TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2006-03320

IN THE MATTER OF THE JUDICIAL REVIEW ACT 2000

AND

IN THE MATTER OF THE TELECOMMUNICATIONS ACT 2001

AND

IN THE MATTER OF AN APPLICATION BY DIGICEL (TRINIDAD & TOBAGO) LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION OF RORY MACMILLAN, SHAHID HUSSAIN AND RONALD RAMKISSOON SITTING AS MEMBERS OF AN ARBITRATION PANAL APPOINTED BY THE TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO MADE 16TH AUGUST 2006

BETWEEN

DIGICEL (TRINIDAD & TOBAGO) LIMITED

CLIAMANT

AND

RORY MACMILLAN
SHAHID HUSSAIN
RONALD RAMKISSOON

DEFENDANTS

AND

THE TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO

FIRST INTERESTED PARTY

TELECOMMUUNICATION SERVICES OF TRINIDAD AND TOBAGO LIMITED

SECOND INTERESTED PARTY

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Mr. Hamel-Smith leading Mr. Rajkumar instructed by Mrs. Bharath for Claimant
Mrs. Peake leading Mr. Harnanan instructed by Mr. Vieira for Defendants and the First Interested Party
Mr. Daly leading Ms. Indarsingh for the Second Interested Party

REASONS

Pursuant to **section 82 of the Telecommunications Act 2001 ("the Act")** and in furtherance of a complaint made by the Claimant, Digicel (Trinidad and Tobago) Limited ("Digicel"), certain disputes between it and the Second Interested Party, Telecommunications Services of Trinidad and Tobago ("TSTT"), were referred by the First Interested Party, the Telecommunications Authority of Trinidad and Tobago ("the Authority") to arbitration by a panel comprising the Defendants ("the Panel"). On the 16th August 2006 the Panel delivered its decision in the arbitration proceedings.

The substantive application before the court is for judicial review of that part of the decision that found that TSTT was not prevented from insisting that a clause requiring

reciprocity in interconnection charges be included in the interconnection agreement between it and Digicel. The Claimant in these proceedings seeks an order of certiorari with respect to that decision and a declaration as to the true construction of section 25(2)(m) of the Act. The grounds upon which relief is sought are that the decision is erroneous in law and/or unreasonable and/or in conflict with the policy of the Act.

Leave was granted on the 23rd October 2006 on the basis of two affidavits, an affidavit of Jerry Hausman ("the Hausman affidavit") and an affidavit of Kevin Barrins ("the Barrins affidavit") both filed on the said 23rd October 2006.

Before me are applications by the Panel, the Authority and TSTT (collectively called "the Applicants"), for orders disallowing the use of the Hausman affidavit and paragraphs 47 to 60 inclusive of the Barrins affidavit (" the disputed evidence")

In summary the grounds for the applications are as follows:

With respect to the Hausman affidavit,

(i) the affidavit seeks to place before the court fresh evidence inadmissible in judicial review proceedings;

(ii) the evidence raised in the affidavit deals with issues on which evidence was led at the arbitration hearing and consequently could have and ought to have been adduced at the hearing;

(iii) the affidavit seeks to place before the court evidence inappropriate to an application for judicial review in that its purpose could only be to have this court substitute its findings for that of the Panel;

(iv) the deponent seeks to usurp the function of the court in that he presents conclusions properly in the province of the court; and

(v) the use of the affidavit flies in the face of section 83 of the Act which provides a procedure for a reconsideration of the decision of the Defendants in the light of new information.

With respect to the paragraphs in the Barrins affidavit,

(i) certain of the paragraphs do not contain facts but rather comment and/ or opinion on the impact of the decision and are therefore speculative and irrelevant;

(ii) paragraph 57 contains fresh evidence which is inadmissible and which could and ought to have been led at the arbitration hearing;

(iii) certain of the paragraphs contain argument and/or submissions and are therefore irrelevant;

(iv) certain of the paragraphs seek to usurp the functions of the court by presenting conclusions properly in the province of the court.

While not denying that the affidavits contain fresh evidence, the Claimant submits that this is admissible since evidence in judicial review proceedings is not strictly limited to evidence which was or should have been before the decision maker. The overriding

principle being that the court will not shut out evidence relevant to the issues or which will dispose fairly with the judicial review application before it. Further, the expert evidence will assist the court in understanding the technical issues of the case and the exercise of its discretion whether or not to grant the relief sought. In any event, the Claimant submits, the court has the discretion to allow the evidence 'de bene esse' and ought to exercise its discretion accordingly until such time as all the evidence is before the court.

It is not in dispute that:

(i) the Panel comprises persons expert in the field of telecommunications and economics;

(ii) these proceedings seek only to challenge the Panel's decision in relation to the issue of 'the basis of interconnection charges, in particular reciprocal charging in relation to interconnection charges for the termination of calls on each suppliers mobile network',

(iii) this issue was an issue raised by Digicel in its complaint;

(iv) at the arbitration hearing evidence was led on this issue on behalf of Digicel from an expert, John Gunnigan, and Kevin Berrins;

(v) at the arbitration hearing Jerry Hausman did not give evidence.

The affidavits

It is clear that the sole purpose of the Hausman affidavit is to provide the court with the opinion evidence of an expert in the field. Paragraphs 1 to 5 of the affidavit detail the

deponent's expertise. Paragraph 6 sets out the request made to him by Digicel 'to provide his opinion on the likely effects on the telecommunications sector in Trinidad and Tobago of the decision of the Arbitration panel'. The rest of the affidavit deals with the deponent's opinion on the effect of the decision.

The purpose of the Barrins affidavit is not so straightforward. The first four paragraphs of the affidavit places recites the deponent's experience, his employment with Digicel and his authority to swear to the affidavit on Digicel's behalf. Paragraphs 5 to 45 identify the parties, give the history of the dispute between the parties and place the record and the decision before the court. Paragraphs 46 to 60 of the affidavit purport to deal with the effect of the decision.

In my view paragraphs 47, 48, the first sentence of paragraph 49, paragraph 50, the last sentence in paragraph 53, paragraph 54, first sentence of paragraph 55, paragraph 58 from the end of the first sentence, paragraph 59 and paragraph 60 present the opinion of the deponent. The rest of paragraph 49, 53 and 58, paragraphs 51, 52, 55, 56, and 60 either recite portions of the evidence or the decision and/or present the deponents comment or conclusions or opinions on the evidence or the decision. Paragraph 57 insofar as it presents to the court information of an advertisement of September 2006 is fresh evidence, insofar as it refers to the evidence it is comment. Further paragraph 56 and the first sentence in paragraph 57 repeat almost word for word the contents of a portion of paragraph 26 of the deponent's witness statement in the arbitration proceedings.

In this regard it must be noted that given the terms of the decision sought to be reviewed the issue on which Hausman has been asked to provide an opinion and the issue addressed at paragraphs 46 to 60 of the Berrins affidavit is exactly the same issue which the Panel had to determine and on which Digicel led evidence before the Panel.

The Law

(a) Relevance

In order to be admissible the disputed evidence must pass the relevance test. The evidence must be relevant to the issues to be determined. In this case the relevance is to be determined by reference to the grounds upon which the relief is sought. With respect to the grounds that the decision is erroneous in law and in conflict with the policy of the Act the only relevant evidence is the record and the decision. The disputed evidence therefore can only be adduced in respect of the ground of the unreasonableness of the decision.

In the context of judicial review proceedings this must be seen in the light of 'Wednesbury unreasonableness'- a 'decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' per **Lord Diplock** in **CSSU v Minister for the Civil Service [1984] 3 All ER page 951 letter a.** In my view it is against this standard that the relevance of the evidence is to be tested.

In doing so it must be borne in mind that the question of the unreasonableness of the decision is a question for the judge hearing the application for judicial review and no other. It is not a conclusion to be made by a witness, however expert. The conclusions of a witness in this regard would not only be irrelevant but its intention could only be to usurp the role of the court.

In its submissions Digicel relies on the cases of **Regina v Secretary of State for the Home Department ex parte Simms and another [2000] 2 A.C. 115** and **R v Secretary of State for the Home Department, ex parte Turgut [2001] 1 All E R 719**, to support the submission that opinions of experts can be of relevance in judicial review proceedings. In my opinion these cases do not attempt to lay down any general principles and, in any event, are distinguishable on the facts. Unlike the instant case, in both of the cases the court was dealing with a human rights issue, in Simms, the access by prisoners to justice and, in Turgut, the right not to be exposed to a real risk of ill treatment. In both cases there was no objection to the receipt of the evidence. Further, in Turgut's case the opinion was requested by the court. None of these factors apply in the instant case.

(b) Fresh Evidence

With respect to the admission of fresh evidence, in my view the principles on which evidence not originally before the decision-maker are to be admitted in judicial review proceedings are as stated in the case of **R v Secretary of State for the Environment and another, ex parte Powis [1981] 1 All E.R. 788** and extended in the case of **R (on the**

application of Lynch) v General Dental Council [2003] EWHC 2987. In my opinion for the reasons stated earlier both **Simms** and **Turgut** present special facts justifying an exception to the general rule which are not applicable here.

In the case of **Shiu Wing Steel Limited v Director of Environmental Protection and Airports Authority of Hong Kong Civil Appeal No 350 of 2003 (Hong Kong),** fresh evidence was admitted on the basis that in circumstances where the trial judge had allowed an extensive amendment to the application based on the fresh evidence the trial judge could not properly refuse to admit the fresh evidence.

In support of its submission that fresh evidence is admissible in judicial review proceedings to assist the court in the exercise of its discretion with respect to the relief sought Digicel relies on a statement of **Stone J** in his dissenting judgment in the **Shiu Wing Steel Limited case** in which at **paragraph 132** Stone J. accepts a submission of counsel that 'in deciding whether to exercise its discretion to grant relief the court can and does have regard to post-decision material.' To my mind, at best, this statement is obiter dicta. Of more relevance it would seem to me is the statement of **Stock JA** in the same case at page 34 paragraph 48 where immediately before dealing with the rationale for admitting the fresh evidence he states:

> " The issue of admissibility of the HSL report does not, in my opinion, affect the construction of these documents, unless it were said that the HSL report so improves the court's understanding of the issues and the technicalities that it could have led to a different conclusion as to the correct construction".

In my opinion, a statement not far removed from the principles enunciated in the Lynch case.

In any event it is difficult to see how the evidence presented in the Hausman affidavit could assist the court in the exercise it discretion with respect to the grant of relief particularly since the opinions arrived at by the deponent merely reflect the opinions already presented by Digicel's expert at the hearing, albeit given by another witness. Similarly it is difficult to see how the fact of an advertisement placed in the newspaper by TSTT in September 2006 could assist in the exercise of a discretion whether or not to make an order quashing the decision.

It is submitted by Digicel that, in keeping with the Lynch case, the expert evidence will assist the court in understanding the technical aspects of the case. In my opinion this is not a case where the evidence of an expert is needed to explain technical terms or processes. Indeed, in so far as the affidavits contain fresh evidence, this evidence does not seek to explain technical terms or processes but rather, in my view, seeks only to place before the court opinion evidence on the likely effects of the decision.

In this regard I can do no better than to accept the reasoning and repeat the statement of **Collins J.** in **the Lynch case** at **paragraphs 24 and 25**.

> "[24] It is clear that the court's functions must not be usurped……
>
> There is in my view a real distinction between a report from an expert

which seeks to explain what is involved in a particular process and one which goes on to opine that it was irrational for the body to have reached the conclusion it did…

However it seems to me that in a truly technical field, where the significance of a particular process is in issue expert evidence can be admitted to explain the process and its significance. Cases where this can be permitted will be very rare and what I have said should not be regarded as opening the door to the admissibility of experts' reports in all cases such as this which involve judicial review of an expert tribunal or body. Equally, the court must be careful to recognise and apply the distinction to which I have referred, albeit in some instances it may be somewhat difficult to see where the line should be drawn.

[25] This is, I appreciate, some extension beyond that recognised by Ex p Powis of the possibility of admitting fresh evidence. But its purpose is in reality to explain to the court matters which it needs to understand in order to reach a just conclusion…. But a word of caution is appropriate. Where the tribunal or body is itself composed of experts or has been advised by an expert assessor…it will be virtually impossible to justify the submission of expert evidence which goes beyond explanation of technical terms since it will almost inevitably involve an attempt to challenge the factual

conclusions and judgment of an expert. That is something which is inappropriate for a reviewing court."

(c) Opinion Evidence

In order that the opinion evidence of either deponent be admissible, in my view, both deponents would have to be presented to the court as expert witnesses capable of giving such evidence in the field of their expertise. While the position with respect to the Hausman affidavit is clear, it is not so obvious with respect to the Berrins affidavit. Even accepting that the question of the degree of competence of the expert is a matter of the weight of the evidence rather than admissibility, it would seem to me that in so far as Berrins seeks to place before the court his opinion as to interpretation to be placed on the evidence or decision he is not competent to do so. It would seem to me that it is only in respect of the opinions proffered at paragraph 47, the first sentence of 49, paragraph 50, the first sentence in paragraph 53, paragraph 54, paragraph 58, paragraph 59 and 60 that this deponent can seek to rely on his expertise.

The Civil Proceedings Rules 1998 as amended ("the CPR") presents a further difficulty with respect to the admissibility of the opinion evidence. And it is this, since evidence in these proceedings is by way of affidavit and since the only basis for the admission of the opinion evidence is by way of the evidence of an expert regard must be had to **Part 33 of the CPR. Part 33.5** provides that no party may call an expert witness without the court's permission. In my opinion with regard to judicial review proceedings

this must mean that no evidence of an expert witness is admissible except with the permission of the court.

Part 33.4 restricts the admission of expert evidence to that which is reasonably required to resolve the proceedings justly. It would seem to me that in order for the Hausman affidavit and those portions of the Berrins affidavit that seek to present his opinions to be used in these proceedings Digicel would have to comply with Part 33 of the CPR. The question is would permission be granted to use this evidence? In dealing with similar provisions in the United Kingdom, Phipson suggests that:

> "The starting point for a court will therefore be to consider whether or not the expert evidence is required at all. There are quite a number of cases where the court has found that the use of expert evidence was a waste of time and expense, usually because the evidence to be called or called has been found to be redundant or irrelevant,…."

Phipson On Evidence, sixteenth edition, page 993 paragraph 33-28

According to **Lady Justice Hale in Baldev Singh Mann v Messrs Chetty and Patel (a firm) [2001] EWCA Civ 267 at paragraphs 15 to 17**

> "15. The overriding objective of the Civil Procedure Rules is to enable the court to deal with cases justly (rule1.1(1). But this includes, so far as practicable, saving expense, dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party,

ensuring that the case is dealt with expeditiously and fairly, and allotting to it an appropriate share of the court's own resources (rule 1.1(2)).

16. Controlling the issues and the evidence to be presented is an important part of that process. Expert evidence is to be restricted to that which is reasonably required to resolve the proceedings (rule 35.1). No party may call expert evidence without the court's permission (rule 35.4(1). The court may direct that evidence be given by a single joint expert instructed by the parties (rule 35.7) or appoint an assessor to assist the court (rule 35.15)

17. Clearly therefore, the court has to make a judgment on a least three matters: (a) how cogent the proposed expert evidence will be; (b) how helpful it will be in resolving any of the issues in the case; and (c) how much will it cost and the relationship of that cost to the sums at stake."

Conclusions

I am of the view that no useful purpose will be served by admitting the disputed evidence 'de bene esse'. In my opinion the court has before it all the relevant material to deal with the issue of the admissibility of the disputed evidence. I can see no benefit from awaiting the receipt of further evidence particularly since of necessity that further evidence will have to include affidavits in opposition to the disputed evidence and perhaps further expert evidence.

In all the circumstances I will not allow the use of the Hausman affidavit for the following reasons:

(i) The affidavit consists of fresh evidence inadmissible in these proceedings;

(ii) It improperly seeks to challenge the factual conclusions and judgment of an expert panel;

(iii) It is irrelevant to the issues to be determined by the court;

In the light of my conclusions herein I am of the view that there is no need for me to consider the effect of section 83 of the Act.

In a similar vein I will not allow the use of paragraphs 47 to 60 of the Barrins affidavit for the following reasons:

(i) insofar as paragraph 57 contains fresh evidence it is inadmissible;

(ii) the contents of paragraph 56 are unnecessary since that evidence is already before the court in KB6 as paragraph 26 of the deponent's witness statement;

(iii) save for the opinions stated in first sentences of paragraph 49 and 53 and paragraphs 47, 50, 54, 58 59 and 60 the opinions of the deponent in the other paragraphs are opinions which the deponent is not competent to give;

(iv) in any event these opinions are in the form of comments on and conclusions to be drawn from the evidence and decision which are properly in the realm of submissions and for which no evidence is necessary;

(v) with respect to the paragraphs particularised at (iii) above these opinions are irrelevant to the issues to be determined by the court;

In any event given the evidence placed before the Panel and the issues to be determined in this case I am of the view that no useful purpose would be served in these proceedings by the admission of the expert evidence.

In the circumstances the use of the affidavit of Jerry Hausman is disallowed and paragraphs 47 to 60 of the affidavit of Kevin Berrins is struck out. Digicel is to pay the costs of both applications to be assessed at the determination of the judicial review proceedings.

Dated this 29th day of March 2007

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Judith A.D. Jones
Judge