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IN CHAMBERS  
IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 228 OF 2004

BETWEEN:  
CABLE & WIRELESS (CAYMAN ISLANDS) LTD.  
Plaintiff

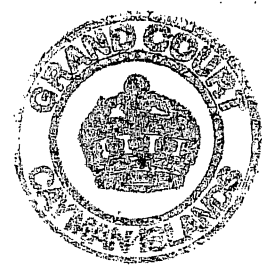
AND:  
THE INFORMATION AND COMMUNICATIONS  
TECHNOLOGY AUTHORITY  
Defendant

Before: The Hon. Madame Justice Levers

Appearance:  
Counsel for the Plaintiff: Mr. Hector Robinson of Quin & Hampson  
Counsel for the Defendant: Mr. Michael Terziano of Charles Adams Ritchie  
& Duckworth

Heard: June 3, 2004

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JUDGMENT  
\_\_\_\_\_



Lever, J

This an application to extend time for appealing to the Court, against a  
decision of the Information and Communications Technology Authority.  
The appellant is Cable & Wireless (Cayman Islands) Limited. The  
Information and Communications Technology Authority is statutory body

1 established by the Information and Communications Technology Authority  
2 Law, 2002 and upon which certain powers and functions are conferred to  
3 enforce and give effect to the provisions of the Law. The Plaintiff, Cable &  
4 Wireless (Cayman Islands) Limited is a company carrying on business and  
5 licence under the Law to provide services in the information and  
6 communications technology industry.

7

8 Until 2003, Cable & Wireless was the sole licensed provider of  
9 telecommunications services in and for the Cayman Islands. On 6 May,  
10 2003, as a result of the Law being created, Cable & Wireless was on the 10  
11 July, granted a new non-exclusive licence for the provision of  
12 telecommunications services in and for the Cayman Islands.

13

14 On 3 March 2004, Cable & Wireless wrote to the Authority providing notice  
15 of a decrease in its mobile rates to become effective on the 9 March 2004.  
16 The Cable & Wireless licence provides a procedure for the reduction of  
17 mobile telecommunications rates by Cable & Wireless once competition in  
18 mobile services had been introduced. According to the terms of Cable &  
19 Wireless' licence, Cable & Wireless need not obtain the prior approval of  
20 the Authority before reducing mobile rates. However, the Authority, in

1 accordance with the Law, may within 180 days of the decrease taking effect,  
2 require Cable & Wireless to demonstrate that the new rate pass an  
3 imputation test if the Authority states in writing that it has concern that the  
4 new rates fails the imputation test.

5

6 The purpose of the imputation test is to determine whether the new rates are  
7 below cost. Both the Law and Cable & Wireless' licence also prohibit anti-  
8 competitive conduct.

9

10 On the 8 March 2004, the Authority wrote to Cable & Wireless stating its  
11 belief that certain of Cable and Wireless' new rates were in breach of the  
12 anti-competitive provisions of its licence and required Cable and Wireless to  
13 file imputation test calculations by the 10 March 2004. Cable and Wireless  
14 submitted the imputations calculation. The Authority required some  
15 interrogatories to be answered and Cable and Wireless responded to these on  
16 the 30 March 2004.

17

18

19 On 7 April 2004, the Authority delivered two decisions ICTA decision  
20 2004-1 and ICT Decision 2004-2. In the 2004-1 Decision the Authority

1 determined that some of the new mobile rates submitted by Cable &  
2 Wireless did not meet the imputation test. In Decisions 2004-2 the  
3 Authority found that Cable & Wireless was guilty of anti-competitive  
4 conduct in breach of conditions of its licence. In respect of the period April  
5 2004, the Authority gave Cable & Wireless certain directions and the  
6 Authority stated that it is minded to issue a further decision which imposes  
7 an appropriate financial penalty upon Cable & Wireless and invited Cable &  
8 Wireless to show cause within 14 days, why the Authority should not  
9 impose a financial penalty. This was done by Cable & Wireless and no  
10 decision has yet been delivered to Cable & Wireless on the question of  
11 whether a penalty should be imposed.

12

13 It is these three decisions that the instant application relates to in light of the  
14 amendment of the Law which has significantly altered the previous position.  
15 The instant applications revolve around a proper interpretation of certain  
16 sections of the Information and Communications Technology Authority Law  
17 (“the Law”), 2002.

18

19 Mr. Hector Robinson on behalf of the company, the Cable & Wireless  
20 (Cayman Islands) Limited argues that the company is the appropriate

1 appellant and that the appeal procedure as set out in the statute is not  
2 conditional on any further procedure, save and except for a finding by the  
3 Authority. Mr. Tersiano for the Authority argues that under a proper and  
4 reasoned construction of section 55 of the Law and having regard to the  
5 entirety of the Law, the right of appeal to the Court under Section 56 shall  
6 not be conferred unless a reconsideration under 55(2) has been requested by  
7 the party seeking to appeal and a decision under reconsideration has been  
8 rendered. Decision 2004-1 and 2 were not submitted for reconsideration by  
9 Cable & Wireless but, say for a request for reconsideration of an issue  
10 related to the pre-paid mobile plan called *bFree* anytime. Cable & Wireless,  
11 after receiving legal advice, chose not to file an application for  
12 reconsideration pursuant to this section. The factual position is this, that  
13 there are now three decisions. Decision 1 being 2004-1, which was not  
14 reconsidered. Decision 2, 2004-2 which was also not reconsidered.  
15 Decision 3, 2004-4 which was a complaint brought by a third party Digicel,  
16 applying for reconsideration. In Decision 2004-4 in response to a request in  
17 Digicel's application that Decision 2004-2 be amended, the Authority ruled  
18 and I quote:  
19

1           “there is nothing in Decision 2004-4 or the additional  
2           information obtained from Cable & Wireless on usage patterns  
3           which requires any modification to the above substantive  
4           findings.”  
5

6           The Authority further ruled however, that it will review the imputation test  
7           analysis for Cable & Wireless’ post-paid mobile rates and will issue the  
8           revised imputation analysis as soon as it possibly can. According to the  
9           Authority, the reconsideration may result in a variation. I quote:

10  
11                           “Once the results of the further imputation test  
12                           analysis have been obtained, the Authority may  
13                           deem it advisable to vary Decision 2004-2 both as  
14                           to substance and disposition.”  
15

16           Mr. Robinson on behalf of Cable & Wireless submits that the decision to be  
17           rendered in 2004-4 may well negate the need for an appeal in Decision  
18           2004-2. He further argues that this application for leave to file an appeal out  
19           of time is brought about by the indecision of the present position as it stands,  
20           that the Authority is still to deliver its final decision on 2004-4 and that  
21           administratively it makes logical sense that any appeal to be argued should  
22           await the outcome of Decision 2004-4 as it may render an appeal on 2004-2  
23           nugatory.

1

2 It would appear that there is now no dispute between Cable & Wireless and  
3 the Authority that Decisions 2004 and 2004-2 are capable of appeal under  
4 section 56 of the Law. The main area of dispute apparently relates to the  
5 question whether it is a precondition to appealing to the Court pursuant to  
6 section 56 that a licensee must first seek relief from the Authority by way of  
7 an application to the Authority for reconsideration, pursuant to section 55(2).

8

9 Mr. Terziano quite rightly asks this Court to look at the entire law and  
10 subject, the interpretation of section 55 and 56, in light of the entire statute.

11 Section 55 comes under part 7, Review of Administrative Decisions and  
12 Appeals.

13

14 Section 55 (1) of the Technology Law-

15 "This section shall apply to the following decisions of the

16 Authority-

17 (a) a decision not to grant a licence;

18 (b) a decision to revoke a license;

19 (c) a decision to modify a licence under section 31(4);

20 (d) a decision to suspend licence under section 32(1);

21 (da) a decision that a section 34B  
22 prohibition has been infringed;

- 1 (db) a decision that a section 34F  
2 prohibition has been infringed;
- 3 (dc) with regard to an individual  
4 exemption under Part 111A-
- 5 (i) a decision to grant or refuse an  
6 individual exemption;
- 7 (ii) a decision to impose any  
8 condition or obligation where  
9 such a condition or obligation  
10 has been imposed;
- 11 (iii) a decision of the date and  
12 duration of the individual  
13 exemption and as to the period  
14 fixed for such exemption;
- 15 (iv) a decision to extend or not to  
16 extend the period for which an  
17 individual exemption has  
18 effect; or
- 19 (v) a decision on the duration of  
20 the extension referred to  
21 subparagraph (iv);
- 22 (dd) a decision to cancel an exemption;
- 23 (de) a decision to impose a penalty in accordance  
24 with Part IIIA and a decision as to the amount of  
25 such penalty;
- 26 (df) a decision to give a direction under sections  
27 34M, 34N or 34P; and
- 28 (e) a decision in relation to a pre-contract under section  
29 46(3).”  
30

31 Section 55A (1):

32 “A person who –

- 33 (a) is not a party to an agreement in respect of which  
34 the Authority has made a decision (as specified in

1 paragraphs (da) to (df) of section 55 (1) (“the  
2 relevant decision”);  
3 (b) is not a person in respect of whose conduct the  
4 Authority has made the relevant decision; and  
5 (c) has no right of appeal under section 55,  
6 may apply to the Authority asking it to withdraw  
7 or vary the relevant decision.”  
8

9 Section 56:

- 10 1. An appeal lies to the Court from any decision of  
11 the Authority specified in sections 35, 37A and 55  
12 on one or more of the following grounds that the  
13 decision is –  
14 (a) erroneous in law;  
15 (b) unreasonable;  
16 (c) contrary to the principles of  
17 natural justice; or  
18 (d) not proportionate.  
19 2. An appeal against the decision of the Authority  
20 shall be to the Court by motion.  
21 3. The appellant, within 28 days after the day on  
22 which the Authority has delivered its decision,  
23 shall serve a notice in writing signed by the  
24 appellant or his attorney-at-law on the Authority of  
25 his intention to appeal and of the grounds of his  
26 appeal.  
27 4. Any person aggrieved by a decision of the  
28 Authority may, upon notice to the Authority, apply  
29 to the Court for leave to extend the time prescribed  
30 by this section as it considers fit.  
31 5. The Authority shall, upon receiving the notice of  
32 appeal, transmit to the Court without delay a copy  
33 of the decision and all papers relating to the appeal

1 provided that the Authority may seek an order  
2 from the Court directing the Authority to file under  
3 seal any information if it is considered that the  
4 public interest would suffer by disclosure of such  
5 information.

6 6. At the hearing of the appeal the appellant shall,  
7 before going into the case, state all the grounds of  
8 appeal on which the appellant intends to rely and  
9 shall not, unless by leave of the Court, go into any  
10 matters not touching upon such grounds of appeal.

11 7. The Court may adjourn the hearing of an appeal  
12 and may, upon the hearing thereof confirm,  
13 reverse, vary or modify the decision of the  
14 Authority or remit the matter with the opinion of  
15 the Court thereon to the Authority.

16 8. The Court may dismiss an appeal if it is of the  
17 opinion that the appeal is frivolous or vexatious or  
18 not made in good faith.

19 9. An appeal to the Court against a decision of the  
20 Authority shall not have the effect of suspending  
21 the execution of the decision unless the Court so  
22 orders.  
23

24 Section 55(1)(db) is the decision that Cable & Wireless has infringed, a  
25 prohibition of section 34(f). Section 55(1) (de) also applies to this matter, in  
26 that, that is the decision to impose a penalty in accordance with part 3(a) and  
27 a decision as to the amount of such penalty in 1(a) as amended is relevant, in  
28 that an appeal against the imposition or the amount of a penalty does not act  
29 as a stay of the decision. The appellate procedure under the statute is

1 contained entirely in section 56(1) and of some importance is the wording of  
2 section 56(1):

3 “An appeal lies to the Court from any decision of  
4 the Authorities specified in sections 35, 37A and  
5 55 on one or more of the following grounds that  
6 the decision is-

- 7 (a) erroneous in law;  
8 (b) unreasonable;  
9 (c) contrary to the principles of natural justice:  
10 or  
11 (d) not proportionate.”  
12

13 It therefore will be of some assistance to look at section 35 and 37. Section  
14 35 deals with cease and desist orders and for the purposes of this application  
15 the relevant section is section 35(4) -

16 “Any person aggrieved by, or dissatisfied with,  
17 the order of the Authority may, within 21 days of  
18 the communication of the order to him, or such  
19 longer period as the Authority may, for good cause  
20 show, allow, apply to the Authority in writing for  
21 its decision to be reviewed.”  
22

23 On receipt of the appeal, the Authority shall, if the appellant has applied to  
24 be heard personally or by a representative, decide whether he shall be so  
25 heard and if it is so decided fix a time and a date for such hearing and notify  
26 the appellant. There is therefore set out in this section, a grievance  
27 procedure when a order is given by the Authority. In section 55(2) as

1 amended, if a person is aggrieved by a decision specified in subsection (1)  
2 (the original decision) he may, within 14 days of the receipt of the decision  
3 and written reasons therefore, apply in the prescribed manner to the  
4 Authority for a reconsideration of that decision. In this section too there is a  
5 grievance procedure which by the use of the word “may” gives the appellant  
6 an option for reconsideration. The Authority argues that the appellate  
7 procedure should not be allowed to override the reconsideration procedure.  
8 The present case they say falls within the requirement for reconsideration  
9 before appeal in as much as Decision 2004-1 and 2004-2 are concerned.  
10 They conceded that Decision 2004-4 is being reconsidered and therefore  
11 could properly be subject to appeal. On a reading of section 56(1) which is  
12 the appellate procedure set out in the Law, it is not subject to any pre-  
13 conditions. The right of appeal is only by statute, an appeal is one in which  
14 the question is whether the order of the Court from which the appeal is  
15 brought was right on the materials which that Court had before it. In this  
16 case the Plaintiffs puts forward one construction of a piece of legislation and  
17 the Defendants another contradictory construction. It is necessary to have  
18 regard to and weigh in the balance every factor which can be said in anyway  
19 to point away from the construction in question. Mr. Terziano submits that  
20 there is an inherent ambiguity in sections 55 and 56, because, he says section

1 56(1) provides that an appeal shall lie to the Court from any decision of the  
2 Authority specified in sections 35, 37A and 55, on four grounds. Under  
3 section 35(1), the Authority he says may issue a cease and desist order and  
4 under section 35(4) any person aggrieved or dissatisfied with the order may  
5 apply to the Authority for its decision to be reviewed. He submits that it is  
6 inherently unclear what the meaning is to be accorded the words contained  
7 in section 56(1) of the Law, that an appeal lies to the Court from “any  
8 decision” of the Authority specified in sections 35, 37A and 55. In section  
9 35 and 55 there are provisions for a review and reconsideration of the  
10 original determinations. Under 37A, an appeal should be made directly to  
11 the Court within 21 days next following the notification of findings under  
12 sections 37A(9) without reference to any further review or reconsideration  
13 by the Authority. He says therefore, that reference to any decision in section  
14 56 (1) is ambiguous. It is true to say that the particular statute does not  
15 define order or decision. He therefore, says that the word “any decision”  
16 against an appeal which lies can only be referable to a final decision in  
17 relation to section 55(3).

18

19 Does it therefore mean that if a prospective appellant does not exercise an  
20 option for reconsideration he loses his right of appeal and the decision does

1 not become final? A lot has been said in submissions about statutory  
2 review, a right of appeal and judicial review. These are of course three quite  
3 distinct remedies and arise in different circumstances. Mr. Robinson in his  
4 opening submissions went into some depth as to the requirement for judicial  
5 review and the basis of such an application. Mr. Terziano in his response  
6 seems to concede that he is not entirely relying on the fact that the appellant  
7 must seek all remedies provided in the statute prior to appealing. What he  
8 submits is that before the appellant is entitled to appeal there must be a  
9 finality and that under a proper and reasoned construction of section 55 and  
10 section 56, the statute does not confer the right to appeal directly unless  
11 there is a reconsideration. Looking at the statute as a whole and bearing in  
12 mind the object of interpretation of a written statute is to discover the  
13 intention of the statute and also bearing in mind that the word order and final  
14 decisions are not defined in the interpretation section of the statute, I have to  
15 ask myself, is the intention of the statute to place a limitation on the right of  
16 appeal from any decision of the Authority. Is a un-reconsidered decision not  
17 a final decision and are the words "may" in the statute entirely optional or  
18 must it be read as mandatory.

19

20

1 **Finding**

2

3 It is my view that had the Legislature desired to place a limitation on an  
4 appellate procedure it would have done so. It is clear that the words “any  
5 decision” as used in section 56(1) means that the appellant must have  
6 received a decision under section 35, 37A or 55. If the appellant chooses not  
7 to submit the decision of the Authority for reconsideration, does he then lose  
8 his right of appeal. It is difficult to imagine how the Law can intend any  
9 prospective appellant to be subjected to a reconsideration as a mandatory  
10 requirement under the statute. Section 56 of the Law which creates the right  
11 of appeal in this case is not subject to any pre-condition. It stands alone.  
12 The only restrictions placed on the nature and scope of the appeal are: the  
13 nature of the decision appealed against, in that it must be a decision  
14 specified in either sections 35, 37A or 55, the party who brings the appeal  
15 and the grounds on which the appeal are brought.

16

17 What the Authority is asking this Court to do is to place a limitation by  
18 necessary implication on the right of appeal. It is my view that this statute  
19 specifically provided for any decision of the Authority to be challenged by  
20 way of an application on appeal to the Grand Court and I would therefore

1 grant the order for the time for appealing to the Court against Decisions  
2 2004-1 and 2004-2, to be extended to 28 days after the Respondent delivers  
3 its decision on an application filed by Digicel Limited for further imputation  
4 analysis to be carried out. I should say that the case for Cable & Wireless  
5 could not have been presented any better and commend Counsel on his  
6 submissions.

7

8 Costs to the Applicant, to be agreed or taxed.

9

10 Dated this 11<sup>th</sup> day of June, 2004.

11

12

13 Levers J.  
14 Judge of the Grand Court

