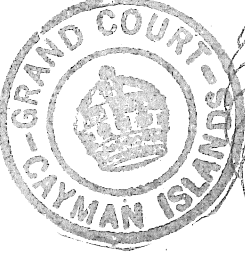



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. OF 2003

659


IN THE MATTER of an Application by CABLE
AND WIRELESS (CAYMAN ISLANDS) LIMITED
for Judicial Review Pursuant to Order 53 of
the Grand Court Rules

AND IN THE MATTER of the Information and
Communications Authority Law, 2002

BETWEEN: CABLE & WIRELESS (CAYMAN ISLANDS)
LIMITED

APPLICANT

AND: THE INFORMATION AND COMMUNICATIONS
TECHNOLOGY AUTHORITY

RESPONDENT

NOTICE OF APPLICATION FOR LEAVE

TO APPLY FOR JUDICIAL REVIEW

TO: THE CLERK OF THE COURT, Law Courts, George Town, Grand Cayman

1. The Applicant

Cable & Wireless (Cayman Islands) Limited, ("Cable & Wireless") a company incorporated in the Cayman Islands with its registered office at Leeward 4, Safehaven Corporate Centre, P.O Box 293, George Town, Grand Cayman, BWI.

2. Decision in respect of which relief is sought

- (a) "Directive to Cable & Wireless" dated 3rd October, 2003 ("the Directive") by the Information and Communications Technology Authority ("the Authority") requiring Cable & Wireless "to develop, publish and offer to

the marketplace, including other licensees,” within 10 calendar days of the date of the Directive, an international private leased circuit (IPLC) for voice services on a wholesale basis; and

- (b) The decision of the Authority set out in a letter to Cable & Wireless dated 3 October, 2003 establishing a process for public consultation “in order to obtain public input prior to giving final approval to Cable & Wireless’ proposed wholesale service agreements” (“the Public Consultation Decision”).

3. Relief sought

- (i) A Declaration that the Directive is contrary to law and void.
- (ii) A Declaration that the Public Consultation Decision is contrary to law and void.
- (iii) An Order for Certiorari to remove into this Honourable Court and to quash the Directive.
- (iv) An Order for Certiorari to remove into this Honourable Court and to quash the Public Consultation Decision.
- (v) Such further or other Order or relief as this Honourable Court may consider appropriate.
- (vi) Costs.

If leave is granted:

- (vii) An Order staying the effect of the Directive and the effect of the Public Consultation Decision pending the final determination of this judicial review.
- (viii) All necessary and consequential directions.

The grounds upon which relief is sought are attached.

Dated this 10th day of October, 2003

Quin & Hampson

Applicant's Attorneys:

Quin & Hampson, Harbour Chambers
3rd Floor, Harbour Centre
PO Box 1348GT
Grand Cayman
Cayman Islands, BWI

GROUNDS UPON WHICH RELIEF IS SOUGHT

SUMMARY OF FACTS

1. The relevant facts are set out in full in the First Affidavit of Jonathan Daniels.

GROUNDS FOR JUDICIAL REVIEW

2.0 *The Authority has no power to require Cable & Wireless to offer IPLC for voice to other licensees on a wholesale basis prior to 1 April, 2004*

2.1 The Authority has no power to require Cable & Wireless to offer IPLC for voice services on a wholesale basis to other licensees on any date prior to 1 April, 2004. The Directive, which requires Cable & Wireless to offer IPLC for voice services on a wholesale basis to other licensees within 10 days of the date of the Directive (i.e. by 13 October, 2003) is therefore contrary to law and void.

2.2 The power of the Authority to issue a directive to Cable & Wireless to offer any service on a wholesale basis is derived from paragraph 64 of Part 6 of Annex 5 to the Licence granted to Cable & Wireless on 10 July, 2003 ("the Cable & Wireless Licence") (corresponding to paragraph 64 of Schedule 4 to the Main Agreement, and hereinafter referred to as "paragraph 64").

2.3 Paragraph 64 confers on the Authority a power to issue a directive to Cable & Wireless to offer any service on a wholesale basis to "licensed operators". A directive under paragraph 64 that Cable & Wireless provide IPLC for voice to other licensed operators may not validly be issued prior to 1 April, 2004.

2.3.1 By the terms of the Agreement dated 10 July, 2003 ("the Main Agreement") between Cable & Wireless, the Governor in Cabinet of the Cayman Islands ("the Governor") and the Authority, in particular Schedule 6 of the Main Agreement ("the Licensing Timetable"), no licence for international voice services may be issued to any licensee other than Cable & Wireless which would permit that licensee to commence operations prior to 1 April, 2004. Specifically, clause 2 of the Licensing Timetable provides:

2. Deferred Operation of Licences to New Entrants

2.1 Licences may only be issued in accordance with the table set out below:

<u>ICT Service</u>	<u>Date</u>
ISP Services	1 November 2003
Mobile Services	1 February 2004
International Services	1 April 2004

For the avoidance of doubt, with the exception of that Licence issued to C&W, no Licence shall be issued after the Effective Date that has the effect of allowing any Licensee other than C&W to Commercially Operate:

- (a) an ISP Network prior to 1 November 2003
- (b) A Mobile Network prior to 1 February 2004; or
- (c) An International Network prior to 1 April 2004.

2.3.2 A Directive to Cable & Wireless to offer IPLC for voice on a wholesale basis to other licensees on 13 October, 2003 is an indication that the Authority proposes to permit the other licensees to operate the leased circuits prior to 1 April, 2004 which is contrary to the Licensing Timetable. The leasing of a circuit amounts to the operation of a network, which in respect of international voice service under the Licensing Timetable may not be done by any licensee other than Cable & Wireless prior to 1 April, 2004.

2.3.3 Section 11 of the ICTA Law empowers the Minister to give to the Authority "directions of a general character as to the policy to be followed in the exercise and performance of the functions of the Authority in relation to matters appearing to the Minister to affect the public interest, and the Authority shall give general effect to any such directions." By a directive dated 10 July, 2003, ("the Ministerial Directive") the Minister directed the Authority to "make decisions consistent with, and give effect to" the Main Agreement. The Authority therefore has no jurisdiction to issue a directive which is inconsistent with the terms of the Main Agreement.

- 2.3.4 The Directive, to the extent that it requires Cable & Wireless to offer IPLC service for voice on a wholesale basis is inconsistent with the Main Agreement, and is therefore inconsistent with the Ministerial Directive. The Directive is therefore on that ground unlawful.
- 2.4 Paragraph 70 of Part 6 of Annex 5 to the Licence ("paragraph 70") provides that Cable & Wireless, without being required by the Authority to do so, shall make the wholesale services available to other ICT Licensees, upon request, from the dates specified in the dates specified in Attachment 1 to Annex 5 to the Cable & Wireless Licence. Attachment 1 specifies that Cable & Wireless will have documentation for IPLC for voice service available from 1 February, 2004.
- 2.5 Paragraph 70 is stated as a commitment on the part of Cable & Wireless. The effect of paragraph 70 is to temper the effect of paragraph 64. Paragraph 70 obliges Cable & Wireless to provide documentation for wholesale services to licensees on a timetable which is prior to the time the licensees are entitled to operate the respective services. Once Cable & Wireless satisfies this obligation the Authority is saved from having to issue a directive under paragraph 64. The object of paragraph 70 is clearly to facilitate the Licensing Timetable whereby, in respect of IPLC for voice, for example, the licensee is able to have the documentation by 1 February, 2004 so that it may commence operations by 1 April, 2004.
- 2.6 Assuming Cable & Wireless abides by its obligation to offer those wholesale services specified in Attachment 1 according to the timetable set out in that Attachment, paragraph 64 is still an effective power in the hands of the Authority in respect of those services not specified in Attachment 1. It is also an effective power, exercisable after the date when the licensee is entitled to commence operations,, in the event that Cable & Wireless fails to satisfy its obligation to provide the documentation for wholesale services in accordance with the timetable set out in Attachment 1.
- 2.7 It would be an absurd result if the provisions of the Licence were to be interpreted such that a timetable is prescribed for Cable & Wireless to offer wholesale services and at the same time the Authority is possessed

with a power to require Cable & Wireless to offer the services in advance of the time specified in the timetable.

2.8 If the intention of paragraph 64 were to empower the Authority to issue a directive requiring Cable & Wireless to offer wholesale service at any time, paragraph 70 would have been entirely unnecessary.

2.9 A directive requiring Cable & Wireless to offer to licensees IPLC service for voice on a wholesale basis prior to 1 April, 2004 is contrary to the spirit and intention of the parties to the Main Agreement.

2.9.1 It is clear from reading the Main Agreement and all its Schedules, including the Cable & Wireless Licence, that the timing of the liberalisation process was a crucial to the Agreement. The intent of the parties was clearly to establish an orderly transition to a fully liberalised market. This includes a transition to full international facilities-based competition on 1 April, 2004, and the publication of the terms and conditions for an "IPLC for voice" wholesale service on 1 February, 2004, in sufficient time prior to 1 April, 2004 to allow other Licensees to have IPLC facilities for implementation on 1 April.

2.9.2 This scheme, where the wholesale terms and conditions were to be made available a month and a half prior to the date at which the services were to be made available, is identical to that set out for wholesale Internet services. The terms and conditions for these were made available September 15, 2003, to be made available to other licensees on November 1, 2003, with the liberalization of the Internet services market.

2.10 The Directive is in clear violation of this intent, as it would require the provision of the "IPLC for voice" wholesale service well in advance of 1 April, 2004.

3.0 ***The Authority has no power to direct Cable & Wireless to offer any service on a wholesale basis which Cable & Wireless does not offer to retail customers.***

- 3.1 By paragraph 66.1 of Part 6 of Annex 5 to the Cable & Wireless Licence Cable & Wireless shall not be required to make available on a wholesale basis any service which it does not offer to retail customers. Cable & Wireless offers a retail IPLC service that allows a customer to connect from a point in the Cayman Islands with a distant point, but with the restriction that the call must terminate at that distant point. Cable & Wireless does not offer a retail IPLC service that allows a retail customer to connect to the publicly switched telephone network (PSTN) or to the public telecommunications system either in the Cayman Islands or at the distant end which would allow the customer either to transmit calls beyond the distant point or to allow traffic over the line.
- 3.2 The Authority has no power under the Cable & Wireless Licence to direct Cable & Wireless to offer IPLC on a wholesale basis to allow other licensees to connect the IPLC to the PSTN or to the public telecommunications system at the distant end and consequently, the Directive, which requires Cable & Wireless to offer a wholesale IPLC voice service without limitation, exceeds the powers of the Authority under the Cable & Wireless licence and is therefore contrary to law and void.
- 4.0 ***The Authority has no power to direct Cable & Wireless to “publish” or to offer IPLC for voice on a wholesale basis to “the marketplace”.***
- 4.1 The Authority has no power to direct Cable & Wireless to “publish” the terms of its offer of IPLC service on a wholesale basis nor does it have the power to direct Cable & Wireless to offer the service to any person other than to “licensed operators” under paragraph 64.
- 4.2 The power in paragraphs 64 is narrowly defined and that paragraph cannot be interpreted so as to constitute the source of a power in the Authority to direct Cable & Wireless to publish its offer to any person other than the other licensed operators or to offer any service for voice to “the marketplace” as the Directive purports to do.
- 4.3 By the Notice issued by the Authority on 26 August, 2003 pursuant to section 23(2) of the ICTA Law (“the section 23 Notice”) IPLC service for

voice is one of the services which require a licence under the ICTA Law. Directing Cable & Wireless to offer the service to "the marketplace", which presumably includes persons other than licensed operators, contravenes the section 23 Notice and the ICTA Law and is therefore unlawful.

5.0 ***The Authority has no power to review and approve terms and conditions on which Cable & Wireless offers wholesale services***

5.1 The Authority has no power to review and approve the terms and conditions on which Cable & Wireless offers wholesale services as purports to be the basis of the Public Consultation Decision.

5.2 The Main Agreement and the Cable & Wireless Licence give the Authority the power to set the discounts on the retail prices that will be used to establish the prices for wholesale services. The Main Agreement and the Licence provide details with respect to exemptions from the wholesale discount rules and the rules for changing those wholesale prices. The Main Agreement and the Licence do not provide the Authority with the power to review and approve the terms and conditions of those services, as the Public Consultation Decision purports.

5.3 The Public Consultation Decision is inconsistent with the Main Agreement and therefore inconsistent with the Ministerial Directive. It is on that ground unlawful.

5.4 In the Public Consultation Decision, the Authority claims to derive its jurisdiction to issue the Letter from section 64 of Annex 5 to C&W's Licence, section 2.5 of the Main Agreement, and subsection 9(4) of the ICTA Law. A review of those provisions shows that this is not the case, and that those provisions do not grant the Authority the power it claims to have.

5.4.1 Section 9(4) of the ICTA Law provides the Authority with only a general, inchoate power to regulate rates, prices, terms and conditions of ICT services. In order to be effective, that general power must be expressed in enacted regulations or in a Licence. No regulations relating to the offering of wholesale services for sale have as yet been enacted. The Cable & Wireless Licence provides only for the regulation of the rates for Cable & Wireless' wholesale services and not for the regulation of the terms and conditions of Cable & Wireless' wholesale services.

5.4.2 Section 2.5 of the Main Agreement does not provide the Authority with the jurisdiction it requires, as it expressly limits the Authority's jurisdiction by reference to the terms and conditions of the Cable & Wireless Licence. There is a marked absence of provisions for the regulation of the terms and conditions of wholesale services. In the face of detailed provisions governing the regulation of wholesale rates in the part of the Annex dealing with the regulation of wholesale services, and in the face of detailed provisions governing the regulation of retail terms and conditions in the part of the Annex dealing with the regulation of retail services, the absence is determinative: the Licence clearly limits the Authority to the regulation of wholesale rates, not wholesale terms and conditions, and section 2.5 of the Main Agreement cannot be relied upon to give the Authority the jurisdiction to regulate wholesale terms and conditions.

5.4.3 Paragraph 64 of Annex 5 to the Licence, provides the ICTA with only two powers: the power to direct resale on a wholesale basis of Cable & Wireless' services, and the power to set the rates at which these wholesale services are offered to other licensees.

5.5 This scheme is consistent with the scheme established by the ICTA Law with respect to the other major category of services provided by licensees to each other, for example, interconnection services. The ICTA Law does not provide for approval of the terms and conditions of interconnection services by the Authority, but rather the negotiation of mutually agreed

terms and conditions by two commercial entities. The ICTA Law, in essence, limits itself to providing guidance to licensees on the development of appropriate rates for interconnection, and allowing the ICTA to resolve disputes. This scheme, where rates but not terms and conditions are regulated, is exactly parallel to that established by the Main Agreement and the Licence for wholesale services.

6.0 *The Directive and Public Consultation Decision made in breach of natural justice*

- 6.1 The Directive was issued and the Public Consultation Decision was made in a manner which was procedurally unfair to Cable & Wireless and in breach of the principles of natural justice.
- 6.2 The principles of natural justice and procedural fairness require an administrative tribunal to consult with the parties that are to be affected by its decisions. This is particularly true where the tribunal's decision will severely prejudice the rights of one of those parties. A breach of this principle by a public administrative tribunal is judicially reviewable.
- 6.3 In this case, Cable & Wireless had a legitimate expectation, based upon the clear and express wording of the Main Agreement and of its Licence, that it was not required to provide the documentation for the "IPLC for voice" service until 1 February, 2004. The Licensing Timetable is a fundamental aspect of the Main Agreement. Cable & Wireless agreed to give up its exclusive monopoly on the basis of the Licensing Timetable. Cable & Wireless has built its business plan around the dates set out in the Main Agreement and in its Licence. Any decision by the Authority to advance the date for the provision of that wholesale service would be prejudicial to Cable & Wireless.
- 6.4 Cable & Wireless was not given an opportunity to present its case to the Authority that such a decision would be in error. The Directive is clear that Cable & Wireless is required to publish and offer the wholesale service. There was no opportunity for Cable & Wireless to have made representations prior to the issue of the Directive and the Public

Consultation Decision. It is clear that the Authority had no intention to allow for that process when it drafted the Directive and the Public Consultation Decision.

- 6.5 This is a clear breach of Cable & Wireless' procedural rights. Cable & Wireless should have been given an opportunity prior to the issue of the Directive and the Public Consultation Decision to provide the Authority with its views as to why the Directive and the Public Consultation Decision violate the Licence, the Main Agreement and Cable & Wireless' legitimate expectations.

NOTE:

Pursuant to Order 53 rule 3(3) and in view of the tremendous possible adverse consequences for the applicant of the Directive and the Public Consultation Decision dated 3 October, 2003, an oral hearing is requested before this application for leave to apply for Judicial Review is considered and determined by this Honourable Court.

This **EX PARTE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW** was issued by Quin & Hampson, Attorneys-at-Law for the Plaintiff whose address for service is 3rd Floor, Harbour Centre, P.O. Box 1348, George Town, Grand Cayman.