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MEDIUM PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

A.P.NO: 279/90

UNDER	the Commerce Act 1986
IN THE MATTER	of a determination of the Commerce Commission
BETWEEN	TELECOM CORPORATION OF NEW ZEALAND LIMITED
	Appellant
A N D	THE COMMERCE COMMISSION, BROADCAST COMMUNICATIONS LIMITED, ATTORNEY GENERAL, IMAGINEERING TELECOMMUNICATIONS (NZ) LIMITED
	Respondents

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C.P. NO: 1132/90

UNDER	the Judicature Amendment Act 1972, the Commerce Act 1986 and the Radio-Communications Act 1989
IN THE MATTER	of an Application for Judicial Review of Decision No. 256 of the Commerce Commission given on 30 November 1990
BETWEEN	BROADCAST COMMUNICATIONS LIMITED
	Plaintiff
A N D	THE COMMERCE COMMISSION
	First Defendant
A N D	TELECOM CORPORATION OF NEW ZEALAND LIMITED
	Second Defendant
A N D	TELECOM MOBILE RADIO LIMITED
	Third Defendant
A N D	THE ATTORNEY GENERAL
	Fourth Defendant

Hearing: 27 February 1991

Counsel: Mr J A Farmer QC and Mr T Arnold for Telecom
Mr I Millard and Kathryn Smith for Commerce Commission
Mr D A R Williams QC & Mr T C Weston for Broadcast Communications Limited
Mr C C Lawrence for Attorney-General
Mr B D Gray for Imagineering Telecommunications (NZ) Limited

Judgment: 6 MAR 1991

JUDGMENT OF JEFFRIES J.

Background

These 2 sets of proceedings arise out of decisions in the first place by the then government to deregulate the broadcasting and telecommunications industry in New Zealand, which took place in the years 1987-1990. Telecommunications previously conducted by the New Zealand Post Office were passed to Telecom Corporation of New Zealand which used to operate as a state-owned enterprise pursuant to the 1986 Act. In September 1990 the undertaking was sold to a private consortium but the announcement of the sale was made about mid-year. For the purpose of the decision this Court must make the sale is largely irrelevant. However, if the issue needs to be outlined at the hearing of the appeal then it could be achieved in the way I have suggested for exposition of technological evidence hereafter. The Radiocommunications Act 1989 (hereafter referred to as the Act) established a new management regime for the radio spectrum whereby a system of transferable property rights was created for the use of radio frequencies. The general policy direction was to facilitate competitive entry into telecommunications markets and to maintain the conditions for competition. Statutory enactments were passed to ensure realisation of the objective

stated above. An important aspect of the enhancement of competition was to make the system for allocation of rights subject to the appropriate statutory procedures under the Commerce Act 1986 which are covered in greater detail hereafter.

The Act made provision for the establishment of management rights for ranges of radio frequencies for up to 20 years. See Parts II to XI of the Act. Certain transitional rights in relation to AMPS-B band (see schedule annexed to judgment for explanation of abbreviations) were provided for an "incumbent" pursuant to ss 154-161 of the Act. Telecom has incumbency right to AMPS-B.

Upon passing of the Act a tender programme was implemented by the Ministry of Commerce for disposal of rights or licences by way of a tender system. Any accepted valid tender was to be subject to authorisation by the Commerce Commission as a determination in relation to a merger or takeover pursuant to s.68(1) of the Commerce Act. The tender procedure took its course in 1990 and the Ministry granted rights in AMPS-A to Telecom, which would operate alongside the rights held in AMPS-B by virtue of its status as an incumbent. Telecom already operates a cellular telephone service on AMPS-B by way of an analogue system. This judgment does not identify subsidiaries of Telecom which might be the actual holder as it is not material. TACS-A was granted to BellSouth Australia Limited, a large overseas company which intends to operate a digital cellular telephone system by 1992. The grant to BellSouth of TACS-A was cleared by the Commission but there is no challenge to that determination. Telecom was also granted rights in TACS-B and that was cleared by the Commission but there is a dispute about that determination as set out hereafter. The most likely use of these radio frequency bands would be for cellular telephone, or similar services.

The procedures before the Commerce Commission pursuant to the Commerce Act took place from about mid year to the dates of the respective determinations. By Decision No. 254 delivered on 17 October 1990, the Commission declined to give clearance or grant an authorisation to the proposal that Telecom Corporation of New Zealand Limited, or any interconnected body corporate thereof, acquire the management rights to the AMPS-A radio frequency band. Within the appropriate time Telecom lodged an appeal against the Determination to the Administrative Division of the High Court pursuant to s.91 of the Commerce Act under AP 279/90.

By Decision No. 256 dated 30 November 1990, the Commission determined to give clearance to the grant of management rights for the radio frequency band TACS-B to Telecom. A competitive tenderer, Broadcast Communications Limited, has made application pursuant to the Judicature Amendment Act 1972 for judicial review of that decision under C.P. 1132/90.

At a hearing on 1 February 1991 I made orders joining Broadcast Communications Limited, The Attorney-General for the Ministry of Commerce and Imagineering Telecommunications (NZ) Limited as respondents in the appeal AP 279/90. There was also a joinder application that the 2 sets of proceedings be heard on the following terms:

"1. All interlocutory hearings relating to time-tables, filing of affidavits (if any) and production of the Commerce Commission record to encompass both the Appeal (AP 279/90) and the Judicial Review proceeding (CP 1132/90) with the object of ensuring that the same hearing date is allocated for both matters.

2. At the substantive hearing, arguments and evidence (if any) on the Appeal to be heard first by a High Court Judge of the Administrative Division sitting with lay members to be followed immediately by the hearing of argument and evidence, if any, on the Judicial Review proceeding by the High Court Judge who has heard the appeal, the lay members having retired at the end of the appeal hearing.

Confidentiality orders were also made in the following terms:

> "The solicitors for all parties to the proceedings before this Court to be served with Volume 7 of the Record being that volume which contains material for which the source of such material has claimed confidentiality. Such service is to be on the basis that:
>
> (a) Subject as hereinafter appears the material in Volume 7 is to be kept confidential and not disclosed or in any way revealed to any person except that party's solicitor and counsel;
>
> (b) If that party's solicitor or counsel thinks fit, the material may be disclosed to an expert retained by that party but independent of that party subject to such independent expert first having given a confidentiality undertaking to the effect that:
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> such expert will not disclose the confidential material with anyone other than that party's solicitor or counsel; and
>
> such expert will not use the confidential material for any purpose other than in connection with these proceedings.

There remained from that hearing an application by Telecom to adduce further evidence, applications by Broadcast Communications Limited for orders under s.8 of the Judicature Amendment Act 1972 and the setting of a timetable for the substantive hearing. All the foregoing were set down before me for hearing on 27 February 1991.

Application to Call Further Evidence

After the hearing on 1 February I issued a memorandum setting out the orders I did make and mentioned above, and that they were made either by consent or without opposition, but there was an exception which was the application to call evidence. On that application I said this:

> "Most parties, with the exception of counsel for BCL, were prepared to hear the argument and have a decision on that point. Mr Williams for BCL objected to the hearing

> taking place today, basically on the grounds that Telecom itself had not given sufficient information to the Court about its proposal to call further evidence and with that submission I agreed. I think it is a point of real substance whether Telecom should be allowed to call further evidence on the appeal and said so to the parties. In particular I indicated that I thought there should be more information available to the Court as to the exact nature of that evidence and the witnesses to be called. Moreoever the grounds for calling the evidence did not seem to be explicitly stated. I pointed out to Mr Arnold that Telecom was seeking a privilege with its application to call further evidence and therefore it had a duty to place all information before the Court and other parties as to its proposal."

Before dealing with detailed argument in support of the application by Telecom, it is necessary for the purpose of understanding the decision set out hereafter to say something of the role of the Commission acting on mergers and takeovers. One of the first major appeals to this Court on mergers and takeovers was Goodman Fielder Limited & Another v Commerce Commission & Ors (1987) 3 NZCLC 100, 225. It is unlikely this case will end as did Goodman Fielder but nevertheless it has quite strong echoes of that case as evidenced by the fact it was cited by several counsel in argument. The Court judgment at 100, 233 mentioned that

> "... [A]n often repeated submission was complaint about appellants seeking to change the nature of the proceedings from an appeal to a new case."

The exact role of the Commerce Commission has now been referred to in several decisions and I here repeat some aspects without an attempt at completeness. It is obliged by its authorising Act to promote competition in markets within New Zealand and mergers and takeovers represent commerical enterprise that impinges on market competitiveness. It is an expert body with an infra-structure of qualified staff which carries out investigations and consultations. The record before the Court in this case testifies to the extensiveness

of those undertakings. A constant theme of Telecom's submissions to call new evidence was the complexity and rapid developments in the field of telecommunications. In my view that is all the more reason why the expert body with a highly qualified staff without the restraints existing on a conventional Court in respect of information gathering should receive even greater respect in regard to its decision. Mr Farmer was unable to nominate in Decision No. 254 a straight out error of primary fact as opposed to errors in weight, judgment and assessment of primary facts which constitute grounds of appeal.

There is another material difference in the Commission's procedure towards a final decision and that is the practice of issuing a draft decision which possesses the characteristics of completeness if not of finality. In this case a Draft Determination was issued on 24 August 1990 which had this in its heading:

> "This is a draft determination issued for the purpose of expediting the Commission's decision in this matter. The conclusions are tentative only and are <u>based on information provided to date</u>." (Underlining is added).

The passage underlined affirms the consciousness of the Commission that conclusions reached by it are based on information provided. The draft determination gave notice that on dominance (a vital ingredient in the clearance or authorisation process) the decision did not favour Telecom. However, the final ingredient of countervailing public benefit was not determined. The Commission decided to hold a conference in September which Telecom attended and participated in full over 3 days. The draft determination related to both the AMPS-A AND TACS-B applications. The foregoing underlines the distinctive features of the Commission process as opposed to an adversarial procedure which will exist at appeal. From the beginning there is a stepped or staged path with time limits to ensure steady and

purposeful progress. The legislation, it seems to me, represents a good balance on the aspects of progression, disclosure of Commission's thinking and tentative conclusions together with safeguards for fairness. That latter remark in no way predetermines one of the grounds of the plaintiff in the judicial review proceeding.

I turn now to the exact grounds of the application as developed by counsel in Court. First, to clear out the jurisdiction about which there was no dispute. Rule 696 provides jurisdiction. Mr Farmer mobilised his argument around 3 "concerns" as he put it:

1. Ensuring Court has the same understanding of the technological aspects of the facts enjoyed by the Commission and its staff.

2. Updating evidence in certain technical and other areas.

3. Adducing economic evidence that establishes the economic framework of the issues before the Court and takes account of the updating evidence referred to above.

In support of the application Telecom had filed several affidavits from employees. Before dealing directly with the argument I make some general remarks by way of background. First, all respondents to the appeal proceeding, which at this stage seems to attract more attention and for obvious reasons, quite vehemently opposed the application in its entirety. To a greater or lesser extent all respondents submitted that, notwithstanding the clear directions given by me on 1 February and reproduced earlier in this judgment, they had not been met in reality. I will deal with that now. When all is said and done, as that weary cliche will have it, the issue for the Commission and this Court when sitting on appeal will be identification and state of markets, dominance and countervailing public benefit, if that is reached. If one

looks unsparingly and without distraction at those issues, there is justification for the criticism. I failed to identify in the quite extensive affidavits and counsel's argument the hard evidence that the proposed evidence will assist those quite specific issues. The most constantly repeated theme in evidence and argument was that telecommunications technology is travelling at high speed and that it is staggeringly complex. Well may be so, but in the end this case is about human beings in New Zealand communicating with each other by telephones in one way or another. Having made those observations the Court does not feel disabled in making its decision on the application through any failing in the evidence to support it.

The respondents drew to the Court's attention the extensive number of witnesses it was proposed by Telecom to call. One counsel put it as high as 11, judged by the affidavits of Telecom's deponents. If that were matched by other parties who necessarily must be given equal rights in calling fresh evidence, the number could rise to somewhere near 20. Mr Farmer assured the Court the number he proposed was between 4 and 6 which would include Telecom personnel and independent experts, some from overseas. Even on Mr Farmer's estimates still significant. Furthermore, the manner of dealing with fresh evidence is different on appeal from the Commission's procedure. In this Court it cannot be done on a conference type mode but if the affidavit evidence is to be challenged then formal cross-examination must take place. It has been the Court's experience that for one expert's opinion favourable to the party that advances it, there is an equal and opposite expert opinion available to other parties. Finally it is to be remembered that the Court which will hear the appeal will be composed of a High Court Judge and two other suitably qualified lay members.

I return to Mr Farmer's grounds. Mr Farmer sought to treat grounds 1 and 2 together to an extent. He said the same

witnesses would cover the 2 points. I do not agree they are the same essential issues.

I deal with 1. I was informed that experts were available from interested parties and tutorial type sessions were held with Commission staff. Beside imparting instruction verbally, apparently visual teaching aids were used. Mr Williams argued, and I think with validity, that there is no reason why counsel for the parties cannot perform the same task for the Court at the substantive hearing. I go further but without suggesting these comments should bind the Court that is to hear the appeal, and say I think it quite possible for the first day or more to be set aside for a verbal and visual presentation of what counsel for the opposing parties think should be made available to the Court to assist it to reach its decision. Counsel for all parties should confer on this procedure before the hearing begins. Beside counsel I think their chosen experts could address the Court directly on the technological substratum for appeal purposes if thought helpful. In the course of his argument Mr Farmer laid emphasis on product substitutability. Those are matters that may be referred to by speakers for I do not believe an information curtain should fall to cover the more recent relevant developments. Unless there is some point that has escaped me, and could in any event be dealt with later, I do not believe a Court record need be kept of the statements, nor should any of the speakers to the Court be sworn. I would imagine they would be dealing with neutral factual matters about which there would hardly be a contest and as it would take place before all parties the procedure would be self-regulating.

It is convenient at this point to deal with another aspect raised by Mr Farmer. Apparently the record before the Court about the Commission's conduct and procedure may have omissions and not be entirely complete. That will require perfecting of the record and is not to be confused with the application to call further evidence. I told Mr Farmer I was

sympathetic to making available a quality record and that is to be achieved by each counsel conferring and discussing any difficulties with the Commission, which is itself separately represented. There is absolutely no suggestion that the Commission has been anything other than fully co-operative on this point.

I turn now to ground 2 which is the updating evidence and it, in my view, is closely linked to ground 3 and both are dealt with together. It is clear it is on the basis of this evidence, if it is admitted, the economic expert evidence will be adduced. Mr Farmer on my enquiry firmly assured the Court this evidence related to technological advances since the Commission's Decision No. 254 and that there was no way of the Commission knowing of its existence. Mr Farmer further submitted this was the central part of his application. For myself I cannot come to any other conclusion than that to allow that evidence to be placed before the Court on appeal, there would result anything but a completely new case to be dealt with and that effectively the Commission procedure is sidelined. In all there were 5 affidavits from 3 deponents before the Court on behalf of Telecom. The evidence of Murray James Major, engineering manager of TCL seemed to me the strongest for Telecom and was principally concerned with "... significant and further developments overseas since September 1990 in relation to various forms of technology which will be substitutable for cellular telephones to a greater or lesser extent" as he put it. His affidavit quite simply was to give notice of the presentation of a new case. This was a point made by several opposing counsel submitting that there could not be a middle course by admitting some new evidence for it would be incapable of control. Mr Major's affidavit certainly supports that contention. Mr Farmer did not resile from the requested remedy that on appeal the High Court is being asked to give clearance but the Catch 22 was pointed out to him that the stronger his case based on the new evidence the more likely it would be the Court would need to send it back. That result would bring about

most unacceptable delay which is against the public benefit. The applicant for the admission of this new evidence can hardly expect the Court to overlook that it is the appellant in the case.

The case law on the precise subject before the Court is not extensive. The 2 cases from which the Court obtained material assistance were a New Zealand case Fisher & Paykel Ltd v The Commerce Commission (Auckland Registry, C.L. 41/89, 24 July 1989 - Barker J) and an Australian case Arnotts Limited & Ors v Trade Practices Commission (1990) ATPR 41-061. I think both cases support a rejection of the evidence in these circumstances. The decision of the Court is to dismiss the application of Telecom to call further evidence.

I have not pursued all the able arguments advanced by counsel but consider it is more important for speedy decisions to be made available in this field. Especially is this necessary as a 4 week hearing has been set to commence on 24 June 1991 and in the public interest that should be retained at all costs.

At the hearing on 1 February a suggested timetable was placed before the Court but not discussed with counsel. At that point no fixture for the substantive hearing had been allocated. On my advice counsel left the Court that day and conferred with the Senior Deputy Registrar. The case has now received 4 weeks commencing from 24 June 1991. The timetable depended to a large extent on the application to call further evidence. That has now been dealt with by this judgment. If there are still issues to be decided by a further Conference, then counsel for Telecom and BCL, or any others, should confer and make an immediate application to the Court for one which could be given at short notice. It is essential that these cases be disposed of promptly. Delay was an issue in the argument before me and counsel for the Ministry made particular submissions that his client is concerned that the

commercial development arising out of the tender process could be unwarrantedly delayed. Telecom and all other parties disavowed any intention to cause delay.

Finally, BCL applied for interim relief in terms of s.8 of the Judicature Amendment Act 1972. It was not opposed by any party. The Court therefore makes the following order:

> "An interim declaration be made declaring that the Fourth Defendant ought not to take any further steps in the tendering process consequent upon the Commerce Commission's approval given in Decision 256 and in particular that he should not take steps to record or transfer or otherwise deal with management rights for TACS-B in terms of section 9 of the Radio Communications Act 1989."

Costs are reserved.

J.

Solicitors for Appellant:	Chapman Tripp Sheffield Young, Wellington
Solicitors for Commerce Commission:	Commerce Commission, Wellington
Solicitors for BCL:	Buddle Findlay, Christchurch
Solicitors for Attorney-General:	Crown Law Office, Wellington
Solicitors for Imagineering Telecommunications (NZ) Ltd:	Bell Gully Buddle Weir, Auckland

ANNEXURE TO JUDGMENT

ABBREVIATIONS

The following abbreviations are used throughout this judgment:

AMPS	- Advanced Mobile Phone System
AMPS-A AMPS-B	- Frequency Bands suitable for use in the provision of cellular services
BCL	- Broadcast Communications Limited (a subsidiary of TVNZ)
Cellular Services	- Cellular telephone services operating on the AMPS and TACS frequency bands
TACS	- Total Access Communications System
TACS-A TACS-B	- Frequency Bands suitable for use in the provision of cellular services
TACS-C	- A frequency Band which could be used for the provision of cellular services, but which has other incumbent users
TCL	- Telecom Cellular Limited