

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2017-404-230
[2017] NZHC 238**

UNDER the High Court Rules, Judicature
Amendment Act 1972 and the Common
Law

IN THE MATTER of an application for interim orders

BETWEEN SPARK NEW ZEALAND TRADING
LIMITED
Applicant

AND COMMERCE COMMISSION
First Respondent

SKY NETWORK TELEVISION
LIMITED
Second Respondent

VODAFONE NEW ZEALAND
LIMITED
Third Respondent

VODAFONE EUROPE BV
Fourth Respondent

CIV-2017-404-228

UNDER the Judicature Act 1972 and the Common
Law

IN THE MATTER of an application for interim orders

BETWEEN TWO DEGREES MOBILE LIMITED
Applicant

AND COMMERCE COMMISSION
First Respondent

SKY NETWORK TELEVISION
LIMITED
Second Respondent

VODAFONE NEW ZEALAND

LIMITED
Third Respondent

VODAFONE EUROPE BV
Fourth Respondent

Hearing: 22 February 2017

Appearances: D Shavin QC, S A Armstrong, S C Keene and C J Curran for
Spark New Zealand Trading Ltd
Z G Kennedy, R H Patterson and O J Skilton for Two Degrees
Mobile
J C L Dixon and M R Tilley for Commerce Commission
T C Weston QC, L A O’Gorman and D T Broadmore for Sky
Network Television Ltd
A R Galbraith QC, D J Cooper and J Q Wilson for Vodafone
New Zealand Ltd and Vodafone Europe BV
M B Wigley for InternetNZ (granted leave to intervene by
making submissions in support of the application for interim
relief)

Judgment: 22 February 2017

JUDGMENT OF LANG J
[on application for interim relief]

*This judgment was delivered by me on 22 February 2017 at 3.30 pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date.....

[1] These proceedings arise out of a decision by Sky Network Television Limited (Sky TV) and Vodafone New Zealand Limited (Vodafone) to merge their two businesses. Completion of the transactions will result in Sky TV owning 100 per cent of the shares in Vodafone, Vodafone Europe BV owning 51 per cent of the shares in Sky TV and the existing shareholders of Sky TV owning the balance. The proposal has already been approved by Sky TV's shareholders by an overwhelming majority.

[2] Sky TV and Vodafone applied in June 2016 to the Commerce Commission (the Commission) for clearance of the proposed transactions under s 66 of the Commerce Act 1986 (the Act). The Commission has announced that it will deliver its decision, but not its reasons, in respect of the application for clearance on Thursday 23 February 2017.

[3] Two of Vodafone's competitors, Spark New Zealand Limited (Spark) and Two Degrees Mobile Limited (Two Degrees) (the applicants) now seek urgent interim relief to enable them to give consideration to challenging the Commission's decision in the event that it gives clearance for the transaction to proceed. Any challenge would be by way of judicial review proceedings.

[4] The applicants are supported by InternetNZ, which describes itself as a not-for-profit organisation that represents the interests of consumers and internet users. I have granted InternetNZ leave to intervene to the extent that I have taken into account its submissions in reaching my decision.

[5] Vodafone and Sky TV oppose the application for interim relief. They say there is no jurisdiction for the Court to grant relief and, even if there is, the Court should decline both applications.

[6] The Commerce Commission abides the decision of the Court in relation to the applications for interim relief, but opposes any order being made that would interfere with the process it proposes to adopt in relation to the provisions of reasons for its decision.

The need for urgency

[7] The need for the Court to make its decision urgently arises in three ways. First, the Commission will release its decision at 8.30 am tomorrow morning. Secondly, the applicants apprehend that Vodafone and Sky TV will move quickly to implement the agreement they have reached to merge their respective businesses. The applicants are of that view because their counsel approached Vodafone and Sky TV seeking an assurance that they would refrain from completing the transactions for a short period to enable the applicants to consider their legal position. This was met with a negative response.

[8] Furthermore, the Commission has declined a request that its decision be issued with delayed effect. The Commission has also declined a request by the applicants that it provide a confidential version of the reasons for its decision, available to counsel only, at the same time as it releases its decision tomorrow.

[9] The present position is therefore that the Commission will release its decision early tomorrow morning, but it is not presently known when its reasons for that decision will be available. A further complicating factor is that the agreement between Sky TV and Vodafone contains a provision permitting either party to withdraw from the arrangement in the event that it has not been completed by 28 February 2017.

[10] The brevity of my reasons reflects the need to provide the parties with an urgent decision. I record my gratitude to all counsel for delivering their submissions within a very truncated timeframe at the hearing this morning.

The clearance decision

[11] The Commission is established under the Act. It has the power to investigate and bring proceedings to prevent transactions occurring where they are unlikely to be for the long-term benefit of consumers in New Zealand. This may occur where a

merger or acquisition is likely to produce a substantial lessening of competition in any particular market.¹

[12] Parties to a proposed acquisition may apply to the Commission for clearance of the transaction. Where the Commission gives clearance to a transaction, actions by third parties to challenge it under the Act will be barred provided the transaction is completed within 12 months.² Clearance therefore provides the parties to a proposed transaction with a statutory immunity from actions taken by both the Commission and any affected third party provided the transaction is implemented within that period.

[13] The Commission is obliged to give clearance where it is satisfied that the transaction will not have, or not be likely to have, the effect of substantially lessening competition in a market.³

No right of appeal

[14] Rights of appeal under the Act are enjoyed by the party seeking clearance to the transaction and/or the party whose assets or shares are to be acquired through it.⁴ Where an appeal is brought, the Court may stay the effect of the Commission's decision pending determination of the appeal.⁵

[15] Where the Commission has issued a decision in respect of a clearance, however, third parties will only have a right of appeal where they have participated in a conference held by the Commission in relation to the clearance.⁶ In the present case the Commission did not hold such a conference but it permitted the applicants and InternetNZ to make submissions in respect of the application for clearance. For that reason the applicants have no right of appeal under the Act, and the Act does not provide the Court with the power to stay the effect of the Commission's decision. It

¹ Commerce Act 1986, ss 84 and 84A.

² Section 69

³ Section 66.

⁴ Section 92(c).

⁵ Section 95(1) and see *New Zealand Vegetable Growers Federation v Commerce Commission* (No. 2) [1987] 2 NZLR 5 (HC).

⁶ Section 92(c)(iii).

is for this reason that the applicants are required to mount any challenge to the Commission's decision by judicial review.

Judicial review

[16] Judicial review focuses on the decision making process adopted by an entity that exercises a statutory power of decision. In general terms, review will only be available where the decision maker has taken into account irrelevant considerations, failed to take into account relevant considerations or has come to a decision that is plainly wrong. For that reason the focus in an application for judicial review is markedly different to that in a substantive appeal.

[17] In the present case the applicants are obviously aware of the general process followed by the Commission in reaching its decision because they participated in that process. They have no way of knowing, however, the reasoning process that has led to the Commission reaching its decision. Furthermore, they will not receive that information for some time after the decision is delivered.

[18] For obvious reasons the applicants cannot at this stage say how they would challenge any clearance decision. One potential area of challenge is likely to be on the Commission's conclusions in respect of issues that it raised with Vodafone and Sky TV on 31 October 2016 in a letter headed "Unresolved Issues". The applicants make the point that if the Commission has decided to grant clearance, it will obviously need to have determined these issues in favour of the respondents. They also express some concern about the Commission's decision not to hold a conference, although they also appear to acknowledge that the Commission has not traditionally held conferences in relation to clearance applications in the past.

The jurisdiction to grant interim relief under the Judicature Amendment Act 1972

[19] Not surprisingly, neither applicant has yet commenced an application for judicial review. Neither will do so unless the Commission grants clearance. In the event that the Commission declines to grant clearance, the present proceedings will obviously be rendered moot.

[20] The purpose of the applications for interim relief is to preserve the ability of the applicants to bring meaningful applications for judicial review in the event that the Commission grants clearance. They are concerned that judicial review proceedings will effectively be rendered nugatory in the event that interim relief is not granted. If Vodafone and Sky TV immediately complete the merger once they receive clearance, the transactions will enjoy immunity from subsequent challenge by any third party. Once that occurs, the Courts hands will effectively be tied in terms of granting relief in the event of a successful challenge by way of judicial review.

[21] Section 8 of the Judicature Amendment Act 1972 (the JAA) provides the Court powers to grant interim relief at any stage prior to the final determination of an application for judicial review. It provides as follows:

8 Interim orders

- (1) Subject to subsection (2) of this section, at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes:
 - (a) Prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power:
 - (b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates:
 - (c) Declaring any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by effluxion of time before the final determination of the application for review, to continue and, where necessary, to be deemed to have continued in force.
- (2) Where the Crown is the respondent (or one of the respondents) to the application for review the Court shall not have power to make any order against the Crown under paragraph (a) or paragraph (b) of this section; but, instead, in any such case the Court may, by interim order,—
 - (a) Declare that the Crown ought not to take any further action that is or would be consequential on the exercise of the statutory power:

- (b) Declare that the Crown ought not to institute or continue with any proceedings, civil or criminal, in connection with any matter to which the application for review relates.
- (3) Any order under subsection (1) or subsection (2) of this section may be made subject to such terms and conditions as the Court thinks fit, and may be expressed to continue in force until the application for review is finally determined or until such other date, or the happening of such other event, as the Court may specify.

[22] The discretion vested in the Court under s 8 may be exercised taking into account all of the circumstances of the case, including the public and private repercussions of granting interim relief.⁷

[23] The applicants rely on s 8(1)(a), which permits the Court to make an order for the purpose of prohibiting any respondent to an application for review from taking any further action that is or would be consequential on the exercise of the statutory power. They point out that Vodafone and Sky TV are waiting to receive the order for clearance before completing the transaction. Once clearance is given, one of the consequences that will follow is that they will complete the transaction relying on the protection afforded by the clearance. Furthermore, the applicants contend their positions need to be protected at this stage because they will effectively lose the right to bring meaningful applications for judicial review if the respondents are able to complete the transaction with the benefit of the clearance. They therefore ask the Court to make an order under s 8(1)(a) that would prohibit Vodafone and Sky TV from relying on the effect of the clearance in completing the transactions. The applicants acknowledge that the Court could not make an order under s 8 prohibiting Vodafone and Sky TV from completing the transactions because those parties already have the ability to lawfully complete them at any time without clearance from the Commission. If they do so without clearance, however, the transaction will lose their immunity from challenge under the Act.

[24] During the hearing, the applicants expanded their written argument by relying upon s 27(2) of the New Zealand Bill of Rights Act 1990. This preserves the right of every person to bring an application for judicial review of decisions of tribunals and public authorities that have affected the rights, obligations and interests of that

⁷ *Carlton v United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430-431.

person. The applicants submitted that the Court needed to consider s 8 of the JAA “through the lens” of s 27(2).

[25] In the time available I cannot do justice to that argument, but I consider the respondents are correct in submitting that s 27(2) does not widen the scope of judicial review in any way. Rather, it is statutory acknowledgement of the importance of the right to bring judicial review proceedings.⁸ Applicants for judicial review must still persuade the courts that they have a recognisable ground of review.

[26] Vodafone and Sky TV say the Court has no jurisdiction to make the orders sought. In particular, they contend the Court has no power under s 8 to interfere with the statutory effect of a clearance. Furthermore, they contend that such an order is declaratory in nature and as such is not amenable to review.

[27] The latter submission is based on observations made by the learned authors of Joseph’s *Constitutional and Administrative Law in New Zealand* and the cases cited therein.⁹ I accept the submission as a general proposition but, in the present case, if clearance is granted the Commission’s decision amounts to a positive finding that the transactions will not breach the anti-competitive provisions of the Act. That finding is necessary before the statutory consequences follow and the participants in the transaction will have statutory immunity from exposure to claims by both the Commission and third parties. In that sense, I consider the effect of the Commission’s decision to be both declaratory and executory in nature.

[28] Furthermore, s 69 of the Act, the section that provides immunity for transactions that have been given clearance or authorisation by the Commission, provides as follows:

69 Effect of clearance or authorisation

Nothing in section 27 or section 47 of this Act applies to the acquisition of assets of a business or shares if the assets or shares are acquired in

⁸ See *Young v Police* [2007] 2 NZLR 382 (HC) at [33]-[34] and *Reid v Attorney-General* HC Wellington CP 255/02, 2 April 2003 at [20].

⁹ Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington 2014) at 936. The cases cited are *Willowford Family Trust v Christchurch City Council* [2006] 1 NZLR 791 (HC) and *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1909, [2012] NZAR 785.

accordance with a clearance or an authorisation and while the clearance or authorisation is in force.

[29] The section does not make any distinction between the two forms of decision, and it also contains the phrase “and while the decision remains in force”. That phrase undoubtedly refers to the twelve month time limit within which immunity applies. The immunity provided by the clearance clearly ceases to have force in the event that a transaction is not implemented within twelve months of the clearance being given. Arguably, however, the phrase extends beyond that situation. I consider that the Commission would have had the power to accede to the applicants’ request that its clearance was to take effect from a date or time subsequent to delivery of the decision. In the same way, I consider s 8 provides the Court with the power to make an interim order prohibiting the respondents from completing the transaction in reliance on the clearance until a date or time nominated by the Court.

[30] I accept the submissions for the applicants in respect of the jurisdiction to make interim orders under s 8 in the present situation. Orders may be made under s 8(1)(a) for the purpose of prohibiting a respondent from taking any further action that is, or would be, consequential on the exercise of a statutory power. The clearance decision will plainly be a decision made in the exercise of a statutory power. The second to fourth respondents clearly intend to complete the transaction acting in reliance on the decision. The completion of the transaction would therefore follow as a direct consequence of the Commission’s decision. Any order staying the effect of the clearance decision would effectively prohibit Vodafone and Sky TV from completing the transaction whilst the clearance was in force.

[31] I also consider the Court may exercise the power under s 8 to make an order granting interim relief notwithstanding the fact that no application for judicial review has yet been filed and the decision that will be the subject of review has not yet been issued.

[32] In this context I draw an analogy from the approach the Court has taken in relation to applications for interim relief in respect of proposed appeals under the Act. The Court has the power to grant interim relief in respect of appeals under s 95(1) of the Act, which provides:

95 Provisions pending determination of appeal

- (1) Where an appeal is brought under any provision of this Part of this Act against any determination of the Commission, the determination to which the appeal relates shall remain in full force pending the determination of the appeal, unless the Court orders to the contrary.

...

[33] The wording of s 95 appears to restrict the exercise of the power to cases where an appeal is already in existence. That is not, however, how this Court has interpreted it. In *Godfrey Hirst NZ Ltd v Commerce Commission* the applicants sought an order staying the effect of a final determination of the Commission in the event that it authorised a particular transaction.¹⁰ This Court saw no impediment to making that order notwithstanding the fact that the decision of the Commission was not yet known and no appeal was currently in existence.

[34] I acknowledge that the present proceedings involve proposed applications for judicial review and not appeals under the Act. I consider, however, that there is an obvious analogy between the two forms of procedure. Each involves a challenge to the manner in which the Commission has exercised its statutory powers of decision. I therefore proceed on the basis that the Court has the power to grant an application for interim relief notwithstanding the fact that the Commission has not yet issued its decision and there is currently no substantive application for judicial review in existence.

Decision

[35] I have concluded it is appropriate in the present case to make an order staying the effect of any clearance decision for a short period in order to enable the applicants to consider their options. I make that decision for the following reasons:

- (a) Ordinarily an applicant for judicial review needs to establish an arguable case threshold before the Court will grant interim relief.¹¹ In the present case that is simply not possible at this stage and will not be

¹⁰ *Godfrey Hirst NZ Ltd v Commerce Commission* [2015] NZHC 2845, [2015] NZAR 1804.

¹¹ *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* (1995) 6 TCLR 682 (CA) at 687.

possible until such time as the Commission delivers the reason for its decision. The applicants have nevertheless pointed to potential errors in the Commission's approach although the materiality of these cannot be determined at the current time. I consider that this issue does not disqualify the applicants for relief in the present case because the adverse consequences of not granting interim relief far outweigh the fact that grounds for review cannot be identified with any further precision at this stage.

- (b) The courts have always viewed the fact that absence of a stay will render an appeal nugatory as a significant, albeit not determinative, factor that favours a stay. That was certainly the approach taken in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd*¹² and *Godfrey Hirst*,¹³ and I consider the same principle applies by analogy in the present case. Once this transaction is completed, it will be too late for the Court to grant effective relief if the Commission's process is found to be flawed. That would effectively defeat the purpose of the application for review.
- (c) It is clearly arguable that the applicants will have standing to bring an application for judicial review because they are likely to be directly affected by the outcome of any clearance decision, and they were also participants in the process by which the Commission reached its decision.
- (d) The transactions have the potential to directly affect consumers in the markets affected by the Commission's decision. There is therefore a significant degree of public interest in the outcome of the clearance decision. As a result, there is also public interest in ensuring that the decision making process has not miscarried in any material way.

¹² At 689.

¹³ *Godfrey Hirst NZ Ltd v Commerce Commission*, above n 10, at [11].

- (e) Vodafone and Sky TV are commercial entities and must have known that the clearance decision would inevitably attract a significant degree of scrutiny by both the Commission and competitors. The fact that competitors wish to consider their options in relation to challenging the Commission's decision cannot be a surprise.
- (f) The contractual provision permitting either party to withdraw from the transaction if it is not completed by 28 February 2017 was a commercial outcome chosen by them. They made that decision in the knowledge that the Commission's decision might not be available by 28 February 2017 or, alternatively, that it might be subject to challenge by third parties. As a result, they have understandably included provisions within their arrangement dealing with the manner in which financial adjustments are to be made in the event of any delay. The machinery is therefore in place for the parties to reach further agreement regarding the terms on which they enter into the transaction.
- (g) The Court can tailor interim relief to ensure that the applicants are committed to a timetable within which to file any application for a judicial review. In the event that proceedings are filed, the Court also has the ability to allocate an early fixture to ensure that any challenge is dealt with expeditiously. It ought to be possible for the parties to prepare for judicial review proceedings far more quickly than would be the case in respect of a substantive appeal. They can therefore expect a truncated timetable designed to accommodate an early fixture.
- (h) Delay may be a factor that counts against interim relief and the respondents contend the applicants have been guilty of inordinate delay in bringing the present applications. I do not consider I am in a position to make any decision in relation to that issue at this stage. The timing of the applications is clearly unfortunate, because they were not filed until the afternoon of 20 February 2017. Submissions

for the respondents then arrived in a deluge at the close of business last evening. This has placed the Court and the respondents in a very difficult position, but I consider the public interest element of the applications far outweighs any issue of delay.

Orders

[36] I make the following interim orders:

- (a) I grant leave to commence each proceeding by way of originating application.
- (b) I make an interim order under s 8(1)(a) of the JAA prohibiting the respondents from completing the transactions in reliance on any clearance given by the Commission until midnight on the third day after the Commission has delivered the reasons for its decision to the applicants (the prescribed period).
- (c) In the event that no application for judicial review of the Commission's decision has been filed by the expiration of the prescribed period, the interim orders will lapse and the respondents will be free to complete the transactions in reliance on the clearance.
- (d) In the event that any judicial review proceeding is filed within the prescribed period, the interim orders will remain in force pending further order of the Court.

[37] If an application for judicial review is filed and the respondents so request, the Court will arrange an early fixture at which the continuation of the interim orders will be reviewed having regard to the grounds relied upon in support of the application for review.

Undertaking as to damages

[38] At this stage I do not consider it appropriate to require either applicant to provide an undertaking as to damages. That issue may need to be revisited, however, in the event that either applicant files an application for judicial review.

Confidentiality orders

[39] Several parties have sought orders that documents filed in the proceeding are to be kept confidential and not available for search because they contain commercially sensitive information. I grant the orders sought and direct counsel to seal those orders so that the Registry is aware of documents that may not be searched without leave.

Lang J