

**Cable and Wireless (Dominica) Limited**

*Appellant*

v.

**Marpin Telecoms and Broadcasting Company Limited** *Respondent*

FROM

**THE COURT OF APPEAL OF THE  
COMMONWEALTH OF DOMINICA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 30th October 2000

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*Present at the hearing:-*

Lord Nicholls of Birkenhead

Lord Steyn

Lord Cooke of Thorndon

Lord Clyde

Lord Hobhouse of Woodborough

*[Delivered by Lord Cooke of Thorndon]*

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The issue in this appeal is whether an exclusive licence to provide national and international telecommunication services in, to and from the Commonwealth of Dominica infringes that country's constitutional guarantee of freedom of communication.

The appellant, Cable and Wireless Dominica Limited (CWD), holds an exclusive licence to provide such services. The licence does not extend to broadcasting. It is for a term of 25 years and was granted by the Minister under the Telecommunications Act 1995, enacted on 26th April 1995. Although the licence was not issued until shortly after the Act came into force, namely on 29th April 1995, both the licence and the Act itself implemented heads of agreement between the Government and Cable and Wireless (West Indies) Limited (CWWI), dated 23rd March 1995.

CWWI had provided the international telecommunication service for Dominica since about 1929 and the internal service since about 1967. Since September 1985 it had held an exclusive 20 year licence covering both national and international services. The Government had no shares in CWWI. A main purpose of the heads of agreement in 1995 was to enable the Government to become the holder of 20 per cent of the shares in the new company, CWD, to be formed to take over the services. The Government was also entitled to royalties, and the capital for its shares was to be found by a cash advance to be repaid out of future royalties.

The respondent Marpin Telecoms and Broadcasting Limited (Marpin), formerly Marpin TV Company Limited, began cable television operations in Dominica in 1983. Currently it holds a licence issued by the Minister on 1st March 1996 under the Act of 1995 and authorising it to install, maintain and operate a television station and related telecommunication services. These operations evidently do not compete with those of CWD. Marpin wishes to compete with CWD, however, in the provision of public telecommunication services, particularly at the present stage mobile telephone services and e-mail and internet services offering international communications.

In early 1996 CWD was advised by the Minister that Marpin's licence entitled Marpin to provide internet services utilising CWD's network. In January 1997 CWD entered into an internet service provider (ISP) agreement with Marpin whereby Marpin acquired access to the internet via leased lines and terminating equipment supplied by CWD; toll free 1-800 numbers were allotted by CWD, enabling the customers to have internet access. But in March 1998 Marpin gave notice to CWD that it would be terminating the ISP agreement. Instead of using the leased circuits, Marpin used VSAT (very small aperture terminal earth station). This enabled traffic to be sent to orbiting satellites and relayed to receiving earth stations in other countries for onward transmission, and vice versa. Thus Marpin was able to bypass a major part of the CWD network, ceasing in that respect to be a reseller of CWD's network services. In retaliation CWD withdrew the 1-800 numbers.

By notice of motion dated 20th October 1998 Marpin sought declaratory and other relief under section 16 of the Constitution. CWD was named as the first respondent, the

Attorney-General of Dominica as the second respondent. The proceedings challenge the validity of the Act and the licence, insofar as the Act authorises and the licence grants the exclusive licence issued to CWD; yet the Attorney- General has taken no active part in the proceedings and was not represented before their Lordships' Board. A suggested reason is put forward in the case for CWD, wherein it is said that the litigation has substantial implications for other jurisdictions in the Caribbean and beyond. "In many cases', it is alleged, "it may be of immediate financial benefit to governments, as well as to potential competitor companies, for such countries to be relieved of their existing licence obligation to the incumbent company (because government thereby acquires an unlooked-for power to grant competitive licences)." To this it should be added that another factor may well be the increasing international recognition of the desirability of fair competition in the telecommunications field, sometimes after initial phases of monopoly.

The present policy or motivation of the Government of Dominica is not a matter which on this appeal their Lordships either need or could investigate. They are concerned solely with the effect of the Act of 1995 and the exclusive licence in the light of the relevant provisions of the Constitution. Nor does the appeal turn on any narrow questions of the detailed wording of the Act or the licence. Accordingly it is unnecessary for their Lordships to reproduce the wording at any length, as was helpfully done in the judgments below. Some particular terms of the licence require quotation later, but at this point it is sufficient to say that the general effect of the Act and the licence, assuming the validity of both, is clearly to confer on CWD an extensive monopoly in telephonic and other telecommunication services in Dominica for 25 years.

Marpin's constitutional motion was heard by Cenac J. in the High Court of Justice over eight days in March 1999. In a judgment delivered on 29th April 1999 the judge

granted the application. He made declarations that, in short, the exclusivity conferred by CWD's licence of 29th April 1995 was in contravention of section 10(1) of the Constitution, and accordingly invalid; and likewise that section 7(1) of the Act, to the extent that the Minister is prohibited from issuing a licence to any person other than CWD, is in contravention of section 10(1) of the Constitution, and accordingly invalid. He also ordered that Marpin's costs be paid by the Attorney-General. On the constitutional issue CWD appealed from that judgment. Marpin cross-appealed on the costs question. The case came before the Eastern Caribbean Court of Appeal (Singh and Redhead JJ.A. and Matthew Ag. J.A.) on three days in September 1999. By a judgment delivered by Redhead J.A. on 8th November 1999, the Court of Appeal dismissed the appeal, agreeing substantially with Cenac J. on the constitutional question, but allowed the cross-appeal, ordering that CWD pay Marpin's costs in both courts. CWD now appeals by special leave granted by the Judicial Committee.

### The Constitutional Provisions

Section I of the Constitution provides:-

"1. Whereas every person in Dominica is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origins, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights

and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.”

The concept of freedom of expression is enlarged as well as enshrined in section 10 of the Constitution:-

"10.(I) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

## Hindrance

The Constitution thus treats freedom of expression as including freedom to receive and communicate ideas and information without interference. Except with his own consent, a person is not to be hindered in the enjoyment of this freedom. The first question in the present case is accordingly, under section 10(1), whether Marpin's freedom to communicate ideas and information through telecommunications is hindered by CWD's monopoly. To that question their Lordships think, in company with the courts of Dominica, that the answer can only be in the affirmative. The extent of the hindrance and its reasonableness or otherwise are for consideration under section 10(2). The degree of efficiency of CWD's services and the level of charges imposed by CWD with the approval of the Minister (required by the licence) are similarly relevant under that subsection. But some significant hindrance to a would-be competitor's freedom is normally inherent in any requirement that he provide to his customers certain services only if permitted and on terms laid down by a monopolist. There is no ground for putting this case into any exceptional category.

There is a dearth of case law directly in point, but such authority as there is supports the foregoing conclusion. In the leading European case of *Autronic AG v. Switzerland* (1990) 12 E.H.R.R. 485 the applicant was a private commercial Swiss company specialising in home electronics. It applied for permission to receive, by means of a private dish aerial, uncoded television programmes intended for the general public from a Soviet telecommunications satellite, the company's object being to give demonstrations of the technical capabilities of the equipment in order to promote sales. The satellite provided a fixed point-to-point radio communication service. It also transmitted telephone conversations, telexes or telegrams and data. In the absence of consent from the broadcasting state, the Swiss authority refused the application. The applicant successfully complained of a violation of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969), corresponding broadly though not exactly to section 10 of the Dominican Constitution. The court held that there had been an interference with the

company's right to receive information, saying in the course of paragraph 47 of the decision: -

"Article 10 applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information."

The court further held that the interference was not "necessary in a democratic society". That part of the decision is relevant at a later stage of the present judgment. The part from which the previous quotation is taken is relevant at this stage and to the reach of section 10 of the Constitution because, although *Autronic* was primarily a broadcasting case, it underlines that freedom of communication is not limited to the information or ideas which a person wishes to convey. The content of the Soviet programmes was immaterial for the technical purposes of the Swiss company. Hence the Case lodged for CWD in the present appeal included a concession that freedom of expression may protect the transmission of information for commercial purposes or profit. Interference with the provision of a telecommunication service, such as that provided by Marpin, can amount to interference with the freedom of expression of those who would wish to use that service.

An authority quite closely in point is the *Retrofit* case in Zimbabwe. A company wishing to establish a mobile cellular telephone service successfully challenged the statutory monopoly of the state-owned Posts and Telecommunications Corporation in the provision of public telecommunication services within, into and from Zimbabwe. There are two unanimous decisions of a Supreme Court of five judges, both delivered by Gubbay C.J. Again the constitutional provisions were broadly similar. In the first decision it was held that the monopoly infringed the right of freedom of expression and went further than was reasonably justifiable in a democratic society: *Retrofit (Pvt) Ltd. v. Posts and Telecommunications Corporation* [1996] 4 L.R.C. 489; 1995 (2) Z.L.R. 199 (S). In the second, a rule nisi having been issued calling upon the responsible Minister to show cause why, in relation to mobile telephone services, the

monopoly should not be declared unconstitutional and invalid, the court dealt further with the issue of reasonable justification in a democratic society and made a declaration of invalidity: *Retrofit (Pvt) Ltd. v. Minister of Information.- Posts and Telecommunications* [1996] 4 L.R.C. 512.

The first of those two *Retrofit* decisions includes a survey by Gubbay C.J. of jurisprudence, mainly American, concerning the value of freedom of expression, mainly in broadcasting. The cases cited by the teamed Chief Justice will be helpful as to the right approach when issues under section 10(2) of the Constitution of Dominica are being determined. As to the scope of section 10(1), their Lordships would adopt the following proposition in his judgment (1995 (2) Z. L. R. (S) at 216):-

"These cases, and there are others, underline the principle that restriction upon or interference with the means of communication, whatever form it may take, abridges the guarantee of freedom of expression. A fortiori any monopoly which has the effect, whatever its purpose, of hindering the right to receive and impart ideas and information, violates the protection of this paramount right."

Later in the same judgment he says (at 218):-

"In my view, it is axiomatic that for the corporation to monopolise telecommunications services in Zimbabwe, and then to furnish a public switched telephone network of dubious worth, available to but a small percentage of the populace, manifestly interferes with the constitutional right of every person in the country to receive and impart ideas and information by means of this 'pervasive two-way communications system'."

Thus it is apparent from the judgment that the monopoly service in Zimbabwe had shortcomings which may have made that case relatively easy to decide. It is to be noted, however, that the previous more general proposition stated by Gubbay C.J. was not limited to cases of inefficient monopolies. Their Lordships regard the efficiency or otherwise of the monopoly as among the matters falling for consideration under section 10(2) of the Dominican Constitution.

Notwithstanding the concession in the appellant's Case already mentioned, the argument for the appellant under section 10(1) was to the effect that Marpin had no constitutional or other

right to operate under its own system. In developing this argument Lord Lester of Herne Hill Q.C. relied heavily on the judgment at first instance of Costello J. in the Irish case of *A. G. v. Paperlink* [1984] I.L.R.M. 373. When that decision is examined their Lordships do not consider that it can bear the weight sought to be placed on it. The individual defendants, who through their company operated a courier service in Dublin, were held to have infringed the state statutory postal monopoly. They pleaded a constitutional right of citizens, not express but implied, to communicate freely with one another. The learned judge held that it was not correct, and indeed could be seriously misleading, to suggest that the defendants enjoyed a right to communicate "freely" (see page 382). He thought that a right to communicate is inherent in the human personality but that a right of *free* communication could not be derived from the Irish Constitution. In *Dominica*, by contrast, freedom of communication is explicitly guaranteed: *Paperlink* is manifestly distinguishable. It would be inappropriate for their Lordships to embark on a discussion of a further part of Costello J.'s judgment wherein he held that, although the right to earn a livelihood was to be derived from the Constitution, the result was not to require the state to justify the existence of a public monopoly.

The basic weakness of the argument for CWD on section 10(1) is that it minimises the importance of the provision that a person shall not be *hindered* in his enjoyment of the rights there specified. As already mentioned, in the view of their Lordships some significant hindrance to freedom of communication is normally and in this instance inevitable if there exists a statutory monopoly to control means of communication as important in the world of today as the telephone. The issue therefore shifts to section 10(2).

### Limitations

On this appeal CWD does not rely on either paragraph (a) or paragraph (c) of section 10(2) of the Constitution. The expression "public order" in (a) has connotations of

the stability of the state and is not so wide as to encompass the considerations of public interest claimed by CWD to be decisive; while (c) is obviously irrelevant. Nor is it suggested that the exclusive licence of CWD was reasonably required for regulating the technical administration or the *technical* operation of telephony; so that part of paragraph (b) is relied on no longer.

What is invoked by the argument, described by Lord Lester as the heart of the appeal, is the reference in paragraph (b) to the rights and freedoms of other persons, read together with the corresponding references in section I and the general references in that section to the public interest. It is said that the Constitution calls for a balancing exercise, a complex value judgment upon which the courts should defer to the opinions of the legislature and the executive. It is contended that the latter arms of the state had to decide whether regulated exclusivity or regulated competition was the best system of telecommunications control for Dominica at the present stage of national development. Emphasis is laid on the smallness of the population (about 75,000) and the mountainous terrain. The difficulties of providing a universal telephone service and the importance of committing an international telecommunications enterprise to Dominica are put forward as reasonably justifying a monopoly able to cross-subsidise its services.

In support of the argument certain terms and conditions of the exclusive licence were pointed out. Among them clause 3 should be quoted:-

"3. Throughout the term of this Licence and subject to the provisions of clause 19, the Company shall operate, maintain in proper working order, expand and improve such Relevant Telecommunication Services as it operates from time to time with a view to providing an efficient and reliable service over as wide an area of the Territory as may be practicable and in accordance with the needs of the Territory, provided that the Company is satisfied that it has the financial resources with which to meet the required additional expenditure and that such expenditure is commercially justifiable taking into consideration the returns derived overall by

the Company from the provision of Telecommunication Services in the Territory.”

A large body of evidence, consisting of affidavits and cross-examination, was presented by the contesting parties in the High Court. It included the expert evidence for CWD of Professor Hausman, who helpfully traversed the options for telecommunications control available to a country and the material factors. As a whole the evidence was characterised by Cenac J. as 'effusive nonetheless instructive.' Much of it related to the standard of service provided by CWD to Marpin, the prices quoted or charged to Marpin by CWD, and the present and future level of competence of CWD's and Marpin's operations. But the learned judge dismissed this evidence as irrelevant to the issues in the case. Hence the Court of Appeal and their Lordships have been without the benefit of factual findings by the trial judge on matters seen by the parties as important.

In the event both the High Court and the Court of Appeal virtually put aside the main argument for CWD - Cenac J. on the ground that "the rights and freedoms of other persons" cannot apply to the regulation of telephony or telecommunications, as otherwise the words "regulating the technical administration or the technical operation of telephony" in section 10(2)(b) would be redundant; the Court of Appeal on the ground that, in the words of Redhead J.A., "I think that it defies logic and common sense to say that a subsection which limits the rights of a person in one section would give those very rights limited by that subsection to a third person".

Their Lordships think that this constitutional issue calls for a rather broader approach. They reject a submission that, in the absence of a relevant cross-appeal, Marpin is debarred from challenging CWD's argument on the merits. They are far from saying that it cannot be effectively answered on the merits. But they hold that CWD is entitled to a consideration of it on the merits.

While much of what is said by Gubbay C.J. in his two *Retrofit* judgments will be highly relevant in determining the issue on the merits, there is one observation which might not apply to the situation in Dominica. In the

second of two judgments Gubbay C.J. says, [1996] 4 L.R.C. at 516:-

"A government committed to the grant of affordable telephonic communication for its people in the rural areas must be prepared to bear a portion of the expense required to promote such a commendable endeavour.

The remedy lies in subsidising this social need, not in impacting upon a fundamental human right."

Their Lordships cannot on the present appeal rule out any possibility of success for an argument that the economic and other circumstances of Dominica may make a monopoly cross-subsidising its services reasonably required for the purpose of protecting the rights and freedoms of the people to communicate freely. The claim that the preservation of a CWD monopoly would be likely to result in significant extensions of telephone services to rural and remote areas not already served was treated with some scepticism in the argument of Mr. Astaphan S.C. for Marpin. The proviso in clause 3 of the CWD licence to the effect that the expenditure must be commercially justifiable in the eyes of the company is hardly reassuring. But in principle the "rights and freedoms of other persons" in section 10(2)(b) of the Constitution is capable of covering the facilities for communication available to the community as a whole. The immediately preceding word "reputations" is not enough, in this constitutional instrument, to warrant a reading down of the scope of "rights and freedoms".

On the other hand the argument for the appellant goes too far if it suggests, as it apparently did, that any consideration seen by the legislature or the executive as bearing on the public interest may be advanced to bring a law within section 10(2)(b). The right to freedom of communication would be a fragile thing if it could be overridden by general political or economic policy. So, too, the stress placed by Lord Lester on the need for judicial restraint cannot be allowed to discourage the courts from a firm performance of their proper constitutional role. The true position is stated by the European Court of Human Rights in the *Auronic* judgment, paragraph 61, in words adaptable to the Dominican Constitution:-

"61. The Court has consistently held that the Contracting States enjoy a certain margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the case. Where, as in the instant case, there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph (1) of Article 10, the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established."

The Eastern Caribbean Court of Appeal regarded the Government's decision to grant CWD the exclusive licence as motivated by business considerations. They attached importance also to Professor Hausman's evidence as confirming that CWD in seeking exclusivity would naturally have in mind protecting its capital investment. In the opinion of their Lordships the fact that the Government and CWD had a common financial interest in exclusivity does not preclude a claim that it was reasonably required for the purpose of protecting the rights and freedoms of other persons. It does militate against over-cautious judicial deference in scrutinising the claim, for it suggests that protection of such rights and freedoms may not have been the dominant purpose.

In the end, however, the question for the court is the objective one whether, in authorising and granting exclusivity, the Act and the licence make provision that is reasonably required for the purpose of protecting the rights and freedoms of other persons. If that is shown, the onus falling on those who support exclusivity, the burden will shift to Marpin to show in terms of the last limb of section 10(2) that it is not reasonably justifiable in a democratic society. In considering these issues it is to be borne in mind that the telephone plays a key role in the modern community. The only pervasive two-way method of communication at a distance, it is crucial in business, in providing information to citizens, and in the ordinary conduct of daily life. An important question will be whether, on balance, to allow Marpin to compete with CWD will or will not conduce to providing

Dominica

with

telecommunications services giving best effect to the rights of users to freedom of communication.

### Remission

Their Lordships are driven to hold that, whether or not the results reached in the courts below were right, they were reached after an over-circumscribed approach. It would be unsatisfactory for the Board to attempt to resolve the issues without a local evaluation of the evidence based on the correct principles. The case is one calling for an appreciation of local conditions. With the regret that must accompany a prolongation of the proceedings, the case must be remitted to the learned trial judge for reconsideration in the light of the principles set out in the present judgment.

Lord Lester suggested that, in that event, there should be a full rehearing. It may be, however, that this can be avoided. It will be a matter for the discretion of the judge, but one course open to him would be to decide on the basis of the evidence already given, supplemented by any updating evidence which he may give leave to adduce.

Accordingly the appeal will be allowed. The decisions of the Eastern Caribbean Court of Appeal and the High Court of Justice of Dominica will be set aside, and the case will be remitted to the High Court for reconsideration.

Marpin must pay the costs of CWD in the Privy Council. The costs orders in the courts below will be set aside. The costs of all proceedings in the High Court and the Court of Appeal, including the costs of the further hearing, are to be as ordered by the trial judge in the light of the outcome of the reconsideration. Their Lordships agree with the Court of Appeal that, in principle, if the Attorney-General takes no active part in the proceedings, he should neither pay nor receive costs.