

IN THE GRAND COURT OF THE CAYMAN ISLANDS

448
CAUSE NO. OF 2010

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

AND

IN THE MATTER OF THE INFORMATION AND COMMUNICATIONS TECHNOLOGY AUTHORITY LAW (2006 REVISION)

BETWEEN: CABLE & WIRELESS (CAYMAN ISLANDS) LIMITED t/a LIME
PLAINTIFF

AND: THE INFORMATION AND COMMUNICATIONS TECHNOLOGY
AUTHORITY
DEFENDANT

NOTICE OF EX PARTE APPLICATION FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW

TO: The Clerk of Court
Law Courts
Court House, George Town
Grand Cayman

1.0 The Applicant

Cable & Wireless (Cayman Islands) Limited, ("Cable & Wireless") t/a LIME ("LIME"), a company incorporated in the Cayman Islands with its registered office at One Technology Square, 19 Eastern Avenue, P.O. Box 293, Grand Cayman KY1-1104, Cayman Islands.

2.0 Decision in respect of which relief is sought

Paragraphs 27 and 28 of ICT Decision 2010-9 made by the Information and Communications Technology Authority ("the Authority") on 1 October 2010.

3.0 Relief sought

3.1 An Order of *Certiorari* removing paragraphs 27 and 28 of ICT Decision 2010-9 into the Grand Court and to quash the decision made in those paragraphs.

3.2 An Order staying the effect of paragraphs 27 and 28 of ICT Decision 2010-9 pending the determination of this application for judicial review.

3.3 Such further, consequential or other relief as to this Honourable Court seems just.

3.4 Costs.

THE GROUNDS UPON WHICH RELIEF IS SOUGHT

4.0 Summary of Facts

4.1 The Authority is a body corporate established by the Information and Communications Technology Authority Law (2006 Revision) (the "ICTA Law") with powers and duties to regulate the provision of information and communications technology ("ICT") services within the Cayman Islands. LIME is one of the licensed ICT services providers regulated by the Authority under the ICTA Law.

4.2 Under section 71 of the ICTA Law the Authority has a duty to manage a national plan for the allocation of telephone numbers, including the making of rules governing local number portability (or "LNP"). Number portability refers to the ability of telephone customers to keep their existing telephone numbers after they have changed their telephone service providers.

- 4.3 As part of the rules governing local number portability, the Authority established a Local Number Portability Consortium (the "Consortium"), consisting of the major telecommunications services providers, with responsibility to identify, investigate and implement the most appropriate LNP model for the Cayman Islands. There are at present 4 service providers in the Consortium, namely, LIME, Digicel Cayman Limited ("Digicel"), TeleCayman Limited ("TeleCayman") and WestTel Limited ("WestTel").
- 4.4 The Consortium had been unable to come to agreement on a number of issues, most recently on: (a) how decisions are made within the Consortium when there is no consensus (the "voting rights dispute"); and (b) who to select as the industry provider of central reference database ("CRD") and related services (the "vendor selection dispute"), which has now been resolved. On 3 September 2010, all 4 members of the Consortium submitted the voting rights dispute to the Authority for resolution pursuant to the Authority's powers under the Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003 (the "Dispute Resolution Regulations").
- 4.5 In ICT Decision 2010-9 the Authority determined the voting rights dispute by prescribing a voting methodology for the Consortium whereby each member of the Consortium will have a single vote, with a decision being made by a simple majority of 50% plus 1 of the membership. The Authority then prescribed, at paragraphs 27 and 28 of the decision, a "tie-breaking mechanism" whereby, in the event of a tie, the Consortium should hold a second vote within 24 hours and, if the second vote again results in a tie, a casting vote should be assigned by randomly drawing the name of one of the service providers from a "hat" containing the names of all members of the Consortium.
- 4.6 This application for judicial review relates solely to the tie-breaking mechanism prescribed by the Authority at paragraphs 27 and 28 of ICT Decision 2010-9.

5.0 Grounds for Judicial Review

5.1 *The decision in paragraphs 27 and 28 of ICT Decision 2010-9 is erroneous in law.*

5.1.1 A deadlock in the Consortium constitutes a dispute within the meaning of the Dispute Resolution Regulations. The decision by the Authority to prescribe the tie-breaking mechanism, rather than to resolve the dispute, whether by itself, or by the appointment of a mediator or arbitrator pursuant to regulation 8(f) of the Disputes Resolution Regulations, constitutes an unlawful abdication by the Authority of its duties and obligations under the ICTA Law and under the Dispute Resolution Regulations.

5.1.2 Further, or alternatively, the decision by the Authority to prescribe the tie-breaking mechanism, constitutes an unlawful fetter by the Authority of its discretion under the Dispute Resolution Regulations to hear and determine disputes arising from a deadlock among the members of the Consortium.

5.2 *The decision in paragraphs 27 and 28 of ICT Decision 2010-9 was an abuse of power by the Authority and/or was procedurally unfair.*

5.2.1 The Authority, throughout the LNP proceeding, had consulted with the ICT service providers, in particular the members of the Consortium, and with the public, before making decisions likely to have significant impact on the LNP process. The members of the Consortium have a legitimate expectation to be consulted by the Authority before the Authority made any decision having significant impact on the LNP process and the operation of the Consortium. The Authority failed to consult with the members of the Consortium before prescribing the tie-breaking mechanism.

5.2.2 The failure by the Authority to consult with the members of the Consortium before prescribing the tie-breaking mechanism denied the members of the Consortium their legitimate expectation to be consulted and constituted an abuse of power by the Authority.

5.2.3 Alternatively, the failure by the Authority to consult with the members of the Consortium, or to obtain submissions from the members of the Consortium before prescribing the tie-breaking mechanism, constituted a breach of natural justice, in that the members of the Consortium were denied an opportunity to be heard on a matter of fundamental importance, the results of which will have significant impact on their commercial interests.

5.3 *The decision at paragraphs 27 and 28 of ICT Decision 2010-9 is irrational.*

5.3.1 The Authority has itself described the tie-breaking mechanism as "*arbitrary*". A decision which can only produce an arbitrary result is irrational and unreasonable.

5.3.2 The prescription of a tie-breaking mechanism which results in the award of a casting vote to a member of the Consortium by the drawing of a name from a hat, on matters which may involve millions of dollars in expenditure, and which could have significant impact on the ICT service providers, and on the telephone consumers in the Cayman Islands, is a decision which is devoid of any ostensible logic, and is so perverse that no rational decision maker would have arrived at such a decision.

5.3.3 The Authority, in prescribing the tie-breaking mechanism, failed to consider or have any, or any sufficient regard for alternative means of resolving a deadlock in the Consortium, such as, for example, (a) the Authority itself resolving the dispute pursuant to its powers under the Dispute Resolution Regulations; (b) the Authority appointing a mediator or arbitrator pursuant to regulation 8(f) of the Dispute Resolution Regulations to resolve the dispute; or (c) the Authority itself exercising the casting vote, as a member of the Consortium pursuant to paragraph 17 of ICT Decision 2005-1.

5.3.4 In prescribing the tie-breaking mechanism, the Authority placed undue weight, and concentrated too heavily, on the need to arrive at decisions in the LNP process speedily, and the need to achieve "*finality*", and, in the process, failed to attach any, or any sufficient weight, or to give any or any adequate consideration to such other relevant factors as, the likely impact of the tie-breaking mechanism on the commercial and competitive interests of the ICT service providers, and on

telephone customers; and the likely impact on the cost effectiveness and timeliness in implementation of the LNP solutions which might be chosen using the tie-breaking mechanism.

Dated this 3rd day of December 2010

Mourant Ozannes

Mourant Ozannes
Attorneys-at-Law for the Plaintiff

NOTE: Pursuant to Order 53 rule 3(3) unless the Judge is of the opinion that leave may be granted without the need to hear from Counsel on behalf of the Applicant, an oral hearing is requested before this application for leave to apply for Judicial Review is considered and determined by this Honourable Court.