

JERSEY / JUDGMENT

JT -v- JCRA [2013] JRC 159 (06 August 2013)

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judgment

the bailiff: 1. This is an application by the appellant ("JT") for an order that implementation of a specified regulatory function by the respondent ("the JCRA") pursuant to its powers under the Telecommunications (Jersey) Law 2002 ("the Law") be delayed pending the hearing of an appeal by JT to the Royal Court against the decision of the JCRA. 2. Following the hearing, the Court announced on Monday 15th July, 2013, that it had granted the delay. We now give our reasons. The statutory background 3. Under the Law, the JCRA is the regulator of the telecommunications industry in Jersey. Any person who wishes to run a telecommunications system in the Island must hold a licence from the JCRA. Under Article 7(2)(a), one of the matters to which the JCRA is to have regard is the importance of promoting competition amongst persons engaged in commercial activities connected with telecommunications in Jersey with a view to protecting and furthering the short term and long term interests of users of telecommunication services. 4. When granting a licence, the JCRA may impose conditions (Article 16). Under Article 18, it is given power to modify any condition of a licence and modification is expressed to include the insertion of a new condition. Modification of a condition contained in a licence is one of the matters which is included by Article 10(1) in the definition of a "specified regulatory function". 5. Article 11 sets out the procedure that the JCRA must follow when it wishes to exercise a specified regulatory function. In due course, when this appeal is heard, it may be necessary to consider the terms of Article 11 in detail, but we do not think it is necessary to do so for the limited purposes of this present application. In short, before exercising a specified regulatory function, the JCRA must give an initial notice stating what it proposes to do and why and giving a period for representations or objections to be made. It is its duty then to consider any representations and objections. It then issues a final notice which must refer to the matters contained in the initial notice, contain a summary of the representations and objections, contain details of the JCRA's response to them and then state the specified regulatory function that the JCRA proposes to take and the date that it will have effect or, alternatively, state that the JCRA does not intend to exercise the specified regulatory function. 6. Under Article 12, an appeal lies to this Court against the exercise of a specified regulatory function. Article 13 gives the Court power to delay implementation of the exercise of a specified regulatory function pending an appeal. The relevant terms of that Article, which is the provision we have to apply in relation to this application, as follows:- "13. Delay in implementation (1) A person who lodges notice of an appeal in accordance with this Part against the exercise of a specified regulatory function may, if the

exercise has not taken effect before the notice is lodged, include in that notice application for an order for a delay in the exercise. (2) If a notice of appeal includes such an application, the exercise shall not take effect earlier than the seventh day after the Court determines the application. (3) The Court shall consider the application as a matter of urgency. (4) The Court may grant the application if it considers that there are, prima facie, reasonable grounds for the appeal and that the balance of convenience in the case lies in favour of ordering the delay. (5 ... (6) ..". 7. In this case, the JCRA has exercised a regulatory function by adding a condition to the licence held by JT. JT has appealed against that exercise and now applies under Article 13 for a delay in the exercise until conclusion of its appeal. Factual background 8. In November 2012 the JCRA issued an initial notice ("the Initial Notice") in accordance with the procedure laid down by Article 11. The Initial Notice stated that the JCRA intended to modify the licence of JT through the addition of a new condition, which would require JT to make available to other operators a wholesale line rental ("WLR") product for its fixed-line telephony network by 3rd June, 2013. The exact terms of the new condition which it was proposed should be added to the licence was set out in Annex C of the Initial Notice as follows:- "From the earliest reasonably practicable date after this licence condition takes effect, and in any event no later than 3rd June, 2013, the Licensee shall provide Wholesale Line Rental (WLR) for single lines on its fixed-line network to Other Licensed Operators. WLR shall be provided in conformance with the processes set out in Section 7 and Annex B of the Initial Notice published as CICRA 12/52. The Licensee shall be entitled to share the efficient costs of the provision of the WLR service equally with each of the Other Licensed Operators that seek WLR and will ensure that it makes representatives available to attend meetings, upon reasonable notice, with the JCRA and/or its representatives to discuss the implementation or operation of WLR. Where a dispute arises in respect of WLR charges, the JCRA may set the maximum price for the provision of such a service." 9. On page 2 of the Initial Notice, the JCRA gave an explanation of what was meant by WLR which was as follows:- "WLR allows competitors to the telecom incumbents to offer a single bill that includes exchange line rental. Currently, the incumbent (in Jersey, JT) maintains a commercial relationship with the customer, given it is the only provider of exchange line rental, even if the customer uses a competitor for calls or broadband services. This allows the incumbent several potential advantages, including the obligatory continuation of a commercial relationship with all customers who take fixed-lines services and the ability to bundle products in a way its competitors cannot. WLR is intended to allow a measure of access competition to remove such obstacles to competition." 10. Responses to the Initial Notice were required by the end of December 2012. 11. In due course, the JCRA issued a final notice ("the Final Notice"). Rather unhelpfully it is simply dated May 2013 but it was agreed before us that it was in fact published on 8th May. In broad terms, the JCRA maintained its position and the Final Notice imposed a modification of JT's licence by inserting certain new licence conditions. The key modification was that JT must make available a WLR service for single lines on its fixed-line network to other licenced operators from the earliest reasonably practicable date and in any event no later than 7th November, 2013. 12. On 5th June, JT lodged a notice of appeal against the decision contained in the Final Notice which notice of appeal also contained an application under Article 13 of the Law for a delay in the exercise of the function represented by the Final Notice until after

judgment upon the appeal. 13. It is not necessary to summarise the notice of appeal in detail. At the risk of over simplification we would summarise its main grounds as follows:- (i) The decision was ultra vires because the exercise of the regulatory function in the Final Notice differed to too great an extent from that proposed in the Initial Notice. It was therefore inconsistent with the requirements of the Law. (ii) The JCRA had failed properly to take into account a number of matters set out in the notice of appeal and had therefore wrongly decided that WLR was appropriate. (iii) The JCRA had failed to comply with the requirements of procedural fairness in a number of respects. (iv) The JCRA had failed to take into account that JT had finite physical and financial resources which were fully committed on important other programmes and that accordingly WLR could not be implemented in the time scale contained in the Final Notice. 14. The appeal is listed for hearing before this Court on 3rd October, 2013, and JT applies for a delay in implementation until 7 days after the Court gives its decision on the appeal. Discussion 15. As set out in Article 13(4), the Court has to consider two matters when deciding whether to grant a delay pending appeal. The first is whether there are, prima facie, reasonable grounds for the appeal. The second is whether the balance of convenience lies in favour of ordering the delay. We shall consider each of these in turn. (i) Reasonable grounds for appeal 16. We do not think it would be right to enter into a detailed discussion concerning the grounds of appeal. The Law does not include any requirement for leave to appeal and the matters raised by JT will therefore fall to be considered by the Court at the hearing of the appeal in October. At that hearing, the Court will hear full argument on the merits of the appeal, which we have not. 17. We propose therefore simply to say that, having considered carefully the submissions of the parties on this aspect, both written and oral, we consider that there are, prima facie, reasonable grounds for appeal. We emphasise that this does not mean that we have concluded that the appeal is likely to succeed. That is not what the statute says. Furthermore, some of the grounds of appeal appear rather more arguable than others. It is simply that, on the face of it, there are reasonable arguments to be brought at the hearing of the appeal and therefore reasonable grounds for appeal. (ii) Balance of convenience 18. In this connection, Advocate Cadin referred me to the observation of Hoffmann J in *Films Rover International Limited-v-Cannon Film Studios Limited*

[1987] 1 WLR 670 at 680:- "The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the courts will make a 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at trial (or would fail it there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense that I have described." 19. That observation was of course made in the context of interlocutory injunctions but there is some read-across to a situation such as the present. 20. The other important consideration when considering appeals is that which is applied when considering appeals from decisions of a court, where a stay of execution is normally granted if a failure to do so would render an appeal nugatory. 21. We take first the prejudice which would be suffered by the JCRA should a delay be granted but the appeal in due course dismissed. In

essence, such prejudice can be shortly stated. The JCRA wishes to see the introduction of WLR because of the benefits it will bring in terms of competition. It will allow other telecommunication companies to compete on a more level playing field because they will be able to bill their customers for line rental whereas at present they cannot do so and the customer has to pay and maintain a relationship with JT. Thus, if the customer chooses to use another operator, he or she receives two invoices. The JCRA considers that other benefits, in terms of competition, will also arise from the introduction of WLR. 22. If implementation of the decision is stayed until the outcome of the appeal, there will be a corresponding delay in the community beginning to enjoy the benefits which would accrue from the introduction of WLR. The JCRA considers that this should be regarded as being a period of 5 months (being the period from the date of the Final Notice to the expected date of the outcome of the appeal). Advocate Cadin submitted that it should be regarded as a period of 4 months (being the period from the expiry of the time for appealing until the outcome of the appeal). 23. Balanced against that, what would be the prejudice to JT if no delay were granted but it was to be successful in its appeal. We would summarise Advocate Cadin's contentions as follows:- (i) If the outcome of the appeal were that WLR was not to be introduced at all, the expenditure of money and diversion of scarce management and technical resources would be irrecoverable. This would be quite wrong. (ii) There would be substantial prejudice to another very important programme which JT was engaged in. The company was carrying out a wholesale modernisation of its billing system. This was a programme which the company had embarked upon well before the Initial Notice. It was very important commercially to the company, as could be shown by the fact that the programme had a budget of £9.1 million. It had been hoped that the programme would go live by July 2013 but many aspects of it had fallen behind schedule. A meeting of senior management had been held on 3rd July to review the position and a presentation had been made. Details of that presentation were exhibited to the affidavit of Mr McDermott, Director of Corporate Affairs of JT. It showed that a number of areas were "red", in the sense that they were behind schedule. At the meeting, the directors had applied considerable pressure and made it clear that everything had to be done and all necessary resources had to be committed in order to try and bring the programme to a successful launch by October at the latest. This would require a heavy commitment of management and technical employee time and there was even mention of cancelling planned leave during August in order to achieve this, although that appears not to have been followed through. (iii) JT was of the view that considerable management and technical staff time would be required to introduce WLR. In its Initial Notice the JCRA had stated at page 12 that "feedback from operators indicates that WLR could be launched in 9 months from the commencement of the project, should it be confined to a single line service". Despite this, the JCRA set a deadline at that stage of 3rd June, 2013, which was some 7 months. In the Final Notice, the JCRA stated that feedback from operators had been that WLR could be launched in 6 - 9 months, although no evidence for this change of position was given. In fact, said Advocate Cadin, given that there is a 29 day period for lodging an appeal and that, if a notice of appeal includes an application for delay, the

decision does not take effect until 7 days after the Court has determined the application for delay, the decision could not realistically take effect before the expiry of the time for appeal. Accordingly the JCRA had in fact given JT only 5 months to comply with the Final Notice despite the fact that the evidence from the other companies was that it would take 6 - 9 months. It followed, said Advocate Cadin, that it must be anticipated that JT would have to devote considerable management and technical time and resources in order to meet the 5 month period. It was simply not in a position to do that without prejudicing progress in its important billing modernisation programme. This was a prejudice which could not be retrieved if the appeal were successful, because by then the delay in the billing programme would have occurred. 24. In response, Advocate Ruelle stated that the JCRA did not believe that the matter was as difficult or complex as JT was arguing and noted that JT had not put forward any particular timescale which it felt was appropriate for implementation. Furthermore, the JCRA considered that it had made 6 months available after the Final Notice rather than only 5 months. Advocate Ruelle made the further point that it was unlikely that the Royal Court on appeal would hold that it was not appropriate to implement WLR at all in Jersey, given that it was widely implemented elsewhere. If the appeal were to be successful at all, it was more likely that it would be in terms of timing. In that event, work done by JT to prepare for the implementation of WLR would not be wasted. JT's case was essentially very thin on any detailed prejudice which it would suffer. She further submitted that the JCRA would not be unreasonable in granting an extension of time if the November deadline turned out to be too short. 25. In reply, Advocate Cadin made the point that the JCRA had taken a long time to prepare the Initial Notice and had then taken from the end of December 2012 to May 2013 to prepare the Final Notice. It had therefore delayed in the introduction of the supposed benefits from some 4 months and it was unreasonable for the JCRA then to complain that great prejudice would be suffered by the community by a delay of 4 - 5 months in the event of a delay being granted pending appeal. 26. We have carefully considered the competing considerations. We have concluded that the balance of convenience comes down in favour of granting a delay pending appeal. In our judgment, the prejudice to JT, should there be no delay and the appeal be successful, would outweigh the prejudice to the JCRA (and through it to the public interest) as a result of delay should the appeal be unsuccessful. 27. We would summarise our reasons for so concluding as follows:- (i) JT is engaged in a major programme which it considers to be extremely important to its commercial interests. The fact that it is commercially significant is evidenced by the fact that the company has invested £9.1 million in the programme. It would hardly do this if it did not expect to benefit in due course by more than this amount. (ii) We accept that the programme is running behind schedule. We have been shown the information provided recently to the Board of JT concerning the present state of the project. It is clear that significant management and technical staff time will have to be thrown at the programme in order to meet the delayed target date of October. (iii) We further conclude that the introduction of WLR would also require a significant commitment of management and technical staff time from JT. We have no direct evidence as to the exact level of such resource requirement, but

the fact remains that the JCRA indicated in the Initial Notice that evidence from other operators suggested a requirement for 9 months. By the time of the Final Notice, this had become 6 - 9 months, although no evidence was given in support of this lower figure. In practice (given that 1 month is allowed for appeal), the JCRA has allowed JT 5 months to introduce WLR. Given the initial estimate of 9 months and the revised estimate of 6 - 9 months, we have to conclude that a deadline of 7th November, 2013, would require a significant commitment of management and technical staff time on the part of JT. (iv) We find that JT is not in a position to commit the required resources without a material impact upon its new billing programme. Accordingly we find that, if JT were to be successful in its appeal and there had been no delay in the requirement to implement WLR, JT would suffer material irrecoverable damage by reason of further delay in the introduction of its new billing programme. (v) Advocate Ruelle emphasised that the JCRA could be relied upon to be reasonable in granting any extension of time, but the fact remains that the Final Notice requires WLR to be introduced by 7th November, 2013, and that is the only concrete material before us. (vi) We understand that, as the current monopoly provider in this respect, JT may have reason to seek to delay the introduction of WLR and we have taken that into account. Nevertheless, we are satisfied from the evidence that, in the event of no delay being granted, JT would suffer damage in the way we have described. (vii) Having found that JT would suffer damage in this way, we must balance that against the prejudice which would be suffered by the public interest should a delay be granted and the appeal ultimately be unsuccessful. The prejudice would be the delay in the implementation of WLR by some 4 -5 months. However, this period has to be put in context. We understand that the JCRA had been considering this issue for a while before issuing the Initial Notice. Furthermore the JCRA took 4 months from the closure of the consultation period following the Initial Notice to the issue of the Final Notice on 8th May. (viii) We conclude that the specific commercial damage to JT, should it be successful in the appeal, outweighs the damage to the public interest which would be suffered by the delay in the introduction of WLR. 28. For these reasons, we grant the delay sought by JT. Postscript 29. It was accepted by both the JCRA and JT that, in order to introduce WLR, there would have to be a number of meetings with the consultant appointed by the JCRA and with other operators so as to clarify the technical details etc in relation to the introduction of WLR. During the course of the hearing before us, the JCRA through Advocate Ruelle expressed concern that the effect of granting a delay would be that JT would "down tools" and do absolutely nothing to prepare for the introduction of WLR pending the hearing of the appeal. 30. Advocate Cadin was at pains to rebut this suggestion and emphasised repeatedly that JT was happy to enter into discussions in order to progress matters. JT was not saying it could not devote any management time at all until completion of its new billing programme; it was simply saying that it could not commit to provide sufficient management and technical staff time to comply with the timescale of the Final Notice without damaging its programme. 31. We wish to make it clear that this Court expects JT to honour the assurances given by Advocate Cadin. It would be quite wrong for JT to "down tools" on the WLR project. Should the appeal be dismissed (or

allowed only in respect of the timing requirement) the Court will need to decide a new deadline for the introduction of WLR. In assessing how much time is required, the Court will wish to hear what efforts JT has made to engage in the constructive discussions referred to in the period pending appeal. The Court would not be impressed were it to conclude that JT had not entered constructively into the relevant discussions and would no doubt take this into account when fixing a revised timetable for the introduction of WLR. Authorities Telecommunications (Jersey) Law 2002. Films Rover International Limited-v-Cannon Film Studios Limited [1987] 1 WLR 670. Page Last Updated: 03 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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