IN THE SUPREME
COURT OF NAURU

Misc Cause No. 61 of 2016

BETWEEN:

Digicel Nauru Corporation

} **Plaintiff(s)**

AND

Secretary for Justice

} **1st Defendant**

AND

Minister for Telecommunications

} **2nd Defendant**

Before: F JITOKO, Registrar
Date of Hearing: 3rd August 2016
Date of Decision: 5th August 2016

APPEARANCES

For the Plaintiffs : V Clodumar
For the Defendant :

DECISION

This is an application for leave for judicial review in accordance with Order 38 rule 1(2) of the Civil Procedure Rules 1972. The application is made *ex parte* by originating summons and is supported by a statement setting out the name and

description of the applicant and the relief sought with the accompanying affidavits verifying the facts relied on.

Digicel (Nauru) Corporation (the Applicant), is a public company incorporated under the laws of Nauru. Through a shareholder's agreement of 20 June 2009, between the Applicant and the Government of the Republic of Nauru (the Respondent), the latter became a shareholder of the former. The Applicant is what is normally referred to in modern day colloquialism, a service provider, specializing in mobile communication, business solutions, media, and entertainment business here in the Pacific region as well as in other parts of the world.

On 8 June 2009, the Applicant was granted a 15 year telecommunication licence by the Respondent to operate and manage a complete telecommunication system on the island, including international gateways through which electronic communication are sent between the domestic network of one country and another. To enable the Applicant to achieve these ends it invested heavily on capital projects building up the telecommunication infrastructure on Nauru.

The Licence spelt out very clearly the terms and conditions of the Agreement as between the Applicant and the Respondent. Clause 18(1) states that the Applicant "shall be immediately granted the fiscal concessions outlined in Schedule 4." Schedule 4 under the heading "Fiscal Matters" sets out the tax concessions granted by the Respondent in respect of equipment and other taxes. Any amendments to the terms and conditions of the Licence, is governed by Clause 3(1) which stipulates as follows:

3.1 The Minister may not amend the terms and conditions of this Licence without the prior written consent of the Licensee, unless such an amendment is required as a result of legally-binding international treaties or of an amendment to the laws of the Republic, but only then to the extent that is reasonably required of such an amendment, while the Minister shall use his best efforts to make any necessary amendment as close to the original clause as possible."(underlining is mine)

There are other provisions of the Licence that deal with procedures to be followed before amendments to it are made (Clause 5), or procedures in case of disputes (Clause 21); while the covenants under Clause 36 oblige the parties to observe the rights and duties under the agreement with compensation formula in case of breaches of conditions.

What triggered this application begins with an unsigned letter dated 2nd May 2016 from the office of the Secretary to Cabinet to Mr. Ben Kealy, General Manager for the Applicant. The letter is headed "Introduction of Nauru's Business Profit Legislation". It briefly explained the direction the Government is pursuing and the initiatives and projects it is engaged in, in its effort to foster prosperity for the future of the people of Nauru. It highlighted the possibility of a new tax regime and the Government's intention to introduce new tax legislation at Parliament's next sitting. The letter continued:

"In line with transparency and a level playing field, at a recent Cabinet meeting a submission was approved vide Cabinet Decision No.226/2016 dated 15th April2016, to change the agreement with Digicel in regards to your current tax exemption."

The letter then referred to Schedule 4 of the Licence and the changes envisaged in it by saying:

"The proposed changes to your agreement would include:...."

thereafter, listing such changes, and concluded with the sentence,

"We would appreciate your support for these wording changes and look forward to our continued close working relationship with the Digicel Group in the development of Nauru."

The Appellant, obviously concerned with the decision and the proposed changes to the conditions of its License, sought clarification. It was not forthcoming. This in turn set off a flurry of letters by the Applicant seeking meetings with the Respondent's representatives while at the same time clearly pointing out the legal obligations on the Respondent to abide by the terms of the licensing

agreement. It is important in my view to elaborate on these letters as they emphasise the urgency the Applicant placed on resolving the matter amicably between the parties. Following the Secretary to Cabinet's letter dated 2 May, 2016 the following exchanges took place:

1. 19 May 2016 : The Applicant's response to the 2 May Cabinet Secretariat letter raising concern that changes proposed were not in accordance with consultative requirements under Clauses 3.1 and 5.1 of the Licence. The Applicant also proposed solution.
2. 2 June 2016: The Applicant met with Respondent's representatives emphasizing that no consultation had been made.
3. 8 June 2016: The Applicant wrote to the representatives of the Respondent it met on 2 June, and having obtained a copy of proposed Business Tax Bill, made certain observations while reserving its position on it.
4. 4 July 2016: The Applicant wrote to the same representatives seeking a copy of the Cabinet Decision No. 226/216, without success.
5. 6 July 2016: The Applicant received a letter from the Secretary for Justice acknowledging its 8th June and 4 July letters and undertaking to respond after the elections.
6. 7 July 2016: The Applicant sought clarification from Secretary for Justice of when does the 3 months' time for the filing of JR begin to run.
7. 11 July 2016: The Applicant received the Secretary for Justice's letter dated 8 July confirming when time begins to run, that is, from receipt of notice.
8. 19 July 2016: The Applicant letter to Secretary to Cabinet seeking discussion on how to resolve matter and suggesting dates to meet.
9. 22 July 2016: The Applicant received a letter from Secretary for Justice requesting a week to respond fully to its concerns.
10. 27 July 2016: The Applicant's letter addressed to both the Secretary for Justice and the Secretary to Cabinet informing that it was proceeding with its challenge to the decision through the court.

It is very clear from the chronology of activities shown above that the Applicant was not dilatory as it made every effort to try and engage the Respondent in some meaningful discussions to try and resolve their differences.

In the meantime, Parliament had on 9th June 2016, passed the Business Tax Act (came into force the next day 10th June, the day of it being gazetted) which, the Applicant had correctly pointed out, was enacted after the Cabinet Decision No. 226/2016 of 15th April 2016. The new Act lays down a very comprehensive new tax regime. By all accounts, the new regime would have implemented Cabinet Decision No. 226/2016 but for the savings under its transition provisions and specifically section 48(1) which provides as follows:

"(1) An amount is exempt from tax to the extent provided for under a provision in an agreement entered into by Government prior to the commencement date."

It would appear from an ordinary interpretation of this provision that the terms and conditions of the Applicant's License and specifically the tax concessions detailed under Schedule 4 therein is protected from the new tax laws. The Applicant certainly prefers this interpretation contending that the new Act "does not change the law in such a manner as to, under the terms of the Licence, enable Cabinet on behalf of the republic of Nauru to begin the process to seek the change in the Licence." This Court tends to agree.

The Issue of Leave

The considerations to be weighed and taken by the court in deciding whether to grant leave or not, is fully canvassed by the Applicant in its written submission. It referred to leading case authorities in UK and from the region including the latest in the Nauru Supreme Court in ***Republic v Nauru Electoral Commission ex p. Tazio Gideon C.A.44/2016.*** The test for leave is whether there is an arguable case to be made upon a cursory glance or a quick perusal of the material facts presented to the court. Leave should be granted if the material then available, the court thinks, without going to the matter in depth, there is an arguable case for granting the relief sought. In another cases cited by the Applicant, ***R v Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Businesses Limited [1992] AC 617*** Lord Diplock, at p.644 stated:

" If, on a quick perusal of the material then available, the court thinks it discloses what might be on further consideration, turn out to be an arguable case in favour

of granting to the applicant the relief claimed, it ought in the exercise of a judicial discretion, to give him leave to apply for that relief."

Leave can only be refused if the Applicant cannot demonstrate an arguable point or case.

Has the Applicant demonstrated an arguable case in this proceeding? It is its contention that the decision of the Cabinet relayed to it by the Secretary to Cabinet's letter of 2 May was arrived at without resorting to the consultation process envisaged under the agreement/Licence. The validity of this argument however depends, in my view, on whether the Cabinet decision was final in the sense that it was irrevocable and changed the conditions of the Licence overnight. Without the Applicant or the court having sighted the actual Cabinet decision, it is hard to come by this conclusion. However, the legal character of the decision may be gleaned by how it is treated in the Secretary to Cabinet's letter. First, it reveals in the reference part of the letter, to the impending introduction in Parliament of a new tax regime for the country of which the suggested changes to the Schedule 4 of the Licence was to be part. Second the letter then identified these changes agreed to by Cabinet. Finally, it requested in the end the support of the Applicant to the changes to Schedule 4. On the plain reading of the letter it is debatable to assert that the decision of the Cabinet was final. By its very nature, the decision has first to be incorporated into a Bill to be presented before Parliament and is susceptible to changes along the way. Second, the request towards the end of the letter for support from the Applicant to the proposed changes can also be interpreted as an invitation to treat. Of its own therefore, the Cabinet Decision No.226/2016, in my view, was not the type of Cabinet decisions that amounted to a final determination of the matter and therefore open to a judicial review challenge. It does not. It amounted to no more than a recommendation to Parliament to enact a law that will bring in the changes to the tax structure as proposed. It only becomes final when it is passed as an Act of Parliament.

There is a further element to the Applicant's challenge to the Cabinet Decision No.226/2016. It argued that it was not consulted when the Cabinet made the decision. However if in fact the said decision was only a recommendation, then

the Applicant cannot be seen or allowed to challenge the exercise of the Cabinet's powers to make such decisions in accordance with its legitimate authority as are permitted by law. Nor for that matter will the court be drawn into a situation where it may be seen as substituting its opinion in the place of the Cabinet's as per Lord Hailsham in ***Chief Constable of North Wales Police v Evans [1982] 1WLR 1155 at p.1160.***

There is no doubt that if in fact there was a decision, taken unilaterally by the Respondent, be it through Cabinet to an Act of Parliament or by any other means, that had denied the Applicant the tax concessions given it under Clause 18(1) and as set out in Schedule 4, it would be quite within its rights to challenge the decision through the judicial review process. There would have been an arguable case established and the grounds such as illegality, procedural impropriety, irrationality and unreasonableness, most likely would have prevailed. Instead the new "Profit Tax Legislation" now known as the Business Tax Act 2016, which the Secretary to Cabinet had intimated to the Applicant in his letter or 2 May was going to incorporate the amendments to Schedule 4 was passed by Parliament and came into force on 10 July with no discernable adverse effects to the rights of the Applicant under the arrangement. In fact the Applicant readily concedes that the transitional provisions of the new Act and specifically section 48(1) protects and "preserves Digicel fiscal concessions provided by the Republic of Nauru in Clause 18 and Schedule 4 to the Licence."

What the court believes this case is all about concerns a proposal to amend an agreement and which in the end or for the time being was not or is not carried out. The party that stands to be adversely affected tries to pre-empt any future unilateral attempt(s) to deny it its rights and privileges, seeks through the use of prerogative remedies binding orders to ensure that the other party complies with its obligations under it. As of today, the Applicant continues to operate on Nauru in accordance with the terms and conditions of its Licence issued to it on 18 June 2009. These terms and conditions have remained unchanged. There has not been a decision arrived at by the Respondent that has denied the Applicant its rights under the Licence which decision is susceptible to a judicial review.

In the end, there is no decision to challenge and therefore no arguable case for the court to consider in deciding whether to grant leave or otherwise. The case is unarguable.

There is finally the issue about time in the application for leave to move for judicial review, which was a concern raised by the Applicant and which may have precipitated in the end its application at this juncture. It is generally understood that leave application should be made promptly or in any case at the latest at least three (3) months from when the grounds of the application first arose. This date is normally taken to mean the date when the decision was made and known to the Applicant. The court nevertheless has the powers to extend this period if it considers there is "good reason" for doing so.

In all the circumstances, the application for leave to move for judicial review is denied.

I make no orders as to costs.

F Jitoko

Registrar