**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 87/2018**

**APPLICATION NO 277/2018**

**BEFORE: THE HON MR JUSTICE BROOKS JA**
**THE HON MRS JUSTICE MCDONALD-BISHOP JA**
**THE HON MISS JUSTICE P WILLIAMS JA**

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| **BETWEEN** | **SYMBIOTE INVESTMENTS LIMITED** | **APPLICANT** |
| **AND** | **MINISTER OF SCIENCE AND TECHNOLOGY** | **RESPONDENT** |
| **AND** | **OFFICE OF UTILITIES REGULATION** | **INTERESTED PARTY** |

**Lord Anthony Gifford QC and Patrick Bailey instructed by Patrick Bailey for the applicant**

**Miss Althea Jarrett instructed by the Director of State Proceedings for the respondent**

**Mrs Daniella Gentles-Silvera and Miss Kathryn Williams instructed by Livingston Alexander and Levy for the interested party**

**14, 15 January, 18 February, 18, 21, 29 March and 29 April 2019**

**BROOKS JA**

[1] On 29 March 2019, after consideration of the very helpful submissions of counsel for the respective parties, for which the court is grateful, we made the following orders:

> "1. The order granting permission to appeal is set aside.
>
> 2. The application for stay of execution is refused.

3. Costs to the respondent and to the interested party to be agreed or taxed."

At that time, the court promised to put its reasons in writing. We now do so.

**Introduction**

[2] This is an application by Symbiote Investments Limited (Symbiote) for an interim injunction or a stay of the implementation, pending appeal, of an order made by the Minister of Science and Technology (the Minister) on 12 June 2018. By that order, the Minister had revoked six licences that he had previously issued to Symbiote under the Telecommunications Act (the Act).

[3] After the revocation, Symbiote promptly applied to the Supreme Court for leave to apply for judicial review of the Minister's decision. Stamp J heard the application, and on 7 December 2018, refused it. He also refused permission to appeal.

[4] Symbiote applied to this court for permission to appeal and for an injunction or a stay of the implementation of the Minister's decision, pending the outcome of the appeal. The court considered the applications at short notice on 17 December 2018. At that time, the court granted permission to appeal, as a conservatory measure, but adjourned the application for the injunction or stay to 14 January 2019. The court also sought to preserve the status quo and granted a temporary stay of the implementation of the Minister's order pending the hearing of the substantive application for the stay. Stamp J had granted a similar stay of implementation pending the outcome of the application before him.

[5] The present application came on before the court on 14 January 2019, and was adjourned part-heard over the course of a number of days stretched over the course of 10 weeks. During that period, the stay was extended and remained in force.

[6] The issues to be decided on this application are whether Symbiote has a real prospect of succeeding on appeal and whether the justice of the case requires an extension of the stay pending the outcome of the appeal. The revocation of the grant of leave to appeal arises as a collateral issue to the question of the prospects of success.

[7] An understanding of the analysis of these issues first requires an outline of the background leading to the Minster's revocation of the licences.

**The factual background**

[8] Symbiote was incorporated in 2011. In March 2014, it applied for a number of telecommunication licences to allow it to provide telecommunication (including mobile and fixed line telephone) services to the public. The applications were refused because of its connection with Mr George Neil, with whom, the regulator for the telecommunications industry, the Office of Utilities Regulation (the OUR), said "adverse traces" were associated.

[9] Symbiote re-applied for the licences in October 2014. Its then attorneys-at-law informed the OUR, by letter, in November 2014, that Mr Neil's connection with Symbiote had been terminated. Thereafter, between 2015 and 2016, the Minister granted Symbiote, on the recommendation of the OUR, six telecommunication licences, to allow it to provide telecommunication services to the public.

[10] Symbiote later applied for a radio frequency spectrum licence (spectrum licence) to facilitate the use of wireless technology. That application proved to be controversial, but the Spectrum Management Authority (SMA) eventually recommended the grant of the licence. The Minister granted the spectrum licence to Symbiote on 14 September 2016. The licence was for a period of 15 years. Importantly, the letter accompanying the licence specifically prohibited the involvement of Mr George Neil in the company. Mrs Minett Lawrence, Symbiote's company secretary, signed a copy of the letter agreeing that Symbiote would be bound by the terms and conditions of the spectrum licence.

[11] In December 2016, the SMA and the OUR separately notified Symbiote, by letter, that they were investigating threats, through Symbiote's operation, to the national security of this country as well as the security of a foreign government. The reasons given for the notice included the fact that the Office of the Minister of National Security had indicated that there had been the continued participation by someone with an ongoing adverse trace in the operations of Symbiote. Both letters warned of the intention to carry out investigations into the assertions by the Minister of National Security and the possibility of a suspension or revocation of the respective licences that had been issued to Symbiote.

[12] In May and October of 2017, the OUR requested certain information of Symbiote, including information relating to its banking arrangements. The OUR particularly asked for information concerning Mr Neil. Symbiote cited confidentiality

issues, refused to provide the information, and refused to authorise the OUR to obtain the information from Symbiote's bankers.

[13] Undaunted, the OUR secured the banking information, and copies of certain banking documents, from the Office of the Contractor General (OCG). The information secured showed that Symbiote had informed the bank, through documents signed respectively in January and in March 2015, that Mr Neil was the chairman of its board of directors. The documents also showed that Symbiote had also designated Mr Neil as a signing officer on its account with the bank. Signature cards, bearing his signature, were included in the information that the OUR secured through the OCG. The signatures of Mr Lowell Lawrence (a director and the chief executive officer of Symbiote) and Mr George Neil both appeared on a number of the acquired documents, which also bore Symbiote's corporate seal.

[14] The OUR brought the documents to Symbiote's attention and sought an explanation. Symbiote sought to impugn the validity of the documents and protested the OUR's acquisition and use of the documents.

[15] By letter dated 17 November 2017, the Minister informed Symbiote that the OUR had recommended the revocation of its licences. The basis for the recommendation, he said, was that Symbiote had knowingly failed to provide information that may have resulted in a refusal to grant the licences. He invited Symbiote to show cause why the licences should not be revoked. Symbiote responded, but the Minister was not satisfied with the response and, by letter dated 10 April 2018, the Minister informed Symbiote

that its licences had been revoked. The reason that was ascribed to the revocation was that Symbiote had failed to show cause why the licences should not be revoked.

[16] Symbiote protested the revocation. It contested the accuracy of the bank's information. It protested the OCG's securing of the information and it sought to get the police to investigate the validity of the documentation. It also contended that not only was Mr Neil never the chairman of its board or a signatory to its account, but that the prohibition of an association with Mr Neil was imposed after the grant of the telecommunication licences.

[17] Symbiote made representations to the Minister, who stayed the decision to revoke the licences in order to accommodate discussions with Symbiote and to facilitate the police investigations. On 12 June 2018, despite the fact that the police had not provided a report on their investigations, the Minister confirmed his revocation of Symbiote's licences.

[18] During the validity of its licences, Symbiote had invested heavily in its business. By the time of the revocation, on Symbiote's account, it had invested over US$79,000,000.00 in the enterprise, had over 75 employees and over 15,000 subscribers to its services. The spectrum licence, it pointed out, cost it US$20,833,332.00.

[19] Symbiote filed its application for leave to apply for judicial review, but the Minister and the OUR, appearing as an interested party, successfully resisted the application, as is evidenced by the decision of Stamp J.

**An overarching issue**

[20] Before analysing the issues identified in the introduction, it is necessary to analyse an issue that consumed much of the efforts of the parties, namely, whether it would be proper to grant a stay in connection with the Minister's decision. The conclusion will depend on the nature of the discretion, which the Minister exercised.

[21] Lord Gifford QC, for Symbiote, commenced his submissions by responding to one aspect of written submissions by Miss Jarrett for the Minister. Miss Jarrett's stance was that the Minister, having confirmed the revocation of the licences, had no further authority under the Act. She argued that his decision was an exercise of executive authority and that authority was spent and therefore was not amenable to a stay of execution. Learned counsel relied upon **Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and another** [1991] 4 All ER 65; [1991] UKPC 19.

[22] In responding to those submissions, Lord Gifford argued that the submissions by Miss Jarrett did not apply in these circumstances. Learned Queen's Counsel sought to distinguish **Vehicles and Supplies** from the present case. He submitted that the Privy Council's guidance in **Vehicles and Supplies** was restricted to executive decisions and did not apply to circumstances, such as in the present case, where the Minister's decision emanated from a quasi-judicial process. Learned Queen's Counsel stressed that the difference was critical.

[23] Lord Gifford also submitted that the decision in **Vehicles and Supplies** was open to criticism. He argued that the decision was too restrictive and that that is perhaps because **R v Secretary of State for Education and Science, Ex parte Avon County Council** [1991] 1 QB 558 was not cited to the Board during submissions. He also submitted that other cases had queried the scope of the decision in **Vehicles and Supplies**. He cited **Digicel (Jamaica) Limited v The Office of Utilities Regulation** [2012] JMSC Civ 91 as an example of such a case.

[24] Miss Jarrett, and in her turn, Mrs Gentles-Silvera, appearing for the interested party, the OUR, argued that the Minister's decision was not subject to a stay of execution. Both counsel emphasised the points in Miss Jarrett's written submissions, as set out above.

[25] Miss Jarrett contended that the decision in **Vehicles and Supplies** is relevant to the present case. Learned counsel submitted that, despite the fact that there have been decisions, which sought to question the interpretation of the Privy Council in **Vehicles and Supplies** it is still the binding authority in this area of the law. She relied, in part, on **The Contractor-General of Jamaica v Cenitech Engineering Solutions Limited** [2015] JMCA App 47, in support of her submissions.

[26] Both Miss Jarrett and Mrs Gentles-Silvera sought to demonstrate that an examination of the relevant portions of the Act showed that whereas the OUR could be said to be exercising a quasi-judicial authority, the Minister's role on the issue of revocation of the licences was entirely an executive function.

[27] Mrs Gentles-Silvera submitted that the order for the stay of implementation, which was made by the court below and this court, was for a stay of implementation, and not a stay of the Minister's order. The practical effect of the order for the stay of implementation, she argued, is that the regulator, OUR, would not be able to impose the statutory sanctions against Symbiote for operating without a licence.

[28] In analysing these submissions, the question is whether the Minister's exercise of discretion is purely executive or is, in fact, quasi-judicial.

[29] In **Vehicles and Supplies**, the Privy Council found that where an executive decision had been made and there was no further step for the decision maker to take, the decision was not amenable to an order for stay of proceedings. Lord Oliver of Aylmerton, who delivered the opinion of the Board, found that the decision of the Minister of Foreign Affairs, Trade and Industry, in that case, had performed "a purely executive function which [was] exhausted once the determination had been made" (page 68 of the report). He said that the implementation of the determination devolved upon someone else.

[30] Lord Oliver went on, at page 71 of the report, to explain why it was meaningless to order a stay of proceedings in such circumstances. He said in part:

> "…A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place. It is not an order enforceable by proceedings for contempt because it is not, in its nature, capable of being 'breached' by a party to the proceedings or anyone else. **It simply means that the relevant court or tribunal cannot, whilst the stay**

> **endures, effectively entertain any further proceedings except for the purpose of lifting the stay and that, in general, anything done prior to the lifting of the stay will be ineffective,** although such an order would not, if imposed in order to enforce the performance of a condition by a plaintiff (eg to provide security for costs), prevent a defendant from applying to dismiss the action if the condition is not fulfilled (see *La Grange v McAndrew* (1879) 4 QBD 210). Section 564B(4) of the Civil Procedure Code [which is equivalent to rule 56.4(9) of the Civil Procedure Rules] provides:
>
> > '… the grant of leave under this section to apply for an order of prohibition or an order of *certiorari* shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the court or judge otherwise orders.'
>
> **This makes perfectly good sense in the context of proceedings before an inferior court or tribunal, but it can have no possible application to an executive decision which has already been made**. **In the context of an allocation which had already been decided and was in the course of being implemented by a person who was not a party to the proceedings it was simply meaningless**…." (Emphasis supplied)

[31] The submission that the Minister's decision was quasi-judicial, and therefore amenable to a stay, does not appear to have much force. Firstly, section 69 of the Constitution provides that the Minister is a member of the executive of the Government. Secondly, unlike other legislation, such as the Contractor-General Act, which stipulates the conduct of what is deemed, by that Act, as a judicial process, the Act does not stipulate such a procedure for the Minister to follow in carrying out his duties with regard to the revocation of a licence. For that reason, cases such as **Cenitech** are distinguishable from the circumstances of the present case. In **Cenitech**, Phillips JA, at

paragraph [69], sets out some of this court's reasons for finding that the investigative process by the Contractor-General is a judicial process. She said:

> "[69] By virtue of these sections, it is clear that the applicant [the Contractor-General] has considerable power when investigating all matters related to the contract award process **and when exercising these powers he is indeed carrying out a judicial function**. Section 16 of the Contractor-General Act empowers the applicant to undertake an investigation on his own initiative and section 17 allows the applicant to conduct hearings to further his objectives in ensuring lawfulness and transparency in the contract award process. In these hearings, the applicant has the power to hear and receive evidence from persons on oath. **Section 18 of the Contractor-General Act classifies these hearings as judicial proceedings within the meaning of section 4 of the Perjury Act which defines judicial proceedings as a 'proceeding before any court, tribunal, or person having by law power to hear, receive and examine on oath'**. In conducting these hearings, the applicant has the power of a Supreme Court judge." (Emphasis supplied)

[32] In the present case, an examination of section 14 of the Act demonstrates the difference in the legislature's approach between a quasi-judicial process and an executive one. Subsections (1), (7) and (8) provide steps which the OUR should take if it is of the view that a person has jeopardised his licence by doing, or omitting to do, something. The OUR is required to conduct an investigation and, thereafter, to make a recommendation to the Minister. The Minister, before acting upon the recommendation, is required to "afford the licensee an opportunity to show cause why the licence should not be suspended or revoked" (subsection (5)). The relevant portions of section 14 state, in part:

"(1) Where the [OUR] has reason to believe that a licensee has contravened the conditions of the licence or, as the case may be, has failed to pay any amount required under section 16, the Office shall give to that licensee notice in writing–

(a) specifying particulars of such contravention; and

(b) requiring the licensee to justify its actions to the Office or otherwise to take such remedial action as may be specified in the notice.

(2) …

(3) …

(4) …

(5) **Before suspending or revoking a licence, the Minister shall direct the** [OUR] **to notify the licensee accordingly and shall afford the licensee an opportunity to show cause why the licence should not be suspended or revoked**.

(6) Subject to subsection (7), the [OUR] may recommend to the Minister that a licence be suspended or revoked, as the case may be, if, on its own initiative or on representations made by any other person, the [OUR] is satisfied that the licensee has–

(a) knowingly made any false statement…;

(b) knowingly failed to provide information or evidence that may have resulted in a refusal to grant a licence;

(c) failed to comply…;

(d) contravened any provision of this Act…;

(e) contravened or failed to comply…;

(f) provided services not authorized by its licence;

(g) operated a facility without a carrier licence;

(h) failed to make payments in a timely manner….

(7) **Before taking action under subsection (6), the** [OUR] **shall carry out such investigations as may be necessary and afford the licensee concerned an opportunity to be heard**.

(8) For the purposes of this section, the [OUR] may–

(a) **summon and examine witnesses**;

(b) **call for and examine documents**;

(c) **require that any document submitted be verified by affidavit**;

(d) adjourn any investigation from time to time.

(9) …" (Emphasis supplied)

[33] It is accepted that the section demonstrates that the Minister is charged with conducting an executive exercise. This is in contrast to the task assigned to the OUR, which may be said to be quasi-judicial. In the present case, it is also clear that the Minister, having confirmed the revocation of the licence, had no further authority or task to perform. Enforcement is, thereafter, left to the OUR. The main principle derived from **Vehicles and Supplies** is completely applicable. The Minister's decision is not subject to a stay of execution.

[34] **Avon** is authority for the principle that a stay is available in respect of an executive decision, where permission has been granted for applying for judicial review aimed at quashing that decision. Admittedly, **Avon** conflicts with the decision in **Vehicles and Supplies** as to the power of the court in those circumstances.

[35] **Vehicles and Supplies** has also been criticised. For example, in **R (H) v Ashworth Special Hospital Authority** [2002] EWCA Civ 923; [2003] 1 WLR 127,

Dyson LJ, in the English Court of Appeal, described it as a "narrow interpretation" of the relevant law. He said, in part, at paragraph 42:

> "…In *Avon*, Glidewell LJ said that the phrase 'stay of proceedings' must be given a wide interpretation so as apply to administrative decisions. In my view it should also be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. **A narrow interpretation, such as that which appealed to the Privy Council in *Vehicle* [sic] *and Supplies* would appear to deny jurisdiction even in [certain cases]**. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review…." (Emphasis supplied)

The English Court of Appeal was not burdened with choosing which course to follow. Dyson LJ acknowledged that **Avon** was binding on that court.

[36] A decade earlier, the contrasting positions of **Avon** and **Vehicles and Supplies** were considered in **R v Secretary of State for the Home Department, ex parte Muboyayi** [1991] 4 All ER 72. In that case, it was considered that, whilst **Avon** was binding on the English Court of Appeal, the House of Lords, by virtue of the decision in **Vehicles and Supplies**, might well overturn a decision following **Avon**. Lord Donaldson of Lymington MR, in **Muboyayi**, said, in part, at page 81 of the report:

> "This raises the question of how this should be done. The *Factortame* case [1989] 2 All ER 692, [1990] 2 AC 85 is authority for the proposition that an interim injunctive order cannot be made against the Crown. However, this court has held in *R v Secretary of State for Education and Science, ex p Avon CC* [1991] 1 All ER 282, [1991] 1 QB 558 that it is within the jurisdiction of the court to 'stay' a decision of a Secretary of State and Brooke J could therefore have stayed the decision to refuse leave to enter. This, perhaps only temporarily, would have put the applicant back into the

> position of someone seeking leave to enter who could be detained pending a new decision being made. There are only two possible disadvantages to this remedy. The first is that it has been suggested on the strength of a very recent decision of the Privy Council (see *Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd* [1991] 4 All ER 65, [1991] 1 WLR 550) that, **whilst the *Avon* case is binding upon this court and upon the High Court, it might not survive an appeal to the House of Lords**. As to this I express no opinion…." (Emphasis supplied)

[37] The decision in **Avon** is not available to this court as an authority for this point. It is not bound by **Avon**. It is, however, for good or ill, bound by **Vehicles and Supplies**.

[38] An application for staying the Minister's revocation order, pending appeal, cannot properly be granted.

[39] It is not by accident, therefore, that the wording of the stay granted in the court below, and later in this court, was not aimed directly at the Minister's decision but rather at the implementation. The present application also asked for a stay of the implementation of the Minister's order. It sought, in part:

> "An interim injunction or other relief staying the implementation of the [Minister's] revocation order pending the hearing of the Appeal against the order of [Stamp J]…"

[40] The law regarding stays and its application to the issues that are relevant to this case will be discussed below.

**The law in respect of applications for stay of execution**

[41] Although the present application is not for a stay of the execution of a judgment of the court below, this court may make any order that the court below could have made (see rule 2.15(b)(b) of the Court of Appeal Rules (CAR)). The principles that are applicable to a stay of execution of a judgment may be applied in this instance.

[42] The principles have been well settled since the decisions in **Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited** [1997] EWCA 2164 and **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, and have been applied in a number of decisions of this court.

[43] Phillips LJ, in **Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited** stated the correct approach in this way:

> "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…." (Emphasis supplied)

[44] Clarke LJ, in **Hammond Suddard**, also succinctly set out the relevant principles, at paragraph 22 of his judgment. There, he said:

> "…Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is **whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay**. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?" (Emphasis supplied)

[45] Phillips JA in **Peter Hargitay v Ricco Gartmann** [2015] JMCA App 44, at paragraph [60], adopted the principles set out in **Hammond Suddard**. The relevant principles to be extracted from the cases are that two main tests should be applied in determining whether to grant a stay of execution, they are:

(i) whether the appeal has a real prospect of success;

and,

(ii) where lies the greater risk of injustice if the court grants or refuses the application.

From **Combi (Singapore) Pte Limited**, it may be said that an appeal with a real prospect of success is a precondition to assessing the issue of injustice.

**The prospects of success of the appeal**

[46] Symbiote filed several grounds of appeal. Lord Gifford, on behalf of Symbiote, candidly abandoned grounds 1 and 2. Those remaining are:

"1. …

2. …

3. The learned judge erred in not holding that the documents obtained by the Contractor General from the National Commercial Bank, which were sent to the OUR and were relied on by them, were illegally obtained, since as confidential documents they could only be lawfully obtained by the Contractor General for the purposes of an investigation by him, and there was no evidence of any such investigation.

4. The learned judge erred in not appreciating that the NCB documents were self-contradictory on their face, in that (a) they purported to say that both Lowell Lawrence and George Neil were chairmen of the Applicant; (b) they purported to say that George Neil and Lowell Lawrence were signatories whereas the only cheque negotiated on the account was signed by Lowell Lawrence and Natalie Neil; (c) they purported to state that George Neil was a director when the Applicant's annual return did not mention him.

5. The learned judge's finding that the Applicant did not meet the threshold test was contrary to the preponderance of the evidence which showed that the Respondent acted on manifestly inaccurate information in circumstances where he knew that the Applicant had reported the matter to the Police for investigation.

6. The learned judge erred in holding that the Respondent acted fairly and rationally in that; after asking for a police report on the investigation of the Applicant's complaint about the NCB documents to aid his reconsideration, and after having received a police report which showed that a serious investigation was in progress, he made findings of fact as to the interpretation of the documents without awaiting the outcome of the Police investigation, in circumstances were [sic] there was no evidence of any default by the Applicant in the operation of their business under the licences granted to it.

7. The learned judge erred in holding that the Respondent acted reasonably and was not required to wait indefinitely for the police report, when the evidence showed that the Respondent knew that the

police had scheduled a forensic examination of the bank documents for May 31, 2018 and the Minister's decision was made on or before June 12, 2018.

8. The learned judge erred in law in holding that the Minister's refusal to grant the Applicant an oral hearing was not unfair or in breach of the rules of natural justice; and/or in holding that the instant case is not one in which an oral hearing was required when the evidence showed that the key facts were a matter of dispute, and by allowing an oral hearing, (whether before him or the OUR); the full circumstances of the creation of the NCB documents could have been investigated.

9. The learned judge erred in holding that the documents referred to and enclosed in the Bank's letter of September 19, 2017, which formed part of the OUR's consideration in making its recommendation to the Respondent; and which documents were not disclosed to the Applicant or to the Court were not relevant and it was reasonable for the Respondent to withhold disclosure of those documents.

10. The learned judge erred in law in holding that; the 'harsh', 'draconian', or 'extreme' nature of the Respondent's decision and the consequential impact on the Applicant's huge financial investment which it made on the faith of the licences; was not a relevant consideration in determining whether or not leave ought to be granted. The learned judge ought to have considered whether the penalty of revocation was wholly disproportionate to the alleged default of the Applicant in not revealing the alleged role of George Neil in the affairs of the Applicant."

[47] At the time of first granting the stay of implementation of the Minister's revocation order, this court considered that the appeal had some prospects of success. It therefore granted permission to appeal. The hearing was, however, at short notice, with limited participation from the Minister's counsel and without the participation of

counsel for the OUR. In fairness, it must be noted that Symbiote was not obliged to give notice to either the Minister or the OUR that it intended to apply for permission to appeal. It was entitled, by rule 1.8(4) of the CAR to have made the application in the way that it did, and without notice to the other parties.

[48] All parties later advanced complete and detailed submissions during the course of the hearing of this application. During the course of the submissions, the court brought to the attention of the parties that rule 1.13 of the CAR allows it to set aside a grant of permission to appeal.

[49] The learned judge's detailed reasons for his decision are not yet available. He, however, did give an oral outline of his reasons. Counsel who appeared in the court below recorded that outline. They have helpfully reduced them to writing and have made them available to this court.

[50] It is important to note that the learned judge was exercising a discretion in deciding to refuse leave to apply for judicial review. It is similarly important to bear in mind that in assessing the complaints against the learned judge's decision, this court will not lightly set aside the judge's decision. In order to have this court set aside his decision, on the hearing of an appeal, it would be incumbent on Symbiote to show that the learned judge was manifestly in error in coming to that decision (see **Hadmor Productions Ltd and Others v Hamilton and Another** [1983] AC 191, at page 220A - F).

[51] It is also necessary to point out, at this stage, that Symbiote bore the responsibility, before the learned judge, to demonstrate that it had an arguable case with a realistic prospect of success (see **Sharma v Brown-Antoine and Others** [2006] UKPC 57); (2006) 69 WIR 379).

[52] This is not the appeal from the learned judge's decision, but the analysis of the prospects of success of the appeal requires a general assessment of the broad issues sought to be advanced in the appeal.

*a. The use of the documents secured from the bank*

[53] In grounds 3, 4 and 5, Symbiote complained about the use of the documents obtained from its bankers. It asserted that the OCG's acquisition of the documents was unlawful, having been made without Symbiote's approval and without the OCG having secured them in the course of an authorised investigation.

[54] Lord Gifford accepted that there is a common law principle that allows for the use of material, by courts, even if the method of acquisition is illegal, so long as it is relevant to the court's investigation. Learned Queen's Counsel submitted, however, that that principle was restricted to the criminal law and had no place in administrative law. He did not provide an authority for that proposition.

[55] Both Miss Jarrett and Mrs Gentles-Silvera contended that the documents were properly acquired from the bank by the OCG and that the OCG was entitled to pass them on to the OUR. Mrs Gentles-Silvera cited the case of **Kuruma Son of Kaniu v The Queen** [1954] UKPC 43; [1955] AC 197 in support of her submission that

relevance is the main criterion for the admission of evidence such as the documents from the bank. She argued that the relevance of the documents was manifest.

[56] The authorities do not support Lord Gifford's stance. In this jurisdiction, the Privy Council in **Herman King v The Queen** (1968) 10 JLR 438, on an appeal from this court, set out the general principles applicable to this issue. The case involved an illegal search by the police, which resulted in Mr King being charged for possession of ganja. The headnote to the report is reflective of the Privy Council's decision. It states in part:

> "…although there was no legal justification for the search, this was not a case in which the evidence had been obtained by conduct of which the Crown ought not to take advantage. **The court had a discretion whether or not to admit the evidence and this discretion was not taken away by the protection against search of persons or property without consent enshrined in the Jamaican Constitution**. In the circumstances there was no ground for interfering with the way in which the discretion had been exercised. [*Kuruma Son of Kanju v R* [1955] AC 197] applied." (Emphasis supplied)

[57] From his submissions, Lord Gifford would not have taken issue with the statement ascribed to their Lordships. Learned Queen's Counsel's contention that the statement has no validity outside of the arena of the criminal law is, however, incorrect. In **In the matter of the Baronetcy of Pringle of Stichill** [2016] UKPC 16, the Privy Council relied on the principle of admissibility in respect of a complaint about a DNA sample, which was said to have been wrongfully used to challenge an entitlement to a baronetcy. The Board said, in part, at paragraph 79:

> "…**The English common law does not normally concern itself with the way evidence was obtained;**

> **improperly obtained evidence is admissible, although the court has a discretion to refuse to admit such evidence**: *Imerman v Tchenguiz* [[2010] EWCA Civ 908; [2011] Fam 116], paras 170 and 171 per Lord Neuberger MR….The Board does not consider that in this case a breach of the [the Data Protection Act 1998] would be a proper basis for excluding the DNA evidence, which is of central importance to the question which the Board must answer." (Emphasis supplied)

[58] The OUR was entitled, therefore, to use the documents in arriving at its recommendations to the Minister to revoke the licences.

[59] Symbiote's further complaint was that the documents secured from the bank contained inconsistencies and therefore should not have been relied upon by the OUR. It particularly identified the fact that, whereas on one of the documents, Mr Neil is identified as being Symbiote's chairman of its board of directors, another of the documents identifies Mr Lawrence as filling that role. Lord Gifford pointed out that there was a cheque that had been negotiated by the bank, which did not bear Mr Neil's signature, although the only two signators on the account, according to the documents supplied by the bank, were Messrs Neil and Lawrence.

[60] These complaints do not address the real issue, which is that a connection between Symbiote and Mr Neil, in any capacity, was prohibited. In respect of the cheque, Mrs Gentles-Silvera pointed out that it bore a date sometime after the dates on the documents supplied by the bank. The OUR, in its recommendation to the Minister, was entitled to rely on the contents of the documents, which, on their face, established a breach of the prohibition. The learned judge was entitled to find that these complaints

had no prospect of success on an application for judicial review of the Minister's decision.

[61] These grounds have no real prospect of success.

*b. The making of the decision to revoke despite the pending police investigation*

[62] The consideration of ground 5 overlaps with that of grounds 6 and 7. Symbiote's complaint in respect of these grounds was that the OUR and the Minister proceeded to act on the documentation received from the bank despite the fact that there was, to the knowledge of both, an ongoing police investigation concerning the provenance and validity of the documents. The resultant decision, therefore, Symbiote contended, was flawed, and the learned judge was wrong to have failed to give leave to apply for a judicial review of it.

[63] Symbiote's position in respect of the documentation secured from the bank is that there was a requirement for some documents to be re-done at the bank and that an officer from the bank had been entrusted with the company's seal in order to achieve the re-organization of the documents.

[64] The learned judge, based on the notes taken by counsel who appeared before him, addressed the issue. He found that the documentation was copious, that they originated from a reliable source, that is Symbiote's bank, and that despite many opportunities to do so, Symbiote had not refuted any association with Mr Neil. He found that the OUR did not act unreasonably and that the Minister could not be expected to

wait indefinitely for a police report, which, up to the time that the matter was before the learned judge, had not been produced.

[65] Lord Gifford contended that, in the light of Symbiote's stance, and the drastic step that the Minister contemplated, the learned judge ought to have found that the only reasonable step for the Minister to have taken was to await the result of the police investigation.

[66] In countering Symbiote's position, Miss Jarrett and Mrs Gentles-Silvera both pointed out that in the various affidavits produced by Symbiote, it has not said that any of the signatures on the various documents is a forgery or that the seal on the documents is not its seal.

[67] Lord Gifford's submission cannot be accepted. It would be unreasonable to require the OUR and the Minister to await a report, the production of which, neither had any control. Indeed, Miss Jarrett and Mrs Gentles-Silvera have stated that to this date, no such report has been produced. The OUR and the Minister both had an entire telecommunication industry to consider. To delay taking a step, which would avert a possible threat to that industry, or indeed the national security, could not properly be allowed, simply because it could have had a devastating effect on one participant in the industry. This is especially so when Symbiote's initial response, when the OUR asked it about the documentation, including signatures of, and references to, Mr Neil, was to attack the propriety of the acquisition of the documents rather than to provide a frank complete repudiation, or explanation, of those documents.

[68] It cannot properly be said that either the OUR or the Minister was wrong in their respective turns in taking the step that they did. The learned judge was not wrong in finding that this complaint had no reasonable prospect of success on an application for judicial review.

[69] These grounds of appeal have no real prospect of success.

*c. The failure to grant Symbiote an oral hearing*

[70] In respect of ground 8, Symbiote complained that the Minister failed to give it a fair opportunity to convince him that he ought not to have revoked its licences. This complaint is based on the fact that the Minister only considered the written representations made by Symbiote in response to his request for it to show cause why the licences ought not to have been revoked.

[71] Concerning the Minister's failure to grant Symbiote an oral hearing before revoking the licences, Lord Gifford accepted that natural justice did not always require an oral hearing. He submitted, however, that where there are issues as to fact, the proper course would be for the relevant tribunal to conduct an oral hearing. The failure of the Minister to do so in this case, Lord Gifford contended, was incorrect and was properly to be the subject of an application for judicial review. Learned Queen's Counsel relied, in part, on the cases of **R v Army Board of Defence Council, ex parte Anderson** [1991] 3 All ER 375 and **R (on the application of Smith) v Parole Board; R (on the application of West) v Parole Board** [2005] UKHL 1, in support of his submissions.

[72] Mesdames Jarrett and Gentles-Silvera both contended that the matters in issue before the Minister did not require an oral hearing. The documentation, learned counsel submitted, spoke for itself and required no explanation, which had not been requested in writing of Symbiote, and to which it had provided a response.

[73] There is no dispute between learned counsel for the parties on the relevant principle involved in the analysis of this ground. Taylor LJ, in **R v Army Board of Defence Council**, set out the principle at page 387 of the report. He said in part:

> "(2) The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision-making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task **it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing**… **Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made. It will also depend upon whether there are substantial issues of fact which cannot be satisfactorily resolved on the available written evidence. This does not mean that, whenever there is a conflict of evidence in the statements taken, an oral hearing must be held to resolve it. Sometimes such a conflict can be resolved merely by the inherent unlikelihood of one version or the other.** Sometimes the conflict is not central to the issue for determination and would not justify an oral hearing. Even when such a hearing is necessary, it may only require one or two witnesses to be called and cross-examined." (Emphasis supplied)

[74] The House of Lords took a similar stance in **Regina v Parole Board**. Lord Bingham of Cornhill, in delivering their Lordships' judgment, re-affirmed that the

common law duty of procedural fairness did not require an oral hearing in every case. He went on to state, however, that there are some instances in which oral hearings are beneficial, in order for the tribunal to be able to communicate its concerns to the party likely to be affected by its decision.

[75] Guidance may also be gleaned from another decision of the Privy Council, namely, **Narayansingh (Barl) v The Commissioner of Police** [2004] 64 WIR 392; [2004] UKPC 20. Their Lordships, in stressing the requirement for fairness in the procedure adopted by the tribunal that is tasked with an administrative power, accepted Lord Mustill's opinion in **R v Secretary of State for the Home Department, ex parte Doody** [1994] 1 AC 531. Lord Mustill, at page 560, said that "[t]he principles of fairness are not to be applied by rote identically in every situation" (paragraph 16 of **Narayansingh**). Their Lordships further accepted as a principle that the demands of fairness "is dependent on the context of the decision, and this is to be taken into account in all its aspects" (paragraph 16 of **Narayansingh**). They found in the circumstances of that case, that a fair procedure demanded that further inquiries should have been made before the tribunal made its decision.

[76] The principles set out in those cases are not doubted. As pointed out by Miss Jarrett, however, the present case did not require an oral hearing. The issue was whether Symbiote, despite its knowledge of a prohibition of association with Mr Neil, had engaged Mr Neil in its business affairs. The bank documents, on their face, showed that there had been such an engagement. Symbiote was requested to address the OUR on the import of the documentation. It knew precisely what the OUR's and the

Minister's concerns were, yet it failed to address them in a forthright manner, engaging instead in technicalities.

[77] The learned judge was not in error in finding that there was no likelihood of success in having this aspect made the subject of an application for judicial review. This ground has no real prospect of success on appeal.

d. *The failure to provide Symbiote with some of the documentation used by the OUR in arriving at its recommendation*

[78] In support of ground 9, Lord Gifford submitted that the OUR, in sending the bank documents to Symbiote, failed to send with them, the bank's covering letter for the documents, and the answers that the bank provided to questions that had been posed to it by the OCG. Learned Queen's Counsel complained that the failure to provide those documents was in breach of the principles of natural justice. He relied, in part, for this ground on **R v Army Board of Defence Council**.

[79] In answer to these complaints, Mrs Gentles-Silvera submitted that the failure to send the documents did not place Symbiote at any disadvantage. Learned counsel submitted that the information communicated by the covering letter and the answers provided by the bank, was the same information that that was set out in the source documents that had been sent to Symbiote. There was, therefore, she submitted, nothing that had not been communicated to Symbiote. The letter and the answers, she pointed out, were placed before the learned judge and it was plain that Symbiote had not been disadvantaged by the OUR's approach.

[80] Mrs Gentles-Silvera is correct in her analysis of the documents. An examination of the documents, which the OUR retained, revealed that the covering letter merely listed the documents that the bank had sent to the OCG, whilst the answers to the questions asked could all be gleaned from the face of the documents, which were sent to Symbiote. The only other documents were two forms of statutory declarations by one of the bank's officials, which certified the truth of the answers provided to the OCG. The OUR did not produce these forms of declaration to Symbiote. No disadvantage to Symbiote could have resulted from the failure to provide them.

[81] This ground also has no likely prospect of success.

e. *The relationship between the alleged breach and the sanction applied*

[82] In respect of ground 10, Lord Gifford contended that the action taken by the Minister of revoking Symbiote's licence was entirely disproportionate to the infraction that Symbiote is alleged to have committed. Lord Gifford pointed to the label, "adverse traces", with which the OUR had associated Mr Neil. Learned Queen's Counsel submitted that the term bore no precise meaning. The effect of his submission is that it was entirely disproportionate to revoke the licence of an entity, which had invested so heavily in the industry, based on an infringement of a condition bearing such a nebulous term.

[83] He submitted that the action would also be subject to challenge based on **Wednesbury** unreasonableness (see **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1947] 2 All ER 680, [1948] 1 KB 223).

[84] Miss Jarrett contended that Symbiote's complaint, about the lack of proportionality should not be considered, as:

a. it was not a ground before the learned judge and therefore is not properly a ground for appeal;
b. the principle of proportionality had been introduced to English law by way of the European Court of Human Rights, but it was not a ground for judicial review under Jamaican law, and requires legislation to be applicable, as had been done in England; and
c. the test of proportionality was not the same as the test for irrationality under the principles in **Wednesbury**.

She cited **R v Secretary of State for the Home Department, Ex parte Brind and Others** [1991] 1 AC 696; [1991] 1 All ER 720, in support of her submissions on the need for legislation to allow for the analysis of the principle of proportionality.

[85] Learned counsel accepted that Sykes J (as he then was) applied the test of proportionality in **The Northern Jamaica Conservation Association and others v The Natural Resources Conservation Authority and another (No 2)** (unreported) Supreme Court, Jamaica, Claim No HCV 3022/2005, judgment delivered 23 June 2006). She submitted, however, that he also decided that issue on other bases.

[86] Miss Jarrett was at pains to outline evidence, which she contended, demonstrated that the Minister's decision could not be said to have been irrational. She argued that Symbiote:

a. undoubtedly knew of the OUR's stance against an association between Mr Neil and Symbiote;

b. deliberately ignored that stance taken by the OUR, as the regulator of the telecommunications sector, and had involved Mr Neil in its business;

c. did not inform the OUR about Mr Neil's involvement; and

d. when confronted with evidence of a breach, sought to avoid a straightforward response to the regulator by resorting to technical devices and circumvention.

[87] Learned counsel argued that in the face of that approach by Symbiote, the OUR's recommendation to the Minister, and the Minister's decision were undoubtedly warranted. It cannot be ignored, Miss Jarret stated, that the OUR was the regulator of the industry. Its authority, she submitted, should not be undermined by the court.

[88] Miss Jarrett's submissions and the authority of **R v Secretary of State for the Home Department, Ex parte Brind** are, with respect, correct on the issue of proportionality. In that case, the Court of Appeal of England, the decision of which was upheld by the House of Lords, considered a complaint that an executive order was disproportionate to the mischief that it sought to prevent. The headnote of the report of the Court of Appeal's decision ([1990] 1 All ER 469) accurately states that the court held, in part:

> "(3) **The doctrine of proportionality had no place in English law as a separate ground for the judicial review of administrative action since it was but one aspect of the test of reasonableness**. Accordingly, the fact that a minister's decision was not in proportion to the benefit resulting from or mischief prevented by the decision was not by itself sufficient to render the decision unlawful and was only relevant if it showed that the minister's action was perverse, unreasonable or irrational…." (Emphasis supplied)

[89] In the House of Lords, their Lordships generally agreed that the doctrine of proportionality did not then form part of the English common law. Lord Ackner, at page 762 of the Appeal Cases report, stated that the test of proportionality was a more severe test than that of **Wednesbury** unreasonableness. He said, in part:

> "[The attack of the executive decision as being ultra vires because it was done in a disproportionate manner] is not a repetition of the *Wednesbury* 'irrational' test under another guise. Clearly a decision by a minister which suffers from a total lack of proportionality will qualify for the *Wednesbury* unreasonable epithet. It is, ex hypothesi, a decision which no reasonable minister could make. **This is, however, a different and severer test**." (Emphasis added)

His Lordship expressed the view that the concept of proportionality, emanating from Europe, and being comprised in the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), required legislation in order to be included in English law. He said, in part, at page 763:

> "…Unless and until Parliament incorporates the Convention into domestic law, a course which it is well known has a strong body of support, there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country."

[90] Lord Lowry agreed with Lord Ackner. He was of the view that the test of proportionality would encourage courts to be more inclined to interfere with executive decisions. He was, however, of the view that that was not a practical idea. He said in part at page 766:

> "**The first observation I would make is that there is *no* authority for saying that proportionality in the sense in which the appellants have used it is part of the English common law and a great deal of authority the other way**…." (Emphasis supplied)

He went on to expand on the reasons, he thought, made the introduction undesirable. It is unnecessary to set them out here.

[91] None of the other Law Lords dissented from those views, although Lord Roskill, with whom Lord Bridge of Harwich agreed, did contemplate that the doctrine may be included in future developments of the law.

[92] It is noted, however, that after **R v Secretary of State for the Home Department, Ex parte Brind** was decided, that England passed legislation dealing with the issue. Section 2(1)(a) of the Human Rights Act, 1998 stipulates that in considering rights which flow from the Convention, English courts should take into account the judgments, decisions, declarations and advisory opinions of the European Court of Human Rights. The Act further states, in section 3(1), that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". Those provisions do not have an equivalent in Jamaican law.

[93] Miss Jarrett's submissions, on the issue of **Wednesbury** unreasonableness, are also well taken. The circumstances of the case, as revealed by the background of the case set out above, show that the OUR and the Minister, in considering the matter of revocation of the licences, would be of the view that Symbiote:

a. would undoubtedly have known, based on the reason given for the first refusal of its application for a telecommunication licence, of the OUR's stance against Mr Neil being involved in the telecommunication industry;

b. would have had the attitude of the officials reinforced by the condition imposed for the grant of the spectrum licence;

c. had, on the face of the documents produced by the bank, involved Mr Neil in its business;

d. did not inform the OUR about Mr Neil's involvement;

e. when confronted with its breach, sought to avoid a straightforward response to the OUR by resorting to a technical response; and

f. importantly, did not disavow any business relationship with Mr Neil.

[94] The Minister could not, therefore, be said to have acted irrationally or in a way that no Minister could have properly acted in the circumstances.

[95] This issue has no real prospect of success on an appeal.

**Where lies the greater risk of injustice if the court grants or refuses the application**

[96] In the absence of grounds which have a real prospect of success on appeal, there should be no order for a stay of execution, or implementation, pending the outcome of an appeal. In recognition, however, of the significant time and effort expended by counsel for the respective parties in preparing and presenting the arguments concerning the other issues involved in the application for the stay of the implementation of the Minister's order, these matters will be considered below.

[97] In supporting this application for the stay of implementation of the revocation order, Mr Lawrence, in his affidavit on behalf of Symbiote, has stressed that Symbiote has suffered and will continue to suffer irremediable and incalculable financial and commercial hardship. Symbiote asserted that just before the temporary stay was granted by this court, one of its service providers, which is also a competitor, had discontinued interconnection service with it, and has refused to restore the service. Symbiote pointed to the massive financial investment that it has made in reliance on its licences. It contended that, without a stay of the Minister's revocation:

a. it would be obliged to cease operating;

b. a successful appeal will be rendered nugatory, and it will have to face its lenders, customers, staff and other contracting parties to whom it is obligated.

[98] The OUR pointed to the consequences of the grant of a stay. Mr Ansord Hewitt, on behalf of the OUR, in an affidavit in opposition to the application for the grant of the stay, pointed out that even if the court granted a stay, the revocation would still be extant. The consequence of that situation, he said, is that any operation by Symbiote would be illegal, as it would be operating without the benefit of a licence, in breach of the Act. The effect of the stay, he further contended, would be, from the standpoint of regulation of the industry, that the relevant authorities would be prevented from enforcing the penal consequences of the illegal operation.

[99] Mr Hewitt also asserted that continued operation by Symbiote, in breach of the provisions of the Act, would have other consequences. In summary these are:

a. uncertainty would exist in the industry as to Symbiote's status, as providers and customers would be unclear as to whether to enter into contracts, or otherwise deal with Symbiote, which would be an unlicensed operator;

b. inability on the part of OUR to mediate in any disputes between Symbiote and any other party, including complaints by subscribers about Symbiote's services; and

c. a possible increase, with any new subscribers, in the number of persons who would have incurred costs to access Symbiote's services, and found themselves stranded if the court should uphold the revocation order.

[100] Lord Gifford supported Symbiote's stance by stressing the massive financial investment that Symbiote has made and the devastating impact that the absence of a stay would have.

[101] Mrs Gentles-Silvera, on this issue, stressed that to grant a stay of implementation of the Minister's decision would result in a highly unsatisfactory state of affairs. It would mean, she submitted, that the OUR would be unable to carry out its mandate as regulator, insofar as Symbiote was concerned. Symbiote would be operating without a licence, yet OUR could not enforce the sanctions provided by the Act for the prevention of such an operation.

[102] Mrs Gentles-Silvera, like Miss Jarrett, submitted that for Symbiote to be allowed to operate, the only proper approach in the circumstances would be the imposition of a mandatory injunction for the Minister to re-instate the licences. The court could only grant a mandatory injunction, learned counsel submitted, if it held the view that Symbiote would most likely succeed in its contentions. This required a higher standard in terms of prospects of success, she submitted. It was a standard, she argued, that Symbiote's case did not attain. She cited, among others, **Shepherd Homes Ltd v Sandham** [1971] Ch 340; [1970] 3 All ER 402 in support of her submission.

[103] A comparison of the competing circumstances, in summary, shows that if the stay were granted, this court would be facilitating Symbiote's operation in breach of the Act, whereas a refusal of a stay would mean significant financial loss to Symbiote.

[104] The relevant provisions of the Act support the OUR's contentions. Firstly, section 60 of the Act stipulates that if the Minister himself does not stay a revocation order, it remains in effect. The relevant portion of the section states:

> "(2) Where an application is made [for a reconsideration of the Minister's decision], the Minister may–
>
> (a) order that the decision to which it relates shall not have effect until the matter has been reconsidered and further determined by him; and
>
> (b) confirm, modify or reverse that decision or any part thereof.
>
> (3) **Where no order is made under subsection (2)(a), the decision shall remain in effect**." (Emphasis supplied)

[105] The second point to be noted is that, subject to certain exceptions, the Act prohibits any person from providing telecommunication services without a licence. The exceptions do not apply to Symbiote. Section 9 of the Act states, in part:

> "9.–(1) A person shall not–
>
> (a) own or operate a facility in Jamaica unless that person is the holder of a carrier licence granted under section 13;
>
> (b) provide specified services to the public by means of that facility unless the person is also the holder of a service provider licence granted under section 13;
>
> (c) sell, trade in or import any prescribed equipment unless that person is the holder of a dealer licence granted under section 13;
>
> (d) engage in bypass operations.

> (2) A person shall not provide a specified service to the public in Jamaica unless that person is the holder of a service provider licence granted under section 13."

[106] The point made by Miss Jarrett and Mrs Gentles-Silvera, in this regard, necessarily carries much force. A mere stay, by this court, of the Minister's order would leave Symbiote in the situation where it would be operating in breach of the Act. Only a repeal of the order would create a situation, which would properly allow Symbiote to continue to operate.

[107] This court would only issue an order repealing the Minister's revocation, if it felt a high degree of assurance that Symbiote would succeed on appeal. Such an order would be akin to the grant of a mandatory injunction. The principles which guide such a grant are recognised in **Shepherd Homes Ltd v Sandham** and **Locabail International Finance Ltd v Agroexport and Others – "The Seahawk"** [1986] 1 All ER 901. It cannot be said, at this stage, that the court has such a degree of assurance. Although this court has only had an outline of the learned judge's findings in the court below, there is nothing which appears to be obviously in breach of any principles of law or practice, or which is obviously inconsistent with the evidence. In that context, at least three factors militate against such a finding:

a. this court will not lightly disturb an exercise of the learned judge's discretion;

b. there is authority from the Privy Council decision of **Vehicles and Supplies**, that where an executive

decision has been made, the court cannot properly grant a stay of the decision; and

c. when Symbiote refused to provide the OUR with its banking information, it played a significant part in the resultant OUR recommendation to the Minister.

[108] On the other side of the injustice equation is Symbiote's possible financial loss. Financial loss is not usually an indicator of irreparable harm. Two further concepts must be considered:

a. litigation may allow for the recovery of damages; and

b. an injured party should seek to mitigate his loss.

[109] Symbiote has not shown that financial loss, though significant, will cause irreparable harm. Whereas it has pointed to the large value of its investment in the enterprise, it has not said that it would not be able to recoup any of it, for example, by sale of the equipment to another licensee. Indeed, Mr Hewitt deposed that, since Stamp J's decision, Symbiote was in discussions concerning the transfer of its facilities to another licensee. It also cannot be ignored, in this context, that Symbiote is not a well-established entity; it has been operating for less than four years. Its presence in the industry is, on Mr Hewitt's evidence, minimal, as its market share is less than 1% of the island's mobile data customer base.

[110] The balance of injustice is not in Symbiote's favour.

**Reversal of the grant of permission to appeal**

[111] Based on the analysis of the grounds of appeal, it is concluded that as the grounds of appeal have no real prospect of success, the permission to appeal that was originally granted on 17 December 2018 should be set aside in whole.

**Summary and disposal**

[112] In its application for leave to apply for judicial review before Stamp J, Symbiote was obliged to demonstrate to the learned judge that it had an arguable case with a realistic prospect of success. The learned judge was at that stage empowered to exercise a discretion as to whether he should grant the application. This court's approach to applications for leave to appeal against exercises of such discretion is guided by the principle that it will not set aside the learned judge's decision on the basis that it would have decided the matter in some other way. Instead, the court will only set aside the learned judge's decision if he has made some error in law, or otherwise had arrived at a decision at which no reasonable judge could have arrived.

[113] An analysis of the grounds has not led the court to the view that the learned judge made any error in the exercise of his discretion. The necessary consequence of that view is that the appeal has no real prospect of success. That finding would normally obviate any need to consider the issue of the injustice to either party if a stay were granted or refused. Out of recognition for the commendable efforts of counsel, the issues concerning injustice were considered, nonetheless.

[114] The balance of the injustice equation, considered along the guidelines of **Hammond Suddard v Agrichem** is not in Symbiote's favour. Symbiote has not shown that a stay would result in less injustice in all the circumstances. The application for a stay of the implementation of the Minister's decision should therefore be refused.

[115] During the course of submissions, the court contemplated its power to set aside its original grant of permission to appeal. It has been decided, based on the analysis of the prospective grounds of appeal, that there is no proper basis on which to allow these grounds to be advanced on an appeal. The order granting permission to appeal must, therefore, be completely set aside.

[116] It is for those reasons that I agreed to the orders that have been set out in paragraph [1] above.

**MCDONALD-BISHOP JA**

[117] I have read, in draft, the reasons for judgment of Brooks JA. His reasoning accords with my own views. I have nothing to add.

**P WILIAMS JA**

[118] I too have read the draft reasons for judgment written by Brooks JA. His reasoning accurately reflects my own reasons for agreeing to the decision made.