JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2020CV00022

APPLICATION NO COA2020APP00053

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST APPLICANT**
AND	**SUPERINTENDENT OF POLICE ANTHONY MCLAUGHLIN**	**2ND APPLICANT**
AND	**XTRINET LIMITED**	**RESPONDENT**

Ms Althea Jarrett instructed by The Director of State Proceedings for the applicants

Michael Williams instructed by Knight, Junor and Samuels for the respondent

27 March and 3 April 2020

IN CHAMBERS BY TELECONFERENCE

BROOKS JA

[1] The Attorney General of Jamaica and Superintendent Anthony McLaughlin (the applicants) have appealed from an order by Pettigrew-Collins J made in the Supreme Court on 10 March 2020. The learned judge's order was made in respect of Xtrinet Limited's (Xtrinet) application for, among other things, the return of its equipment and documents, which had been seized by a police team including Superintendent of Police Anthony McLaughlin,. The learned judge ordered the applicants to return the equipment

and documents to Xtrinet. The applicants seek a stay of execution of the order pending the determination of the appeal.

[2] The learned judge made her decision, after hearing a contested interim application by Xtrinet, for that relief, among others. She was then exercising a discretion allowed to her in the circumstances. Given the impressive, clinical approach that she brought to the exercise, the applicants have an uphill task in demonstrating that the learned judge either erred in fact or in law, or made a decision that no judge, mindful of her judicial duty, could have made.

The background

[3] Xtrinet operates a telecommunications business. It provides, under the auspices of licences under the Telecommunications Act (the Act), a number of services to the public, including internet and domestic voice services. It does so from, apparently, the same premises from which, another telecommunications company, Symbiote Investments Limited (Symbiote), formerly operated. It also uses, in its operation, equipment that Symbiote previously used, up to the time that Symbiote lost its telecommunications licences. Xtrinet asserts that it is entitled to use that equipment because it has purchased all the shares in Symbiote.

[4] Xtrinet also claimed the right to use the frequency of the electromagnetic spectrum (the spectrum) that Symbiote previously used. The Spectrum Management Authority (SMA) disputed Xtrinet's right so to do.

[5] The responsible Minister of Government revoked Symbiote's telecommunication licences in 2018. The revocation was confirmed by this court (see **Symbiote Investments Ltd v Minister of Science and Technology and Office of Utilities Regulations** [2019] JMCA App 8). Xtrinet maintains that the Minister did not revoke Symbiote's licence to use the spectrum.

[6] It is in that context that, on 21 February 2020, the police team, including Superintendent McLaughlin, raided Xtrinet's premises, armed with a warrant to seize equipment, which was said to be connected to breaches of section 70 of the Act. After an extended stay at, and search of, the premises, the police took documents and equipment and left.

The litigation

[7] Xtrinet is unable to operate without its equipment. On 2 March 2020, it filed a claim in the Supreme Court, claiming, among other things, the return of its equipment and damages for trespass. On the same date, Xtrinet also filed the application that Pettigrew-Collins J heard. In its application, Xtrinet sought:

1. a declaration that the search and seizure "is illegal, null and void";
2. the return of its equipment and documents;
3. the restoration of its services to its subscribers;
4. an injunction preventing the applicants from re-entering its premises or interfering with its operation; and

5. an injunction preventing the applicants from communicating to the press about Xtrinet's operations.

[8] Mr Livingston Hines, Xtrinet's chairman and chief executive officer, supported the application with an affidavit explaining Xtrinet's operation and describing the raid by the police. Importantly, he asserts that neither the warrant nor the police specified the particulars of the alleged breach of the Act. He deposed that the police took the equipment without giving any explanation for their removal. He complained that Xtrinet is being prejudiced by the seizure of its equipment as it uses the equipment to provide services to its customers. He pointed to the dire results of such a situation, including loss of customers, laying off of employees and the tarnishing of Xtrinet's image.

[9] The applicants did not file any affidavit evidence in response to Mr Hines' affidavit. Although given an opportunity to do so by the learned judge, counsel for the applicants asserted that they were contesting the application on the law.

The decision in the court below

[10] The learned judge made her decision after considering and following the guidelines for the grant of injunctions, as set out in the landmark cases of **American Cyanamid Co v Ethicon Ltd** [1975] AC 396; [1975] 1 All ER 504 and **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd** [2009] UKPC 16; [2009] 1 WLR 1405.

[11] The learned judge considered the issues of:

a. whether there is a serious issue to be tried;

b. whether damages would be an adequate remedy; and

c. the balance of convenience, including:

i. the maintenance of the status quo;

ii. the relative strength of each party's case; and

iii. whether it would be just and convenient to grant the injunction,

in the context of the case that had been placed before her.

[12] On that consideration, the learned judge granted order 2, of the application. She refused orders 1, 3, 4 and 5 on the reasoning that:

a. she did not have sufficient information to grant order 1;

b. order 3 was totally up to Xtrinet; and

c. she would not, by orders 4 and 5, restrain the police from doing what they deemed to be their duty.

She also spent some time on the issue of an order for undertaking as to damages, but that aspect is not an issue for these purposes.

Developments after the delivery of the judgment

[13] There has been, however, subsequent to the filing of the appeal and the present application, a further significant development in the case.

[14] On 19 March 2020, the police arrested and charged Mr Hines and others with conspiracy between themselves and with others, unknown, "to use the spectrum within

the frequency range 746-756Mhz and 777-787Mhz without a licence". The police also charged Xtrinet with engaging "in the use of the spectrum within the frequency range", mentioned above, in breach of section 63A of the Act. The "spectrum" is defined in section 20(6) of the Act as meaning "the continuous range of electromagnetic wave frequencies up to and including a frequency of 420 terahertz".

[15] Section 63A(1)(b) of the Act makes it an offence to "[engage] in the use of the spectrum without first obtaining a spectrum licence".

[16] As a result of those developments, affidavits were filed by both the applicants and Xtrinet. On this occasion, the applicants were not much more forthcoming than they were before the learned judge. Essentially they stated that they had charged Xtrinet and the other persons based on the opinion of the Director of Public Prosecutions, and that having charged Xtrinet they were entitled to retain the equipment as preservation of evidence for the prosecution. No details were given.

[17] The effect, if any, of these developments will be discussed below.

The present application

[18] The applicants assert that it is obvious that the learned judge erred in law in that, in refusing to declare that the search and seizure were illegal, she could not properly order the return of the items seized. Learned counsel for the applicants, Ms Jarrett, also contended that in granting order 2, the learned judge had not only failed to recognise that the evidence was incomplete, but had given Xtrinet "the entire relief that is sought in its claim" (ground of appeal ii). Learned counsel also submitted, that the

learned judge also failed "to have regard or sufficient regard to the principles applicable to the grant of a mandatory injunction particularly in public law cases" (ground of appeal iv).

[19] Ms Jarrett also argued that the learned judge relied too heavily on the fact that Xtrinet had said that it had licences to operate its business. She submitted that Xtrinet did not provide evidence that it had a spectrum licence and therefore there was "insufficient evidence before the learned judge enabling her to determine that [Xtrinet] was operating legally".

The analysis

[20] There is no dispute between the parties that a single judge of appeal may grant, pending the determination of an appeal, an order for a stay of execution of an order or judgment against which the appeal has been filed (see rule 2.11(1)(b) of the Court of Appeal Rules).

[21] Two major principles govern the approach to be adopted in considering applications for stay of execution. The first is that an appellate court is generally unwilling to disturb a decision, which is the result of an exercise of a discretion given to the judge at first instance. It will only do so if it is shown that the judge made an error of law, or misinterpreted or misapplied the facts involved in that exercise or made an order that is so aberrant that no reasonable judge would have made, in the circumstances of the case. Authority for that principle is to be found in the often cited

case of **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042 at page 1046.

[22] That reasoning has been adopted in a number of cases in this court, including the more recent decision of **Marilyn Hamilton v Advantage General Insurance Company Limited** [2019] JMCA Civ 48. At paragraph [40], Phillips JA, with whom the other members of the panel agreed, cited **Hadmor**. She said:

> "In **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, at 1046, Lord Diplock gave guidance on how the appellate court ought to treat the exercise of the discretion of the single judge, and when it was appropriate for the court to interfere with the decision. He said that:
>
> > 'It [the Court of Appeal] may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, **or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it**. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it

> becomes entitled to exercise an original discretion of its own.'" (Emphasis supplied)

[23] Barring some other development, if the appellate court decides that the judge below erred, this means that there is merit in the appeal and it can then consider the application afresh. This introduces the second principle, which is that the order that a court makes, in considering an application for a stay of execution, should be the one less likely to result in injustice. Guidance in respect of this second principle is set out in the judgments in **Combi (Singapore) Pte Limited v Ramanath Sriram and Sun Limited** [1997] EWCA Civ 2164 and **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065.

[24] In **Combi**, Phillips LJ stated, in part:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice. The starting point must be that the normal rule as indicated by Ord 59, r 13 is that there is no stay but, where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal...."

a. Did the learned judge err?

[25] In the present case, the applicants contend that the search and seizure was properly executed in pursuance of a warrant, and that the retention of the equipment is necessary to permit the police to properly prosecute any breaches of the Act. There can be no real dispute that the applicants entered Xtrinet's premises and conducted a search in accordance with a warrant. They, however, made no effort to demonstrate to the learned judge that, having entered and searched, they found any material to justify the seizure of the equipment.

[26] There are at least three flaws in the applicants' complaint about the learned judge's decision. The first is that section 70(1) of the Act does not authorise the seizure of equipment unless the search reveals the commission of an offence against the Act. The provision states:

> "70.–(1) If a constable has reasonable cause to suspect that any equipment is being used or has been used for the commission of any offence against this Act, he may apply to a Resident Magistrate for a warrant authorizing him to search the specified apparatus named in the warrant…and to seize and detain that equipment **if the search reveals evidence that it is being used or has been used for the commission of an offence** as aforesaid." (Emphasis supplied)

[27] The onus is therefore on the applicants to justify their seizure and detention of the equipment. They placed no information before the learned judge to justify those actions.

[28] The second flaw in the applicants' complaint addresses the issue concerning the grant of a mandatory injunction and the issue of giving Xtrinet its entire relief on an interlocutory application. The flaw is that the applicants do not seem to appreciate that the equipment belongs to Xtrinet and the company is entitled to have it, unless some legal requirement dictates otherwise. In this instance, section 15 of the Constitution of Jamaica is relevant. The section is a part of the Charter of Fundamental Rights and Freedoms. Section 15(1) prevents the compulsory taking of possession of property belonging to persons in Jamaica "except by or under the provisions of a law" that prescribes for the taking and for compensation, and secures the rights of the persons affected, to protect their interest in that property. Section 15(2) allows for legislation providing for the:

> "taking of possession or acquisition of property –
>
> …
>
> (k) for so long as may be necessary for the purposes of any examination, investigation, trial or inquiry…"

It is to be noted that the taking of possession must be pursuant to legislation.

[29] The applicants made no attempt to place any evidence before the learned judge to demonstrate that some law or legal principle authorised the retention by the police or prevented the return of the equipment to its owners. The submission that it is for Xtrinet to show that it was operating legally, is to improperly reverse the burden of proof, in the context of the litigation.

[30] The reliance by Ms Jarrett on the cases of **Shepherd Homes Ltd v Sandham** [1970] 3 All ER 402 and **Homer Davis and Another v Maurice Tomlinson** [2019] JMCA Civ 34, cannot assist the applicants.

[31] The third flaw is that the return of the equipment would not give Xtrinet its entire relief. Xtrinet has sued, among other things, in trespass for damages. The return of the equipment would not disentitle it to continue its action to recover damages for the trespass to, and detention of, that equipment.

[32] Based on that reasoning, the applicants have not shown, considering what occurred before the learned judge, that she made any error that would justify intervention according to the principles in **Hadmor Productions Ltd and Others v Hamilton and Others**. They therefore have not shown that the appeal has any real prospect of success, so as to justify an order for a stay of execution of her order.

b. The effect of the subsequent developments

[33] The essence of the question that this court posed to learned counsel for the applicants and for Xtrinet is "how does the laying of charges against Xtrinet affect the status of the property or the learned judge's order?".

[34] Ms Jarrett submitted that there is "an overriding public interest in the detection and punishment of crime and there is an equal public interest in preserving evidence until trial". She submitted that unless material evidence is preserved, a trial would be pointless (paragraph 21 of the written submissions filed on 26 March 2020). Learned counsel relied on the judgment of Sykes J, as he then was, in **B & D Trawling**

Limited v Cpl Raymond Lewis and Another (unreported) Supreme Court, Jamaica, Claim No CL B 015 of 2001, judgment delivered 6 January 2006, in support of her submissions on this point.

[35] Learned counsel also submitted that one of the investigators, Deputy Superintendent Albert Diah, had deposed that he "genuinely believes that returning the equipment will frustrate the prosecution and enable [Xtrinet] to continue to use them [sic] to commit the alleged breaches under the Act" (paragraph 24 of the written submissions filed on 26 March 2020).

[36] Learned counsel for Xtrinet, Mr Williams, pointed out the defects in the applicant's case. Specifically learned counsel highlighted the evidence of both Mr Hines and Mr Leroy James, both of whom are telecommunications engineers. Both men deposed that the equipment that was seized by the police are incapable of revealing if they were being used on a radio frequency or any segment of the electromagnetic spectrum. Mr James went on to say that none of the items of equipment on the list of items seized by the police "could have enabled the [applicants] to confirm or ascertain the commission of the offences charged at the time of seizure or on any prior occasion. Mr Williams pointed out that the applicants had provided no evidence to counter the testimony of Xtrinet's witnesses.

[37] There is much force in Mr Williams' submissions. The applicants seemed to have maintained the stance that it was for Xtrinet to show why it is entitled to the return of

the equipment, rather than for them to justify the retention. If those were the only factors, the applicants would have woefully failed to justify a stay of execution.

[38] In **B & D Trawling v Crpl Lewis**, the police had wrongfully seized and detained a boat. The relevant portion of Sykes J's judgment in the case, was a discussion of the issue of detinue. During his characteristically comprehensive analysis, Sykes J, said, in part at paragraph 29:

> "**The law is quite clear that the ability of the law enforcement officials to seize and retain items is not unlimited. There is no law that confers on any law enforcement personnel indefinite powers of indefinite detention of property**. The legal position in relation to goods allegedly involved in or to be used as evidence was stated unambiguously by Lewis J.A. in ***Francis v Marston*** (1965) 8 W.I.R. 311 (Court of Appeal of Jamaica)…" (Emphasis supplied)

[39] In **Francis v Marston**, cited by Sykes J, a police officer seized a firearm from Mr Francis after it proved that he had not renewed the licence for the weapon. No charges were laid against Mr Francis. He demanded the return of the firearm, but the officer refused. Mr Francis sued. On appeal Lewis JA discussed the position at common law as the Firearms Act, at that time, did not authorise the retention of the weapon. Lewis JA pointed out that detention of property by the police may be justified if at the time of the taking, or shortly thereafter, someone is arrested for an offence in connection with the property. He said, in part, at page 313:

> "**There is no doubt that at common law the police have in certain circumstances power to seize and retain property which may afford evidence of the commission of a crime. The cases show that on the lawful arrest of a person the police are entitled to**

> **take and detain property in the possession of the arrested person which may form material evidence on the prosecution of any criminal charge; that where a seizure of property would be otherwise unlawful the interests of the State will excuse it if the property ultimately proves to be capable of being used as evidence on the trial of some person for a crime committed by him; and that where the taking of property is thus excused the police may retain it until the conclusion of any charge with respect to which it is material**. See *Elias v Pasmore* ([1934] 2 KB 164, [1934] 2 All ER Rep 380, 103 LJKB 223, 150 LT 438, 98 JP 92, 50 TLR 196, 78 Sol Jo 104, 32 LGR 23, 46 Digest (Repl) 405, *469*) and the cases referred to therein. The basis of these powers is the necessity of ensuring that material evidence is avaliable [sic] on the prosecution of the person charged and that his trial is not rendered abortive by the inability to produce such evidence as [may be] in his possession. **But this presupposes that either at the time of the seizure or at least promptly thereafter some person is arrested or charged for an offence on the trial of which the property seized is material evidence.** No case was cited to the court in which such seizure has been excused where it is not accompanied by an arrest but is followed sometime later by the issue of a summons and I express no opinion on this point. In this connection see, however, *R v Waterfield* ([1963] 3 All ER 659, CCA, 3rd Digest Sup)." (Emphasis supplied)

[40] The learned judge of appeal also said, at page 314, that the owner of the property, detained by the police, is entitled to sue in detinue even if it would be unlawful for the owner to have possession of the property, such as the absence of a licence.

[41] The authorities were not completely in favour of the applicants. The distinguishing features of this case are:

a. the applicants have not said that the equipment was seized on the basis that illegal activity was discovered during the search; and

b. the claim was filed in the Supreme Court and the learned judge's order was made before Xtrinet was charged.

It is unnecessary, however, to investigate these aspects further.

[42] The turning point in the case was the insistence by Xtrinet that it wished to have the equipment to resume providing service to its customers. In answer to this court, Mr Williams said that Xtrinet required the use of the spectrum in order to provide that service. Learned counsel further asserted that Xtrinet holds a spectrum licence to enable it to do so. Mr Williams explained that the licence was a "*pro forma*" one. He stated that Xtrinet holds the licence by virtue of having taken over the operation of Symbiote.

[43] The documents, which were later exhibited by Xtrinet did not support Mr Williams' assertion. The documents showed that Xtrinet had applied for a spectrum licence but had not yet been granted it. A letter from the SMA, dated 3 December 2019 and addressed to Xtrinet (exhibited by Mr Hines), also definitively stated that Symbiote had no spectrum licence on which Xtrinet could rely. The letter stated, in part, that:

"1. Symbiote's Domestic Mobile Spectrum Licence was revoked; and

2. The Radio Frequency Spectrum is neither assignable nor transferrable."

Xtrinet wrote to the responsible Government Minister challenging those assertions by the SMA. Xtrinet stated that the first assertion was false and the second was wrong in law.

[44] The correspondence shows that Xtrinet was pressing the SMA for the spectrum licence, for which it had applied, but the SMA said that it was waiting on the Minister's approval. Xtrinet also asked the Minister to break the deadlock. It urged the Minister to make a "decision as the spectrum is key to the services [to be provided]" (letter dated 9 December 2019). There was no progress on either of those official fronts. Although Xtrinet was seeking to say that it could use the spectrum because it owned and was using Symbiote's equipment, it knew, at least, that:

a. it had applied for a licence to use the spectrum;

b. that licence had not been granted, despite all its efforts; and

c. the SMA was of the view that:

    i. Xtrinet needed to have its own licence to use the spectrum; and

    ii. it did not have one.

[45] It is not surprising, therefore, that the SMA, upon detecting the use of the particular frequency of the spectrum, wrote to Xtrinet by letter dated 13 February 2020, asking Xtrinet if it was the party using that frequency. The frequency was one for which Xtrinet had sought a licence. The SMA instructed Xtrinet to "immediately cease and

desist use of the frequency…or any other range within the electromagnetic spectrum". That letter was exhibit LH-6 of Mr Hines' affidavit, sworn to on 30 March 2020.

[46] Xtrinet's response to that letter was to ask for the SMA's "forbearance in respect of the use of the 746MHz to 756MHz range for a period of ninety days to facilitate your processing of the application and a reasonable transition process that will minimise inconvenience and loss for [Xtrinet's customers]". It nonetheless re-iterated its stance that its use of the Symbiote equipment, and presumably the spectrum previously assigned to Symbiote, is a *pro forma* transaction according to the provisions of the Act. Mr Hines did not state or exhibit anything which shows that the request for forbearance was granted.

[47] The applicants latterly filed an affidavit of Dr Maria Myers-Hamilton, the Managing Director of the SMA, which asserted that Xtrinet had no authority to use the spectrum. She supplied documentary evidence to support her assertions. It is unnecessary to go into any further detail with that affidavit.

[48] The indications are against Xtrinet in this regard. It would be wrong to allow Xtrinet to have back the equipment, since it has made it plain that it intends to do the very thing, which is outlawed by section 63A(1) of the Act, and for which Xtrinet has already been charged. Although there is a presumption of innocence, the indications are that Xtrinet will be in breach of the Act if it is allowed to resume operations.

[49] The learned judge at first instance said that she would be loath to make an order that would facilitate the carrying on of an illegal operation. She made the order for the

return of the equipment because the applicants had failed to provide any evidence that the order would have had that effect. The evidence provided to this court indicates that such an operation by Xtrinet would, apparently, be contrary to law.

Conclusion

[50] The applicants have failed to show that the learned judge erred in the exercise of her discretion in ordering the return of the equipment.

[51] The subsequent laying of charges against Xtrinet for illegally using the spectrum has however made a difference. Although the applicants initially failed to provide any evidence to support their claim that there was such usage, that is not the end of the matter. Xtrinet has said that it intends to use the equipment to provide services to its customers. It asserts that to provide that service it needs to use the spectrum. The documentation that it has provided to this court strongly indicates that Xtrinet does not possess a licence to use the spectrum.

[52] In the absence of a spectrum licence, that usage would be in breach of section 63A(1)(b) of the Act. This court should not allow such a breach.

[53] The orders therefore are:

1. The application for a stay of execution of the judgment of Pettigrew-Collins J, handed down on 10 March 2020, is granted.

2. Execution of the said judgment is stayed pending the outcome of the appeal or further or other order of the court.

3. Costs to be costs in the appeal.