

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2006-00298

BETWEEN

**SOLOMON GABRIEL
(Trading as Sidewalk Radio 92.1 FM)**

CLAIMANT

AND

91.9 TRINI BASHMENT LIMITED

DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Mr. Munroe Brown for Claimant

Mr. Kwasi Bekoe for the Defendant

Ms. Hernandez for Attorney General

JUDGMENT

The Claimant holds a licence and a concession issued by the Trinidad and Tobago Telecommunications Authority (“the Authority”) pursuant to the Telecommunications Authority Act (“the Act”) to operate a public communications network and to provide public telecommunications and broadcasting services. The Defendant operates a radio station in Trinidad and Tobago.

By a claim filed on the 2nd February 2006 the Claimant seeks:

1. A declaration that the Defendant is not entitled to transmit in the Port of Spain area;

2. An order that the Defendant should cease to transmit outside of its authorised coverage area as stipulated in the licence granted by the Telecommunications Authority of Trinidad and Tobago;
3. An injunction restraining the Defendant from interfering with or disrupting the Claimant's broadcasting signal on his 92.1 FM frequency; and
4. Damages from the 31st December 2005 to the date of the order.

By a notice of application for interim relief the Claimant seeks declaration that the Defendant is not entitled to transmit in the Port of Spain area and an injunction. On the hearing of the application the question of the jurisdiction of this Court to hear this case was raised and both parties invited to make submissions. During the course of the submissions the Claimant indicated that it was no longer pursuing the remedies of the injunctions and as well filed an application to join the Attorney General as a Defendant to these proceedings.

I am therefore required to determine whether this court has the jurisdiction to hear this dispute and, if so, whether it ought to exercise such jurisdiction and whether leave ought to be given to the Claimant to join the Attorney General as a Defendant?

The relevant facts as disclosed by the Claimant's affidavits are as follows:

- (i) On the 24th June 2004 the Claimant was granted a special licence by the President under **section 3(2) of the Wireless Telegraphy Ordinance Chap. 36 No. 3 ("the Ordinance")** for the operation of a FM broadcasting station.

- (ii) The special licence was for the period beginning 24th June 2004 and ending the 31st December 2005.
- (iii) Provided to the Claimant together with the said special licence was a covering letter dated 5th July 2004 from the Ministry of Public Administration and Information (“the Ministry”). This letter advised the Claimant that on its expiration once the requirements of the Act was observed the special licence would be renewed pursuant to the provisions of the Act.
- (iv) On the 28th August 2004 a memorandum of agreement was entered into between the Claimant and the Permanent Secretary of the Ministry on behalf of the Government of Trinidad and Tobago.
- (v) By a letter dated the 5th January 2005 from the Authority the Claimant was advised that pursuant to section 85 of the Act his special licence would remain in force until the 28th February 2006 or until such time as a concession is granted under section 21 of the Act.
- (vi) By a letter dated the 4th January 2006 the Claimant requested that the Authority deal with the problem of the unlawful interference by the Defendant in part of the Claimant’s coverage area.
- (vii) By a letter dated the 13th January 2006 to the Defendant and copied to the Claimant the Defendant was advised that the Authority had determined that its broadcasting was causing harmful interference to the Claimant within its coverage area and outside of the Defendant’s coverage area. The Defendant was therefore required to adhere to the specifications of its licence and

advised that a failure to do so would render the Defendant in breach of the Act.

- (viii) The Defendant failed to comply with the directive of the Authority and the claim was filed.
- (ix) On the 23rd February 2006 the Authority, pursuant to the Act, granted the Claimant the licence and concession that he now holds.

Does the Court have the jurisdiction to hear the dispute and if so ought it to exercise such jurisdiction?

From the facts as recited it is clear that between the 24th June 2004 and the 31st December 2005 the Claimant was operating under a special licence issued pursuant to section 3(2) of the Ordinance.

Section 3 (2) of the Ordinance states:

“ In any case where it shall appear to the Governor in Council that no provision has been made by regulations made under this Ordinance for the issue of an appropriate licence, or that the circumstances of the case justify the issue of a special licence, the Governor in Council may issue a special licence for the installation and using of wireless apparatus on payment of such fees and on such terms and conditions as to the Governor in Council may seem fit.”

Given the fact that the Ordinance is a 1936 statute it is not surprising that the Ordinance itself contains no procedure for the settlement of disputes. Nor is it surprising, given the terms of section 3(2), that the regulations made under the Ordinance contain no reference to a special licence.

On the face of the special licence it states that it is subject to the terms and conditions set out in the schedule attached and forming part of the special licence.

Clause 1 of that schedule states:

“This Special Licence shall be granted conditionally for the period commencing June 24th 2004 and ending December 31st 2005 and may be renewed subject to the provisions of the Telecommunications Act, 2001.”

In accordance with the terms of the special licence therefore, by the letter of the 5th January 2005, the special licence was renewed pursuant to section 85 of the Act. Section 85 of the Act contains the transition provisions. Among other things it provides for the repeal of the Ordinance.

Insofar as it is relevant **section 85(7)** provides:

“The holder of a licence issued under the Wireless and Telegraphy Ordinance shall enjoy no new benefit or right conferred by the Act unless

such benefit or right was conferred under the Wireless Telegraphy Ordinance.”

The Act was brought into force incrementally, however by the 30th June 2004 all the sections of the Act, including the amendments, had been either assented to or proclaimed by the President.

Since the special licence granted the Claimant under the Ordinance provided that if renewed such renewal would be subject to the provisions of the Act, it would seem to me that all the rights and benefits conferred by the Act would not, in respect of the special licence, be new rights or benefits but rather rights and benefits already conferred by the Ordinance.

The original special licence expired on the 31st December 2005. The letter of the 5th January 2005 from the Authority indicated that the special licence would remain in force until the 28th February or until a concession under the Act was granted. In my opinion this could only have been a renewal pursuant to the Act consistent with the terms of the special licence and the undertaking given the Claimant in the letter of the 5th July 2005. Further, although communicated to the Claimant by letter dated the 5th January, the effective date of the renewal must have been the date of the expiration of the special licence. Consequently by the 31st December 2005 the Act and all the rights and benefits conferred by it applied to the Claimant’s special licence as renewed.

Section 82(1) of the Act provides that

“The Authority shall establish a dispute resolution process to be utilized in the event of a complaint or dispute arising between parties in respect of any matter to which section 18(1)(m) or 25(2)(h) applies, or where a negotiated settlement, as required under section 26, cannot be achieved, or in respect of any other matter that the Authority considers appropriate for dispute resolution.”

On the 18th January 2006 the Authority published its **‘Procedures for the Resolution of Disputes in the Telecommunications and Broadcasting Sectors of Trinidad and Tobago’**. In part the document states:

“2.4 Referral of a Matter as a Dispute

- 2.4.1 Any party may, on its own initiative at any time refer any dispute in respect of any matter arising under the Act, any regulations made under the Act, or any concession or licence under the Act to the Authority as a dispute.
- 2.4.2 Submission of a matter as a dispute shall be made by way of a Notice of Dispute, which shall be sent to the Authority for the attention of the Executive Director. The Notice of Dispute shall identify the parties involved in the dispute, and the nature of the dispute.
- 2.4.3 Dispute resolution proceedings shall be deemed to have commenced on the day that the Notice of Dispute is received by the Authority.”

Section 18(1) (m) of **the Act** states that the Authority may exercise such functions and powers as are imposed on it by the Act and in particular:

“investigate complaints by users, operators of telecommunications networks, providers of telecommunications and broadcasting services or other persons arising out of the operation of a public telecommunications network, or the provision of a telecommunications service or broadcasting service, in respect of rates, billings and services generally and to facilitate relief where necessary;”

By **section 21(1)** of the Act any person wishing to operate a public telecommunications network, a public telecommunications service or a broadcasting service is required to obtain a concession from the relevant minister.

Section 22(3)(f) of the Act requires that, subject to section 82, every concession for a broadcasting service contain conditions for the submission to the Authority of disputes with other concessionaires where the dispute arises out of a concessionaire’s exercise of his rights and obligations under the concession.

Section 36 of the Act requires any person establishing, operating or using a radio-communication service or installing or operating or using any radiotransmitting equipment to be licensed by the relevant Minister. The Act provides no similar requirement with respect of licence holder as is provided by section 22(3)(f).

In the instant case the Claimant was issued both a concession and a licence pursuant to **Section 36** of the Act. The concession provides that:

“Any dispute on matters relating to the requirements of the Concession or the Act shall be referred to the Authority for determination in accordance with section 82 of the Act. The concessionaire expressly agrees and acknowledges that it shall, as provided for within the provisions of such dispute resolution process, be bound by any decision or award made in such process.” -**Clause A49 of the concession.**

The licence granted to the Claimant is worded in exactly the same manner save that the words ‘concession’ and ‘concessionaire’ are replaced by the words ‘licence’ and ‘licensee.’ -**Clause A34 of the licence.**

Both the licence and the concession contain terms preventing harmful interference with the service provided by other operators, with respect to the licence-**clause A13** and with respect to the concession -**Clause A21.**

In the instant case since the Defendant also operates a radio station it can be safely assumed that it holds at least a licence or a concession in the same terms as that held by the Claimant.

It is trite law that Parliament may by statutory provision deprive the court of jurisdiction to deal with certain disputes. As stated by **Asquith L.J. in Wilkinson v Barking Corporation [1948] 1 All ER 564 at page 567**

“It is, undoubtedly, good law that, where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to this remedy or this tribunal and not to others.”

In the words of **Tindal CJ** in the case of **Crisp v Bunbury and Others [1824-34] All ER Rep. 669 at page 672**

“It is undoubtedly true that the jurisdiction of the superior courts of Westminster is not to be ousted, except by express words, or by necessary implication: *Cates v Knight*; yet, where the object and the intent of the statute manifestly requires it, words that appear to be permissive only, shall be construed as obligatory, and shall have effect of ousting the courts of their jurisdiction...”

This principle has been adopted in the courts in this jurisdiction time and time again in cases dealing with the jurisdiction of the court in disputes arising out of the business of a cooperative society. With respect to disputes touching the business of a co-operative

society between members or between members and the society, **section 67(1)** of **the Co-operatives Societies Act Chap 81:03** provides that the dispute **shall** be referred to the Commissioner of Co-operatives for decision. **Section 67 (3)** further provides that:

“The Commissioner may on a dispute being referred to him under subsection (1)

- (a) decide the dispute himself or,
- (b) with the consent of the parties refer the dispute to arbitration”.

By **subsection (4)** the settlement of any dispute by an arbitration award shall be final and shall not be called in question in any court of law.”

The courts in this jurisdiction have consistently held that these words have the effect of preventing the court hearing such disputes. The Court of Appeal of Guyana, in the case of **Sowatilall v Persaud 18 WIR 186**, has held that similar words have the effect of ousting the jurisdiction of the court save in a limited supervisory capacity.

It is clear that the Act makes it mandatory for the Authority to establish a process by which disputes under the Act may be resolved and requires that the Authority ensure that all concessionaires submit disputes to it for resolution. It seems to me that the conjoint effect of sections 82, section 21(1) and section 22(3)(f) of the Act is that all disputes described by section 82 are to be dealt with under the disputes resolution procedure set up by section 82 of the Act. In my opinion section 82 attempts to set out a comprehensive list of the types of disputes under the Act and, in the event that the list is

not exhaustive, allows the Authority to list any other matter which it thinks appropriate for dispute resolution. In other words, in my view, the Act seeks to have all disputes under it referred to dispute resolution.

This view, to my mind, is fortified by the preamble to the Act and the objects set out in section 3. In my opinion it is clear that the intention of Parliament in mandating the establishment of a dispute resolution process was not only to provide for a swift determination of commercial disputes under the Act but also to allow the Authority the flexibility of choice in the type of process needed to effectively resolve the dispute, a luxury unavailable to the court.

In the instant case, in my opinion, the dispute between the Claimant and the Defendant arises from a complaint by a provider of a public telecommunications and broadcasting service arising out of the operation of another broadcasting service in respect of the service provided. To my mind this is a complaint or dispute arising between parties in respect of a matter to which section 18(1)(m) of the Act applies. In any event, even if section 18(1)(m) does not apply, section 82 allows the Authority to utilize the dispute resolution process in respect of any other matters it considers appropriate for dispute resolution.

It is pursuant to this additional power granted by the Act that the Authority, by the concession and the licence, extended the ambit of the dispute resolution process to include ‘matters relating to the requirements of the concession/licence or the Act’.

Accordingly, apart from the mandatory provisions of the Act, by the terms of the concession granted to and accepted by the Claimant the Claimant is bound to refer any dispute on matters relating to requirements of concession, licence or the Act for determination in accordance with section 82 of the Act.

In my opinion therefore, given the provisions of the Act and the terms of the Claimant's concession and licence, it is mandatory for the Claimant to submit the dispute between itself and the Defendant to the dispute resolution process established under section 82 of the Act. This has not been done. It would seem to me that the complaint to the Authority by the Claimant by the letter of the 4th January and the subsequent investigation of such complaint by the Authority was an appeal to and an exercise of the Authority's investigative powers pursuant to section 18(1)(m) and not the institution of the dispute resolution process established under section 82 of the Act.

The question that remains to be to be answered is, what ought the court to do in the circumstances? If the Act had mandated referral to arbitration then by **section 7 of the Arbitration Act Chap.5:01** the court is empowered to grant a stay of proceedings in circumstances where a party commences proceedings in breach of an arbitration agreement. Arbitration is however but one of the options available in the dispute resolution process.

In **Channel Tunnel Group and Another v Balfour Beatty Construction Ltd. [1993] 2 WLR 262**, in circumstances where it was unclear given the terms of the clause

whether the agreement was an agreement to submit to arbitration or to expert assessment, the House of Lords accepted that the court had an inherent jurisdiction ‘to inhibit proceedings brought in breach of an agreed method of resolving disputes.’ In that case the defendant was granted a stay of the proceedings.

In **Cott UK Ltd. v F E Barber Ltd. [1997] 3 All E.R.540**, in circumstances where the referral was to an expert, **Judge Hergarty QC** sitting as a judge of the High Court stated:

“The courts have increasingly recognised that where the parties have agreed that a dispute should go to arbitration, the court should be slow to interfere with that choice, and should normally grant a stay, unless there are strong grounds for permitting the matter to proceed in the ordinary courts. That is part and parcel of the increasing recognition by the courts in this country of the benefits of alternate dispute resolution, of which arbitration is the classic and historic example.” **Page 548 letter c**

And later in the judgment:

“I take the view therefore that, even where there is no arbitration clause, in the light of the observations of Lord Mustill in the Channel Tunnel Group case, and in the light of the changing attitudes of our legal system, the court plainly has a jurisdiction to stay under its inherent jurisdiction, where the parties have chosen some alternative means of dispute resolution”. **Page 548 letter e**

In that case while accepting that the court had the power to stay the action the court determined that it ought not to exercise its discretion to grant a stay. This refusal was based on the fact that there were no rules governing arbitration or any other form of dispute resolution, the expert appointed to resolve the dispute had no experience in arbitration or any other form of dispute resolution and that the clause itself set out no rules or principles to guide the expert.

In **Sowatilall's** case the court was of the view that given the extreme provisions of the particular legislation the jurisdiction of the court, to review, was circumscribed and in those circumstances dismissed the plaintiff's case.

In the instant case, unlike the Cott UK case, the referral is by way of statutory provision rather than by agreement between the parties. Unlike the Sowatilall's case however the provisions of the Act are not as extreme and do not purport to prevent an approach the court. The provisions here merely provide that the parties shall engage in dispute resolution.

In my opinion the Act provides that the dispute resolution process set up by the Authority pursuant to section 82 of the Act must be exhausted before that dispute can be referred to the court. I am not at this stage, however, prepared to consider the extent to which the Act ousts the jurisdiction of the court except to say that, given the wide and varied methods of resolving disputes that comprise 'the dispute resolution process'

and the ability of the Authority to determine the process to be used in each case, it would be difficult if not impossible to make a general determination on this point. It seems to me that the extent of the court's jurisdiction over such disputes may depend on the method adopted to resolve the dispute.

In the circumstances I am of the view that the proper course of action would be for me to grant a stay of the proceedings to enable the Claimant to comply with the terms of the Act and his concession and licence.

In my opinion it is not appropriate at this stage to consider the Claimant's application for the Attorney General to be joined as a party. I note here that the procedures for the resolution published by the Authority provide, by **clause 2.4.4** that the 'Authority may in its discretion determine that any additional entity shall be included in the dispute resolution process proceedings, and shall in the Confirmation of Dispute identify such additional party or parties.'

The proceedings are hereby stayed.

Dated this 23rd of March 2007

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Judith A.D. Jones
Judge