Neutral Citation Number CC17{2018) C2 (General Civil Division)

Case No: cc 17/2018

IN THE HIGH COURT OF SIERRA LEONE
HOLDEN AT FREETOWN
GENERAL CIVIL DIVISION

Law Court Building
Siaka Stevens Street
Freetown

Date: 22 March 2021

Before:

THE HONOURABLE MR JUSTICE FISHER J

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Between:

Native Consortium, Edmond Abu Jnr & Ors **Plaintiffs**

-and-

Africell Ltd, Orange (SL)Ltd, Sierratel ltd, Natcom **Defendants**

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MP Sesay, C Hortobah During, FA Gerber of Counsel for the Plaintiff
A Showers, Il Mansaray for the 1st Defendant
U Turay, C Taylor-Young for the 2nd Defendant,No Appearance for the 3rd Defendant
TA Jabbie, DH Yokie, M Kenneh, AK Koroma and IF Sawaneh for the 4th Defendant

Hearing date: 15 March 2021

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APPROVED ORDER

I direct that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FISHER J

The Honourable Mr Justice Fisher J:

Introduction

1. This case raises two central issues. The first can be summarised as the failure by the 1st, 2nd and 3rd defendants, hereinafter referred to as "the defendants", to provide quality telecommunications services in their role as communications service providers in Sierra Leone. The second issue can also be summarised as whether the 4th defendant, failed or neglected to exercise and perform its statutory functions to enforce compliance by the 1st, 2nd and 3rd defendants of their duty at common law and statute to ensure the provision of quality services to consumers.

Background facts

2. This case arises as a result of complaints by the plaintiffs to the 4th defendant about poor services being provided by the 3 defendants in the provision of telecommunications services. Notwithstanding these complaints, it is alleged that the defendants failed to take appropriate steps to improve their services and that failure is continuing and the 4th defendant also failed to comply with its statutory duty to regulate the defendants in accordance with its statutory duties. The plaintiffs then subsequently commenced an action in 2018 which is now the subject matter of the action.

3. By way of a notice of motion dated 3rd March 2021, the plaintiffs sought an interim injunction against the 3 defendants, compelling them to revert back to the previous voice tariff cost of Le410,00 per minute, pending the hearing and determination of the matter herein. In support of the application is the affidavit of the 2nd plaintiff sworn to on the 3rd day of March 2021, and exhibits attached.

4. Whenever an interim injunction is applied for, the court needs to consider whether or not to grant it and if so, the basis of the grant of the injunction.

An interim injunction is usually granted to maintain existing conditions, until the trial can be heard. The court must consider the following matters prior to granting an interim injunction:

1. The applicable law.
2. Whether, the grant of a mandatory injunction is justified in the circumstances of the case.
3. Whether the court can be satisfied that a mandatory injunction, if granted will be capable of enforcement.
4. Whether there is a serious issue to be tried.
5. How the court's discretion is to be exercised.

The relevant law

5. Order 35 of the High Court Rules 2007 provides the legal basis for the granting of interlocutory injunctions. Order 35 rule 1 sub rule 1 provides:

"*(1) The Court may grant an injunction by an interlocutory order in all cases in which it appears to the Court to be just or convenient to do so and the order may be made either unconditionally or upon such terms and conditions as the Court considers just*".

6. In deciding whether to grant an injunction, the court must take into account the matters set out at paragraph (4) above in addition to whether it is just and convenient to grant the order sought. The general principles underlying the grant of an injunction have been set out in the case of **American Cyanamid v Ethicon 1975 A.C. 396.** The court held in that case that so long as an action was not frivolous or vexatious the only substantial factor the court takes into account is the balance of convenience.

7. The court must consider whether there is a serious issue to be tried and in which way the balance of convenience lies. The court must also consider whether damages are an adequate remedy for the plaintiff.

8. I shall now deal with the relevant principles of law.

Mandatory injunctions.

9. A mandatory injunction requires the performance of a specific act, such as what the plaintiffs have prayed for. They require the defendants to revert back to the voice tariff of Le410.00 from the rate of Le650.00. Such injunctions are generally less likely to be granted by a court as they are by their nature, likely to be harsh and intrusive. Notwithstanding the court is only likely to grant such injunctions at an interim stage and where there are special circumstances, as was the case in ***Parker v Camden London Borough Council [1986] Ch 162, [1985] 2 All ER 141, CA,*** *where it was found that a real risk to the health of tenants could amount to such special circumstances*.

10. In some situations, the court may be unable to obtain any high degree of assurance that the applicant will establish its right in the main proceedings, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interim stage. Those circumstances will exist where the risk of injustice, if an injunction is refused, sufficiently outweighs the risk of injustice if it is granted.

Capable of enforcement

11. The court needs to be satisfied that a mandatory injunction will be capable of enforcement, as was the case in ***Locabail International Finance v Agroexpert (The Sea Hawk) [1986] 1 W.L.R. 657****.*

Serious issue to be tried

12. The first step for an applicant seeking an interim injunction is to show that there is a "serious issue to be tried". In ***Eng Mee Yong v Letchumann [1980] AC 331 at 337C-D***, the court held that:

"The evidence must show that the applicant has a real prospect of succeeding in its claim for a permanent injunction at the final trial. Once the applicant has established this, the court should consider whether, as in the ***American Cynanamid Co. v Ethicon Ltd [1975] AC 396***; ***Lumley v Wagner (1852) 1 De G M & G 604,*** the following matters.

1. If the applicant were successful at a final trial, damages would be an adequate remedy. Damages may not be an adequate remedy for the applicant where there would be great difficulties involved in assessing them, as was the situation in ***Evans Marshall & Co v Bertla SA 1973 1 WLR AT 379-380***.

2. If the respondent were successful at trial, damages under a cross-undertaking to pay damages by the applicant in return for an interim injunction would be an adequate remedy. If damages would be an adequate remedy, and the applicant would be in a financial position to meet the cross-undertaking, there would be no reason to refuse an interim injunction.

3. If there is any doubt as to the adequacy of the remedy of damages to either or both parties, the court must consider the "balance of convenience" and the individual facts of the case. In weighing up the various factors, the fundamental objective of the court is to take the course which ultimately involves the least risk of injustice, should the court's decision to grant or refuse an injunction turn out to be wrong. Where the factors are evenly balanced, the courts have been inclined

to preserve the *status quo*. If damages are shown to be an adequate remedy, an injunction will not normally be granted.

4. ***In Shelfer v City of London Electric Lighting Co (1895) 1 Ch 287,*** *Court of Appeal,* the court had this to say.

Lindley LJ:

"ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalising wrongful acts; or in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (e.g. a gas or water company or a sew er authority) ever been considered a sufficient treason for refusing to protect by injunction an individual whose rights are being persistently infringed"

A L Smith LJ*:*

"Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.

There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorized by this section. In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the Court may award damages in its place. So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.

In my opinion, it may be stated as a good working rule that –

(1) If the injury to the plaintiff's legal rights is small,
(2) And is one which is capable of being estimated in money,
(3) And is one which can be adequately compensated by a small money payment,
(4) And the case is one in which it would be oppressive to the defendant to grant an injunction: --
then damages in substitution for an injunction may be given.

There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction.

It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the

defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication. For instance, an injury to the plaintiff's legal right to light to a window in a cottage represented by £15 might well be held to be not small but considerable; whereas a similar injury to a warehouse or other large building represented by ten times that amount might be held to be inconsiderable. Each case must be decided upon its own facts; but to escape the rule it must be brought within the exception. In the present case it appears to me that the injury to the Plaintiff is certainly not small, nor is it in my judgment capable of being estimated in money, or of being adequately compensated by a small money payment."

The court's discretion

13. The court can refuse an application on discretionary grounds and as such, considerations such as delay, misconduct and wilful or other breach of contract may be relevant. The court can also consider matters of public policy or public interest, or the effect of the injunction on third parties, as was the case in ***Attorney General v Guardian Newspapers 1987 1WLR 1248***.

14. It is generally accepted that the applicant should apply promptly for an interim injunction, and the court will consider delay as a discretionary matter when weighing the balance of convenience. Delay raises questions as to whether the applicant really needs an injunction pending trial, the quality of the applicant's case and whether the delay has affected the respondent.

15. The substantive action was filed in 2018 some months after the Bintumani Conference. There has been no explanation from the plaintiff as to the reasons for the delay. I conclude there has been an inordinate delay in

seeking an injunction in the face of an alleged breach by the defendants, of the undertakings given at the Bintumani conference in March 2017. I have to consider whether the plaintiff really needs an injunction pending trial, the quality of their case and whether the delay has affected the Respondent.

16. There is no direct evidence before me that the delay in seeking an injunction has affected the Respondent. However, as companies, the delay might have had serious effects on their budget and investment capabilities. They may have invested or disbursed monies based upon the projection of income they were expected to receive and have received over the past four years and had the injunction been sought sooner, there is an arguable case that such an injunction if granted would have evidently resulted in loss of funds to the defendants and third parties. Such a state of affairs would have had an impact on decision making and future investments.

17. This is a case in which I have to consider whether it is just and convenient to grant a mandatory injunction at this stage. There is no indication as to why the plaintiff delayed in seeking an injunction. This substantive writ of summons was filed in 2018, with an allegation that the defendants have failed to revert to the Le410.00 voice tariff, since 2017, notwithstanding their undertaking to do so. There is no explanation as to why it took four years to seek an injunction in the face of what was evidently a fundamental breach of the undertaking, the plaintiff claims were given at Bintumani in March 2017.

18. I recognise that proceedings were issued against the defendants in 2018 but the long delay in seeking an injunction in 2021 remains unexplained and I consider the delay to be an inordinate one.

19. I have considered in the light of the evidence before me if the court is in a position to enforce the injunction, if granted. I am satisfied that should an

injunction be granted, the court is in a position to enforce the injunction by a range of consequential orders. It would not be difficult to ensure that the defendants have reverted to the lower tariff as this can be easily verifiable. However, there are two very fundamental issues this court needs to consider in determining whether an injunction needs to be granted as prayed for by the plaintiffs. These are firstly whether on the evidence before me, there is a serious issue to be tried. Secondly, where the balance of convenience lies.

Serious issue to be tried.

20. I do not wish at this stage to address issues of evidence on the affidavits as these are matters to be dealt with at trial. I do not also intend to comment on the strength of the evidence on either side. Suffice to say, in determining whether there is a serious issue to be tired, the court must have regard to whether the plaintiff's claims as disclosed in the writ of summons, is frivolous or vexatious and in any event, must have some prospect of succeeding, as was set out in the case of *Re Cable 1975 1 WLR 7 and Smith v ILEA 1978 1 All E.R.411)*. The court held:

"It is no part of the court's function at this stage to try to resolve conflicts of evidence on affidavits as to fact on which the claims of either party may ultimately depend nor to decide difficult questions of law which call or detailed arguments and mature considerations. These are matters to be dealt with at trial'.

21. There is unarguably the case that the matters raised in the substantive application are serious issues to be determined at trial which can be loosely summarised as follows:

1. The allegations of poor service by the defendants in the provision of telecommunications services.

2. The legality surrounding the increase in the voice tariff price from Le410.00 to Le650.00.
3. The allegations of negligence against the 4th defendant in this case, in relation to their failure or otherwise to comply with their statutory duty of regulation of the defendants, in their provision of telecommunications services in the public interest.

The balance of convenience

22. Having concluded that there are serious issues to be tried, the court then has to consider where the balance of convenience lies. In considering this matter, the court is required to analyse two key questions:

    1. Are damages an adequate remedy for the plaintiff and is the defendant able to pay them? If damages are an adequate remedy, an injunction will be refused.
    2. Is the undertaking as to damages, adequate protection for the defendant and is the plaintiff able to honour it? The plaintiff may be ordered to put up some security in case he fails to honour it. Where a court is satisfied on one or both limbs, the injunction will be granted. Where the court is not so satisfied, the court then has to consider the maintenance of the status quo. As a general rule, where the other factors are evenly balanced, the court prefers to maintain the status quo, prevailing before the last change if the plaintiff applies promptly after that change. However, the relevant status quo will change if the plaintiff delays his application to the court.

23. In this case, it is arguable that the relevant status quo has changed on account of the plaintiff delaying his application to the court. The current rate for voice tariff of Le650.00 has been in existence for four years during which period consumers have become accustomed to the higher rate. In

addition, the court has to consider social and economic factors. The court is duty bound to take into account the public interest in cases in which injunctions will have some public or political significance going beyond the protection of merely private rights. This was the situation in ***Beaverbrook Newspapers v Keys 1978 I.C.R 582***. There might arguably be disruption inimical to the development of future products and loss of revenue should the tariff suddenly revert to the lower rate.

24. The question of consideration of the public interest by the court in granting injunctions, must also be carefully considered as that may have some public or political significance beyond the protection of private law rights which in turn must be considered in the light of the requirement in such cases to consider the impact of the injunction upon third parties. The plaintiff is seeking a reversion to the old Le410.00 voice tariff rate. Such an injunction it would seem, if granted, would inevitably result in loss of revenue to the defendants and The Government of Sierra Leone amongst others, which are a third party and not a party to these proceedings, and is therefore likely to impact upon government revenue and projects that require funding, in terms of loss of taxation. This was the situation in ***Attorney General v Guardian Newspapers 1987 1WLR 1248***. The public interest would normally militate against the granting of an injunction where third party rights are affected by the actions of wrongdoing by the defendants. The appropriate remedy is in damages.

25. Another factor the court takes into account in determining where the balance of convenience lies, is the relative strength of the parties cases. This is the factor of last resort in granting injunctions and is only used if the strength of one case is disproportionate. It must be pointed out that the American Cyanamid principles have a degree of flexibility and they do not prevent the court from giving proper weight to any clear view which the court can form at the time of the application for interim relief as to the likely outcome of the case at trial. That is particularly so when the grant of

an injunction or withholding of interim relief may influence the ultimate commercial outcome.

26. In ***R V Secretary of State for Transport Ex p Factortame Ltd (No 2) 1991 1 AC 603*** the House of Lords reaffirmed the American Cyanamid principles and Lord Bridge had he following remarks:

"Questions as to the adequacy of an alternative remedy in damages to the party claiming injunctive relief and of a cross undertaking in damages to the party against whom the relief is sought play a primary role in assisting the court to determine which course offers the best prospect that injustice may be avoided or minimised".

The defendant's case.

27. Having set out the relevant law, I now consider the case for the defendants. The 1st defendant did not file an affidavit in opposition to the application for the injunction. The 2nd defendant did file an affidavit in opposition which I shall consider shortly. The 3rd defendant did not enter an appearance and did not appear before me to defend the proceedings.

28. I shall briefly consider the affidavit in opposition sworn to by Haffie Haffner, a barrister and solicitor and General Secretary of the 2nd defendant company. In that affidavit the central claim, she makes is that the tariff of Le650.00 was approved by the 4th defendant who is mandated by the Telecommunications Act 2006, to regulate tariffs for services provided by telecommunications operators. She deposed that should the 2nd defendant provide services at Le410.oo per min, it will be in contravention of the directives of the 4th defendant, mandated by law to regulate tariffs and will result in the 2nd defendant providing services that will prevent it from recovering returns on investment.

29. That to my mind does not sound like a considered defence to this action. She has not exhibited any evidence to show that the increase in tariffs was as a result of the directives of the 4th defendant. That, in any event was not the plaintiff's pleaded claim. The issue is not the increase in tariff but the failure to honour an undertaking given at the Bintumani Conference to revert to the Le410.00 tariff, in the event of continuing poor service. This issue was not addressed in the affidavit in opposition, and the failure to challenge this issue amounts to an admission of the plaintiffs' claim.

30. In arguments before me, I pointed out to counsel for the 2nd defendant that the affidavit in opposition was defective, by reason of its failure to address a specific issue raised by the counsel for the plaintiffs in the affidavit in support, sworn to by Edmond Abu Junior, which is the claim at paragraph 12 that "*it was resolved the tariff would be increased from Le410.00 to Le650.00 and most importantly, should the defendants fail to provide a better service, they will revert to the Le410.00 per min after 31 July 2017.* They have not done so since 2017 to date. I have seen no evidence before me of a reversal of the tariff increase by any of the defendants. It is clear law that where evidence goes unchallenged, it amounts to an admission, and where evidence remains unchallenged, the court is duty bound to uphold it as unchallenged evidence, from which the court can draw the necessary inference.

Disposal

31. Upon careful consideration of evidence before me, I make the following findings:

    1. That the plaintiffs did not act expeditiously in seeking an interim injunction, having regard to the fact that the defendants had allegedly breached the undertakings they gave at the Bintumani conference in 2017.

2. The defendants failed to challenge the evidence of the breach of the undertaking in the affidavit in opposition of the 2nd defendant, whilst the 1st defendant failed to file an affidavit in opposition.

3. That damages would be an alternative remedy to claiming injunctive relief in the circumstances of this case and the balance of convenience lies in not granting an injunction where damages would be an alternative remedy.

4. The grant of an injunction will adversely affect the rights of third parties and the public interest would normally militate against the grant of an injunction where third party rights are affected. The appropriate remedy is damages, which I find adequate in the circumstances of this case.

5. That the status quo has changed in the light of the long delay in seeking injunctive relief.

6. I am not satisfied that the undertaking in damages provided by the plaintiff, offers adequate protection to the defendants in view of the large number of plaintiffs. Enforcing damages against the plaintiffs should it turn out that the injunction ought not to have been granted, would be difficult to accomplish and would thereby cause injustice to the defendants.

7. That the court will be in a position to enforce the injunction should it be granted.

8. That the court's discretion in granting an injunction should be exercised judiciously.

32. Having heard the arguments in the matter, I consider that the balance of convenience for the reasons given above, lies in <u>not</u> granting an injunction at this stage of the proceedings, pending the hearing and determination of the substantive matter. However, it should be made clear that on the evidence before the court, the plaintiff, but for the other factors identified

above would have been entitled to an injunction. The public interest is the only militating factor against the grant of an injunction in this case, particularly so as I have found, third party rights would undoubtedly be affected, through no fault of theirs. To that extent these matters are relevant to the issue of costs.

Costs

33. The issue of costs is dealt with in Order 57 of the High Court Rules 2007. Subrule 1 of order 57 which provides:

1. (1) Subject to this Order, the costs of and incidental to proceedings in the Court shall be at the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.

34. In dealing with the issues of costs, the powers of the court are set out in sub rule 3 subrule 1 of order 57 which provides:

3. (1) Costs may be dealt with by the Court at any stage of proceedings or after the conclusion of the proceedings, and any order of the Court for the payment of any costs may, if the Court thinks fit, require the costs to be paid immediately notwithstanding that the proceedings have not been concluded.

35. Having regard to the proceedings before me, the plaintiffs would have been entitled to an injunction on the strength of its case but for the overriding public interest which militates against the grant of the injunction. The defence as contained in the affidavit in opposition of the 2nd defendant does not address the plaintiffs' case to any significant extent and consequently I hold that the plaintiffs succeed on their case to the limited extent mentioned above as against the defendants. The 1st defendant has not opposed the application and to that extent the plaintiff succeeds to the limited extent mentioned above, against the 1st defendant.

36. The 3rd defendant has not entered an appearance, a fact which I find extraordinary in the circumstances. Whilst there will be no costs orders against it, there is a case against it and it would be advisable for them to enter appearance in this case. Further, the application for the injunction did not concern the 4th defendant. However, the substantive application does in fact include the 4th defendant. Their counsel had to appear in this court and raise an objection.

37. Having reviewed the case against the defendants by analysing the number of plaintiffs involved in this case, with regard to the proportion of costs payable, I have had regard to the nature of the case against each defendant. Out of a total of 300 plaintiffs in this case the complaint of poor service and other complaints emanate from 250 of the plaintiffs with respect to the 2nd defendant. With respect to the 1st defendant there are 50 plaintiffs involved in this action.

38. The case against the 1st defendant represents 20 % of the total number of claims whilst the case against the 2nd defendant, represents 80% of total number of claims. In line with Order 57 rule 1, subrule 1, the court does have the power to determine "by whom and to what extent the costs are to be paid.

39. In the circumstances, in view of the fact that the 2nd defendant has the largest number of claims against it, (80%) I will order the 2nd defendant to pay the larger proportion of the costs to be awarded. In accordance with the provisions of Order 57 rule 2 and sub rule 5 of the High Court Rules 2007, I have summarily assessed the amount of costs to be paid by the 1st and 2nd defendants to the plaintiff cumulatively, given the large volume of plaintiffs, to be Le100,000,000.00.

40. The 1st defendant shall pay the sum of Le20,000,000.00 of those costs, immediately.

41. The 2nd defendant shall pay the sum of Le80,000,000.00 representing 80% of those costs, immediately.

42. The plaintiffs shall pay the sum of Le2,000,000.00 as costs to the 4th defendant assessed summarily as costs of the 4th defendants.

43. In addition, in order to ensure the speedy conclusion of this action, I shall give directions for the conduct of this matter as follows:

1. The parties shall jointly prepare and serve upon the court and each other, within seven (7) days of this order, in any event no later **than 4pm on Monday the 29th day of March 2021**, a trial bundle which shall be properly paginated and numbered for ease of reference and shall include the following:
   (a) Copies of pleadings and any amendments thereto;
   (b) Joint list of issues to be determined;
   (c) Admissions of facts (if any) arising out of those issues;
   (d) A list of witnesses to be called at the trial by each party and their signed witness statements.
   (e) Any expert report to be relied upon by either party.
   (f) Any authorities relied upon.
   (g) Any points of law relied upon.

2. The parties shall lodge two (2) copies of their respective skeleton arguments with the court, no later **than 4 PM on Wednesday the 7th day of April 2021** and the same to be sent to an email address justicea.fisher@aol.com.

3. The matter shall be set down for trial on **Friday 9th April 2021**.

4. The parties shall be limited to closing oral submissions for no longer **than 20 mins each.**

5. The parties shall be at liberty to seek the leave of the court for further directions no later than **Wednesday 7th April 2021**.

6. Costs of the trial shall be in the cause, exclusive of the costs orders at the interim stage.

The Hon Mr Justice A Fisher J

Justice A. Fisher J

Digitally signed by Justice A. Fisher J
Date: 2021.07.07 22:35:08 Z