of the legal and policy issues which arise, will be well placed
11 to predict what the tribunal's decision will be. Where the selection is purely
12 random, the element of predictability is wholly absent. This absence of
13 predictability is, an indication (although not a conclusive one) that a decision-
14 making process is irrational.

15

16 16. For these brief reasons, I make an order setting aside paragraphs 27 and 28 of the
17 decision under review and direct the Authority to reconsider the question of how a
18 deadlock vote should be resolved.

19

20

21

22

1 17. The Applicant LIME is entitled to its costs of this application on the standard
2 basis.

3 Dated this 9th day of June, 2011

4

5

6 Henderson J.
7 Judge of the Grand Court