THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2010-02389

IN THE MATTER OF THE JUDICIAL REVIEW ACT CH.7:08 OF THE LAWS OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF THE TELECOMMUNICATIONS ACT CH. 47:31 OF THE LAWS OF TRINIDAD AND TOBAGO

IN THE MATTER OF AN APPLICATION BY TELECOMMUNICATIONS SERVICE OF TRINIDAD AND TOBAGO LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION OF TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO PUBLISHED 16TH MARCH 2010 THAT DECLARED TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO LIMITED IS DOMINANT IN THE RETAIL DOMESTIC FIXED TELEPHONY MARKET

BETWEEN

TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO LIMITED

Claimant

AND

TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO

Defendant

Before The Hon. Madam Justice C. Gobin
Appearances:
Mr. M. Daly SC and Ms. S. Sinanan for the Claimant
Mrs. D. Peake SC and Mr. R. Harnanan for the Defendant

JUDGMENT

1. Prior to the enactment of the Telecommunications Act Ch. 43:31 in July 2001 (the Act), the claimant TSTT enjoyed a "virtual monopoly" in the provision of telecommunication services in Trinidad and Tobago. The Act which ushered in the liberalization of the telecommunication sector introduced a regulatory framework, not uncommon in anti-competition regimes, the aim of which was to monitor and protect against abusive anti-competitive behavior by any supplier or suppliers dominating defined markets. The defendant is the regulatory body established under the Act.

2. To further the aims of the legislation, S.29 (8) provides:

> "(8) For the purposes of this Part and wherever the issue of dominance otherwise arises in the Act, the authority may determine that an operator or provider is dominant where, individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers and, for such determination, the Authority shall take into account the following factors:
>
> (a) The relevant market.
> (b) Technology and market trends.
> (c) The market share of the provider.
> (d) The power of the provider to set prices.
> (e) The degree of differentiation among services in the market.
> (f) Any other matters that the Authority deems relevant.

3. On the 12th March 2010, the defendant made a determination that TSTT is dominant in the retail domestic fixed telephony market. This determination is challenged in this application. Leave to file judicial review was granted without a hearing on TSTT's notice dated 14th June

2010. The leave application was supported by an affidavit of Mr. Ed Duke, the claimant's Head of Regulatory and Policy Affairs.

4. At the hearing it became necessary to scrutinize the leave application and in particular the grounds and the facts that were set out at that early stage and to compare them with what was eventually filed in the substantive application. This was because Counsel for the defendant forcefully argued that there is a significant discrepancy between the two, which if the court permitted it to stand, would result in the claimant being allowed to argue a different case or extending its grounds without a necessary amendment. I consider it both convenient and sensible to deal with this at this stage.

5. Before I proceed with this exercise I note that counsel for the claimant has criticized the defendant's position in this regard as reflective of "a long abolished demurrer approach", not consistent with the modern approach to judicial review. I do not consider this criticism to be well founded. There is clearly a distinction to be drawn between the robustness of the court's approach to preventing the abuse of executive power on the one hand and an insistence on compliance with rules of court which govern judicial review proceedings on the other. I do not think that the latter can be dismissed as mere pedantry for the following reasons.

6. Judicial Review procedure is governed both by primary and subsidiary legislation through the Judicial Review Act Ch.7:08 as well as the CPR. The following sections of the JR Act apply:

> S. 5 (1) An application for judicial review of a decision of an inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance
>
> with any law shall be made to the Court in accordance with this Act and in such manner as may be prescribed by Rules of Court.
>
> S. 5 (4) An applicant is not limited to the grounds set out in the application for judicial review <u>but if the applicant wishes to rely on any other ground not so set out, the Court may, on such terms as it thinks fit, direct that the application be amended to specify such other ground.</u>

7. As to the Civil Proceedings Rules the relevant ones are as follows:

> CPR 56.3 (1) No application for judicial review may be made unless the court gives leave.
> (3) The application for leave must state
> (c) the grounds on which such relief is sought.
>
> CPR 56.7 (3) The claimant must file with the claim form an affidavit.
> (4) The affidavit must state -
> (d) the grounds on which such relief is sought.
> (e) the facts on which the claim is based.

And perhaps most significantly CPR Part 56:11 states:

> ***"Any evidence filed in answer to an application for an administrative order must be by affidavit but the provisions of Part 10 apply to such affidavit".***

Part 10 deals generally with defences. It provides what has been interpreted as a strict duty on the defendant's part to set out his answer to a case. Amendments as we know are not readily granted. The rules could not contemplate a lighter burden on the claimant in this regard.

8. When the above provisions are read together I can only conclude that there is a requirement for discipline in judicial review procedure which must be insisted upon by the court.

A grant of leave is not a grant at large. Permission to proceed with a judicial review claim is permission to proceed on specified grounds only unless amendments are sought and granted. There is no need to indicate any specific areas where the claimant appears to be enlarging its grounds. These have been adequately highlighted by counsel for the defendant. The claimant will be limited to the original case which was filed on the 14th June 2010.

9. What then were the grounds on which leave was granted in this case? These are to be found in the notice filed on 14th June 2010 at paragraph (8), (9), (10) and (11). I begin with the one that must necessarily be excluded. The ground set out at paragraph 10 (a) to (f) was one of Wednesbury unreasonableness in the more classic sense. The evidence on which the claimant intended to rely in support of this particular ground was struck out at an interlocutory stage. As a result the claim on this ground could not be pursued. I turn to the complaint of procedural irregularity at paragraphs (8) and (9) which was expressed in the following terms:

> ***A: PROCEDURALLY IRREGULAR***
>
> ***8. The Respondent in its Annual Report on Key Deliverables and Financial Statements for the period 2007-2008 dated 23rd January 2009, states at paragraph 19, "In attempting to initiate the process to declare TSTT dominant in the fixed domestic market, the Authority was advised by external Counsel that this deliverable had to be split into two key parts:***
>
> ***(a) Determine Market Definitions for Domestic Fixed Voice Telecommunications Services;***
> ***(b) Assess Dominance in the defined market***
>
> ***9. The Respondent in making the said determination on 16th March 2010 acted in a procedurally irregular and/or unfair manner in that as evidenced by the matter set out in paragraph 8 above the Respondent***

> ***initiated a process to declare the Applicant dominant as aforesaid prior to having any sufficient reason for initiating such a process and/or setting out with a predetermined and/or fettered mindset to declare the Applicant to be dominant.***

Paragraph (8) simply indicates the alleged offending statement while paragraph (9) particularizes the complaint as arising directly out of it.

10. When the claimant is confined to the issue of predetermination on the ground specified above, the case comes down to this, can the statement which appeared in the defendant's annual report be said to demonstrate a predetermination of the claimant's dominance prior to the process and the decision under challenge. When the statement is read in isolation it does have a tendency to mislead. When I read it at the leave stage I thought it gave rise to an arguable case on predetermination. Having considered all the evidence and having viewed the same statement in the light of the process adopted by the defendant, undisputed evidence of which emerges through ongoing exchange of correspondence between the parties, the case cannot be sustained. It becomes clear that until the actual determination there was on the defendant's part nothing more than a contemplation of dominance and from its own responses, the claimant knew this to be the case. Indeed on August 21st 2009 the claimant's Legal and Policy advisor under caption "Re: Notification Consideration of Dominance in Fixed Access and Voice Markets in Trinidad and Tobago" in the course of a letter wrote:

> ***"we would like to take the opportunity to commend the Authority for its patience and the manner in which it sets out the assessment for dominance in fixed access and voice markets in Trinidad and Tobago"***

11. The process which led to the determination of dominance involved the fullest participation of the claimant. There were complaints at a very early stage about what might have been a misstep by the defendant. The defendant's letter of 18th September 2007 did give the impression that it had arrived at market definitions at a stage when there was no or insufficient input from the claimant. The claimant quite properly objected to what it perceived to be a lack of consultation. It went on to suggest a two stage approach, first market definition, then a consideration of dominance. The defendant adopted this approach. From as early as the 15th November 2007 the claimant wrote to the defendant and candidly accepted the possibility of a finding of dominance. It's words were:

> ***TSTT recognizes that once a consultation process has been properly concluded TATT may find a price regulation regime to be warranted.***

It accepted that the defendant could have come to the conclusion that it did.

12. With the fullest participation of the claimant, the defendant completed the first stage of market definition on the 14th April, 2009. Details of process leading to the determination are detailed in the submissions of counsel for the defendant (paras. 29 to 45). I need not repeat them. The constant exchange and the direct responses of the defendant to all concerns and objections raised by the claimant and the willingness of the former to grant sufficient time on several occasions requested by the claimant, negate the claim of predetermination on the basis of the statement particularized in the leave application, or indeed generally. From it I have concluded that the defendant demonstrated conduct which can be described as careful, accommodating and at the end of the day, fair.

13. I come to the remaining ground. In the course of his oral arguments, in answer to a question posed by me to clarify the "Wednesbury unreasonableness" complained of, Counsel for the claimant conceded that on the material available to it, the defendant could properly have come to the determination of dominance. He restated then the last ground was an attack not on the unreasonableness of the decision in the sense of irrationality. It was that having decided on market definitions in April 2009 that the defendant in using those defined markets as the basis for determining the claimant's dominance, allowed its own discretion to be fettered. As I understand it, is because the information used in arriving at that earlier determination could have become outdated or irrelevant because of intervening events, one such event for example which was given in the oral submission of counsel was the entry of Digicel (another provider) on the market. This fettering of the discretion counsel contended resulted in procedural unfairness.

14. Having considered the submissions, I find that this ground too is without merit. It was the claimant who suggested the two stage process which was adopted by the defendant and which approach appears to be standard in this sort of exercise in the industry. The claimant was fully consulted and participated in the first stage until completion. There was no challenge to the market definitions arrived at. The defendant then embarked on the second stage which took months for completion. The exchange of correspondence again reflects the extent of the claimant's participation and the defendant's consultation and its requests for more timely provision of information.

15. What is clear is that the process commended by the claimant was necessarily time consuming. It took several months. Nothing appears in the exchange of correspondence

between the parties during this period which suggests that there was anything happening in the industry or the markets, that any factor had arisen which could possibly have required the defendant to revisit the "precursor" decision. This is as significant as it is understandable. It is significant in the sense that the absence raises an issue as to the credibility of the charge that there were new matters which could have been taken into account had the defendant not fettered its discretion. The claimant's credibility is not helped by the fact that it failed to avail itself of the opportunity to have a reconsideration of the decision under S.83 of the Act by providing any new information. This appears to confirm that the freshness of the market definitions was preserved up to the time the determination was made. It is understandable too because it would undermine the appropriateness and value of the two stage consultative approach urged by the claimant. If the defendant had to revisit the first decision in order to make its final decision this could lead to a scenario where in a new and dynamic environment the defendant would never be able to complete the exercise, it would be going around in circles.

16. In relation to this ground Counsel for the defendant has argued that in effect the decision which is being challenged is the one related to the market definitions which was made since April 2009 and in respect of which a challenge by way of judicial review would be well out of time and in any case not permissible in these proceedings. Upon closer examination I have found that the fetter that the claimant says has been unreasonably self-imposed by the defendant is indeed the pre-cursor decision which was arrived as part of an accepted two-stage process. In those circumstances it can be described neither as self-imposed, nor as a fetter. The claimant's remaining ground of judicial review must therefore be rejected.

17. Since the claimant was confined to the case as pleaded at the leave stage it has not been necessary for me to determine whether the defendant demonstrated any bias or intention to declare the claimant dominant for any reason other than what could be inferred from the annual report or whether if it did so, such action was lawful or not. However, I had to consider how and in what circumstances the defendant's discretion provided by S 29 (8) could be "triggered". Against the background of the claimant having enjoyed a monopoly in the fixed telephony market I do not think that the defendant can be criticized even on the undisputed historical basis alone for contemplating a determination of dominance. The fulfillment of its regulatory function even at an early stage after its assumption of office would have required no less.

18. But if there remains any doubt as to whether just that factor was a sufficient trigger and if I am wrong on that, I am more certain that the actions of the claimant in relation to its Single National Rate Proposal in mid 2007 were more than sufficient to provoke the defendant to move to consider a determination of dominance. When in its insistence on imposing a rate change in the face of the defendant's concerns, it waived the absence of a determination of dominance to justify its conduct and to flaunt its intention to do as it pleased without regard to the statutory powers of the defendant and to the public interest, it must have been clear to the claimant that it was inviting if not goading the defendant to activate a process to declare dominance. It was manifestly demonstrating that it enjoyed a position of strength which afforded it the power to behave independently of competitors, customers and consumers. This conduct could not have been erased by any subsequent position taken in litigation or otherwise. The defendant would have been justified in taking the action that it did, indeed it could have exposed itself to a complaint of dereliction of its duty if it had chosen to simply ignore it.

19. The application for judicial review is refused, the claim is dismissed. The claimant will pay the defendant's costs fit for senior and junior counsel.

Dated this 4th day of May 2011

CAROL GOBIN

JUDGE