

BETWEEN

VODAFONE NEW ZEALAND
LIMITED

Plaintiff

AND

THE COMMERCE COMMISSION

Defendant

Hearing: 7 October 2005

Counsel: A Galbraith QC and B Gray for Plaintiff
M Scholtens QC and D Laurenson for Defendant

Judgment: In accordance with r 540(4) I direct the Registrar to endorse this judgment with the delivery time of 10.30 a.m. on Wednesday the 12th day of October 2005.

RESERVED JUDGMENT OF RONALD YOUNG J

Introduction

[1] This interlocutory application is to restrain the Commerce Commission from disclosing confidential information. Although formally an interlocutory application, the parties agree that this judgment will resolve the issue between the parties in that, as I understand it, no further hearing in the High Court would be required.

[2] The plaintiff says that information it provided to Government officials, including a Minister of the Crown, in circumstances of confidentiality, has now been provided to the Commerce Commission who in turn proposed to release this information publicly as part of information informing a report to Government. The

plaintiff says that this information is confidential information and the Commission has no right to disclose this information publicly. The Commerce Commission says that if the information is confidential information, which it denies, then the public interest overrides any confidentiality.

Background

[3] The Telecommunications Act which the Commerce Commission is responsible for administering, entitles in part the Commission to investigate whether particular telecommunication services should be regulated. The Commission undertook such an investigation with regard to mobile termination services. In June 2005 the Commission provided its final report to the Minister. That report recommended "the termination on a cellular telephone network of voice calls originating on a fixed telephone network where the cellular telephone network technology used for the termination of those calls is not a third generation or later technology be made a designated access service". Essentially, therefore, the report recommended that such services be regulated.

[4] Vodafone and Telecom allege that this report has procedural and substantive errors and have filed judicial review proceedings. Just before the release of the final report, the plaintiff, along with Telecom, began negotiations with the relevant Minister to see whether he was prepared to consider a commercial alternative to regulation. As a result of those discussions, Vodafone and Telecom presented the Minister with a "reference offer" of prices which they would agree to for termination services if the Minister decided not to regulate termination services.

[5] This reference offer by Vodafone was given to the Minister at a meeting on 19 July 2005. The documents in support of the offer were said to be "without prejudice and commercial in confidence" and were, Vodafone believed, presented on the understanding that the Minister and his officials would keep the information confidential. Mr Chignall and Mr Ellis from Vodafone were, amongst others, present on behalf of Vodafone at these meetings. Both have filed affidavits. There is no affidavit from any one present from the Minister's office, nor from the Minister himself. I therefore proceed on the basis that the descriptions by Mr Ellis and Mr

Chignall of what happened at those meetings is accurate. Both confirm that the meetings with the Ministry and the Minister beginning in June 2005 were being held on a confidential and without prejudice basis. And both witnesses say that information provided to the Ministry by Vodafone was expressly provided on the basis that the information would be held on a confidential and without prejudice basis. This they said, was confirmed especially at the meetings of 13 July and 19 July when sensitive written material was provided to the Ministry.

[6] During the meeting of 13 July Vodafone representatives were advised that the Ministry did not have analytical models necessary to assess the benefits of the alternatives put by Telecom and Vodafone. Nor did the Ministry look to duplicate the analysis by the Commission. They asked Vodafone and Telecom if they would consent to the release of the confidential information for the limited purpose of enabling the Commerce Commission to advise the Ministry in respect of the offer. Vodafone agreed to this but expressly on the basis that confidentiality would be retained and the exception would be the provision of the information of the Commerce Commission for the limited purpose sought. On 19 July the formal offer was presented to the Minister on Vodafone's behalf and again Vodafone stressed the information was to be held on a confidential and without prejudice basis, and that it could only be provided to the Commission for the limited purpose of enabling the Commission to assist the Ministry in its analysis of Vodafone's offer.

[7] At that time Vodafone believed that the Minister was going to make a decision with regard to the Commerce Commission report but needed the informal help of the Commission to do so.

[8] However, by letter dated 9 August 2005 the Minister in fact required the Commission to reconsider the recommendation pursuant to Clause 6(b) of Schedule 3 of the Commerce Act. The Minister, asked the Commission to reconsider its recommendation by giving further consideration to a number of matters and he said:

I would like the Commission to consider the commercial offers made to me by Telecom and Vodafone following the Commission's Final Report, in comparison to regulation. I attach an appendix that incorporates, without endorsement, the essential features of the offers. The offers were made to

me on a commercially confidential basis but I expect the Commission to apply its usual processes to such offers.

[9] The Vodafone information provided to the Commerce Commission and referred to in the Minister's letter was Vodafone's rate for second generation mobile termination service and its blended rate for 2G and 3G mobile termination services commencing April 2006 for each of the following four years. The appendix to the Minister's letter also set out the Telecom offer.

[10] The Commission therefore proceeded to reconsider its final recommendation in accordance with the statutory regime as required by the Minister. The Commission decided that it should make the information provided to the Minister by Telecom and Vodafone public. It therefore wrote to both Telecom and Vodafone advising them of its intention in August 2005.

[11] Telecom agreed to the information being released, and indeed released the information itself. Vodafone objected. It stressed that the information was confidential and it had not waived confidentiality in this context. It invited the Commission to consider whether it could invoke the provisions of s100 of the Act to maintain restricted confidentiality. The Commission considered that section but decided that it was inappropriate to invoke it in this case. These proceedings followed with interim agreement protecting confidentiality of the information.

The plaintiff's case

[12] The essence of the plaintiff's case can be summarised simply. It says that the information provided to the Minister was confidential commercial information. The Minister was obliged to maintain that confidentiality. Vodafone agreed to a limited release of the confidential information to the Commerce Commission under certain conditions. The Minister released the information to Vodafone under conditions not agreed to by Vodafone and therefore in breach of its obligation of confidence.

[13] The plaintiff says the Commerce Commission knew it was receiving information that Vodafone had said was given in confidence to the Minister. They submit the Commerce Commission's proposal to publicise that information obtained

in confidence is in breach of the plaintiff's right to have that information held in confidence. Vodafone says any release of the information will potentially harm its commercial interests. The plaintiff says that there is no countervailing public interest which would demand release of the information in the circumstances. It therefore seeks the return of the information and a prohibition against the defendant publishing any material contained in that confidential information.

The defendant's case

[14] The defendant's position is that the Commission is obliged by statute to carry out a process triggered by the Minister's decision to have its final report reconsidered. The Commission submits that the only basis upon which it is authorised to limit access to information it receives is through the statutory process set out in s100 of the Act. It has already considered whether it should apply s100 to the information and has decided that it should not do so. It says that Vodafone is free to withdraw the offer made to the Minister regarding the alternative to regulation and the Commission would not then carry out any evaluation and the information would not be publicly released. The Commission claims that in any event the information is not confidential in nature. The Commission says it is in the public interest that they have access to such information and that outweighs any confidentiality.

The Law

[15] The broad principle of confidentiality was usefully identified by Lord Goff in *AG v Guardian Newspapers Limited (No 2)* [1990] 1 AC 109 when he said:

... that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.

[16] And the necessary elements of the cause of action of breach of confidence were summarised by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47 as follows:

- (i) The information must have the necessary quality of confidence about it.
- (ii) The information must have been imparted in circumstances importing an obligation of confidence.
- (iii) There must be an unauthorised use or threatened use of that information.

[17] Further, the principle of confidentiality applies only to information to the extent that it is confidential. The duty of confidence cannot apply to information which is useless or trivial. It may be public interest in receiving the information will outweigh the public interest in protecting confidences. Some form of balancing exercise may be necessary. (See *A-G v Guardian Newspapers (No 2)*) (supra).

Discussion

[18] I accept the plaintiff's submissions that there can be no argument that the elements of the claim are made out and that the real question in this case is whether there is some countervailing public interest of sufficient importance to outweigh the public interest in having confidential information kept confidential.

[19] I accept the plaintiff's proposition that the information is confidential. Some submissions were made by the defendant that because Telecom was prepared to disclose the information, and because Vodafone does not object to the information being subject to a s100 order then Vodafone does not really consider the information to have that necessary quality of confidence. I reject those submissions. Telecom will have had its reasons for agreeing to disclose the information but that does not affect the quality of the information. The fact that Vodafone was prepared to agree to a s100 order seems to me to support the proposition that this is information that has that necessary quality of confidence. A s100 disclosure would disclose information on the basis that the parties could respond to it by way of submissions to the Commerce Commission but would prohibit the use of that information in any other context. Vodafone is concerned to ensure that the information is protected

from its competitors. The purpose of the s100 order in part would be to achieve that and so its agreement to such an order is consistent with preservation of the information as having that necessary quality of confidence.

[20] I am satisfied that the information was communicated to the Minister in confidence⁸ and that the Commerce Commission knew or now knows the confidentiality asserted.⁹ There is uncontradicted evidence that Vodafone made it clear to the Minister that the information was provided in confidence. They agreed to waive the confidence solely for the purpose of the Minister consulting with the Commerce Commission informally to obtain analysis. The Commerce Commission knew from the information provided to them by the Minister, at the time the information was provided, and subsequently from Vodafone, that the information they hold which they propose to release is confidential information.

[21] Thirdly, disclosure. The Commerce Commission have said they propose to disclose the information. That is not disclosure which the owners of the information, Vodafone, have authorised.

[22] All three elements, therefore, of a claim to confidentiality are established. The question, therefore, is the public interest defence.

Public interest

[23] The Commerce Commission say that they have considered issues of confidentiality as part of their decision to reject the giving of confidentiality to the information pursuant to s100 of the Commerce Act. They say there is a strong public interest in having this information about cellphone termination rates made available to the public. They say that a finding of confidentiality with regard to this information may well prevent them from completing their statutory task and this will delay the introduction of lower mobile termination rates and in any event will do little harm to Vodafone. The Commerce Commission stress that they are simply carrying out the statutory function they were required to undertake by the Minister.

[24] I accept that the Commerce Commission has found itself in an impossible position. It is clear to me, given the conclusions I have reached, that the Minister provided the Commerce Commission with information that he had received which was confidential. In those circumstances the Minister could not and should not have passed that information on to the Commerce Commission without ensuring the continued confidentiality. By referring the issues raised by Vodafone and Telecom to the Commerce Commission by way of a formal reference under the Commerce Act, the Minister lost control of the way in which the information he had supplied could be used. Once he had instructed the Commerce Commission to carry out a statutory reconsideration then the Minister had no control over the confidentiality or otherwise of the information he had provided to the Commerce Commission. The Commerce Commission in turn is stuck with the statutory regime which limits the circumstances under which it may restrict access to information it possesses. This difficulty was, as I have said, caused by the Minister providing information to the Commerce Commission, which he received in confidence, in circumstances where he required a statutory reconsideration of the recommendations by the Commerce Commission. This was outside the agreement with Vodafone as to the use of the information. And the reference required the Commerce Commission to follow a statutory regime.

[25] The Commission submits a solution to the problem is within Vodafone's own hands. It says all Vodafone has to do is contact the Minister and withdraw its "price" offer. This in turn the Commerce Commission says will no doubt mean the Minister advises the Commerce Commission it should no longer undertake an analysis of Vodafone's offer and the information's confidentiality will be preserved. This suggestion, in my view, misapprehends what happened between Vodafone and the Minister. Vodafone did not give the information to the Minister inviting him to use the information to formally refer the question of regulation back to the Commerce Commission. Vodafone explicitly gave the information to the Minister inviting him to personally reconsider Vodafone's offer in terms of his statutory obligations and in light of Vodafone's offer. Vodafone made it clear that the information was confidential and should not be provided to others. They agreed to the release of the information to the Commerce Commission only in the context of the Commission informally providing an analysis to assist the Minister in reaching

his conclusions. Vodafone, therefore, do not wish to withdraw any offer they have made to the Minister. They simply ask the Minister, and in this context the Commerce Commission, to adhere to the confidence they are bound by. Vodafone supplied the document in the context of a consideration by the Minister of the Commerce Commission's report. They still want that reconsideration to occur and in that context the material supplied can be used by the Minister. Their concern is that the Minister, in giving the confidential information to the Commerce Commission, breached what they say is their right to confidentiality with regard to the information. I agree with Vodafone's submission. There is nothing for them to "withdraw". Their only offer was the supply of the information in the context of a Ministerial decision, not a Ministerial referral to the Commerce Commission for a statutory reconsideration of its report. Their original offer remains. The Commerce Commission's proposition, therefore, will not solve the matter in the way that they propose. Of course there will be public interest in virtually every situation involving the potential release of confidential information. Public interest expressed in this simple way is hardly likely to overcome confidentiality.

[26] The Minister asked the Commerce Commission, by using the analytical tools developed in its first report, to compare its conclusions about regulation with Vodafone and Telecom's offer. While the public will be interested in the result it is difficult to see beyond the Commerce Commission's determination why there is any compelling public interest in disclosing the information. Certainly the Commerce Commission can undertake an analytical response to Vodafone's proposals using the s100 process without the need for any public release. If the information is not available to the Commerce Commission to undertake its statutory reconsideration it may be the Commerce Commission will tell the Minister they cannot properly consider Vodafone's offer on the known facts. And the Minister may ultimately, having determined that he requires the Commerce Commission's analysis conclude that he cannot properly determine Vodafone's offer because of an inadequate opportunity to evaluate it. In those circumstances, the loss of opportunity to have the Minister consider this alternative to regulation may be Vodafone's. It is difficult to see the public interest has been unfairly compromised in those circumstances. I am not satisfied, therefore, that the public interest is such here that it should override the confidentiality which attaches to the documents. I am therefore satisfied that the

plaintiff has established this cause of action and that confidentiality should attach to the documents from Vodafone in the possession of the Commerce Commission, and the Commerce Commission in turn should be prohibited from publicly revealing this information. I leave it to counsel to agree between themselves as to the exact extent of the information to which the confidentiality attaches and I will endorse any agreed order accordingly.

[27] I invite memorandum as to costs from the plaintiff within 14 days and in response the defendant within a further 14 days.

"Ronald Young J"

Solicitors:
Wilson Harle, Auckland, for Plaintiff
Commerce Commission, Wellington, for Defendant