IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLT NO. 7/19
OA NO. 1/2017

IN THE MATTER	of the Telecommunications Act 1989 (the "Act")
AND IN THE MATTER	of the Radio Regulations 1993 (the "Regulations")
AND IN THE MATTER	of the Constitution of the Cook Islands
AND IN THE MATTER	of the Declaratory Judgments Act 1994
BETWEEN	**ORAMA LIMITED**, a duly incorporated company having its registered office at Rarotonga Applicant/Plaintiff
AND	**MINISTER FOR TELECOMMUNICATIONS** First Respondent
AND	**TELECOM COOK ISLANDS LIMITED**, a company incorporated under the Companies Act 1970-71 Second Respondent
AND	**ATTORNEY GENERAL** Third Respondent

Hearing Date: 25 May 2021

Appearances: Mr B Mason for Applicant/Plaintiff
Mr S C Baker, Solicitor General, for First and Third Respondents
No appearance for Second Respondent

Judgment: 20 September 2021

JUDGMENT OF THE HONOURABLE JUSTICE DAME JUDITH POTTER

[0962.dss]

Introduction

[1] The applicant, Orama Limited ("Orama") issued proceedings on 10 February 2017 seeking certain declaratory orders relating to s 4 of the Telecommunications Act 1989 ("the Act") and the exclusivity of the second respondent ("Telecom") in respect of telecommunications in the Cook Islands.[1]

[2] On 29 October 2019 Orama filed an Application to Set Down Special Case for Hearing. The parties are agreed the application falls under Rule 197 of the Code of Civil Procedure of the High Court for a question of law arising in the action to be stated as a special case for the opinion of the Court. They have concurred, as required by R 197, in the question of law to be stated:

> "May a licensee holding and using radio apparatuses licensed by the First Respondent to operate a cell phone network or to communicate with satellites, issued pursuant to Part V of the Act, operate such network or communicate with such satellites without an agreement with Telecom Cook Islands Limited where the licensee does not seek to use any of Telecom Cook Islands Limited's network?"

[3] The parties agree the question stated focuses on statutory interpretation.

Previous determinations on questions of law

[4] Two questions of law have previously been determined in this proceeding by Doherty J.[2]

1. Does section 4 of the Act apply to any radio frequency produced by radio apparatus licensed under the Radio Regulations 1993 ("the regulations"); and
2. Does the Minister have under the regulations the power, subject to any other lawful requirements, to grant a license to a person allowing that person to use apparatus for the purpose of operating:
   (a) A cell phone network and/or
   (b) Ground to satellite communications?

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1 Orama has also issued proceedings (OA 7/2020) for judicial review of the first respondent's decision on 9 September 2015 declining Orama's application for a license under the Radio Regulations 1993 to operate radio apparatus for (1) cell phone network and (2) ground to satellite communications.

2 *Orama Limited v. Minister Charged with Responsibility for Telecommunications, Telecom and the Attorney General*, OA 1/2017, 30 November 2017 (NZT).

[5] Doherty J answered "No" to question 1 and "Yes" to both questions 2(a) and (b).

[6] Thus, Doherty J decided that by virtue of s 5(b), exclusivity under s 4 of the Act does not apply to any radio frequency produced by radio apparatus licensed pursuant to Part V of the Act and the Minister is authorised to grant licenses to use apparatus for a cell phone network and ground to satellite communications.

[7] However, Doherty J observed obiter:

> "[27] Orama and Telecom both agree that the regulations do not restrain the Minister from issuing a licence that would permit the operation of a cell phone network and/or ground to satellite communications. But Telecom submits that the operation of such networks and communications would cross the threshold from a radio frequency produced by licensed radio apparatus permissible under section 5(b) of the Act to a telecommunications network which is prohibited under section 4. The effect being that if Orama was granted such licences it would be prohibited from using those licences (because of exclusivity granted to Telecom by section 4(1)) absent any agreement with Telecom (section 4(4)).
>
> …
>
> [31] In a minute dated 16 March 2017, the Chief Justice directed that matters in evidence in previous proceedings (Plaint 19/2015) were to form part of the evidence in this proceeding. While Orama has not introduced evidence into what it means by cell phone network or ground satellite communications, it is clear from perusal of Orama's application for a radio communication licence (evidence in Plaint 19/2015) that it is intended to "supply wireless telecommunications services to the public" and that it intended to implement a "network infrastructure" to at least two of the islands making up the Cook Islands.
>
> [32] Telecom argues that this evidence, together with the definition of the Act (see para [7] above) shows the intent of Orama but while the Minister might have power to issue and grant individual licences allowing a person to use apparatus for the purpose of operating both a cell phone network and ground to satellite telecommunications, the effect of section 4(4) is that the licensee would require the agreement of Telecom to do so. Whether the effect of the grant of a number of licences so as to enable operation of a network offends against exclusivity granted to Telecom is another matter and outside the scope of the determination the Court is required to make at this stage. But the intention of a party applying for a licence might well be relevant to the consideration of the application."

The parties accept that the application of s 4 of the Act to the factual situation in this case addressed by the agreed question stated, has not been decided by the Court.

Background

[8] The Act has been repealed by the Telecommunications Act 2019 which together with the Competition and Regulatory Authority Act 2019 came into force on 13 December 2019.

[9] Counsel for the respondents explained from the Bar that this legislation creates a new regime under which Telecom's exclusivity/monopoly will be phased out over four years with licenses to other operators being issued in a considered manner, one per annum, to preserve and protect telecommunications for Rarotonga and the Outer Islands on an economically viable basis, but maintaining government control over the telecommunications network for the Cook Islands as under the Act.

[10] With the passage of the 2019 legislation, Telecom did not participate in this proceeding.

[11] Orama maintains its application for a licence was wrongly declined on 9 September 2015. It seeks a licence under the Act to support a "first in line" position under the 2019 legislation.

Statutory Provisions

[12] The preamble to the Act states it is:

> "an Act to regulate the law relating to telecommunications and connected purposes."

[13] At the heart of the question stated for determination are ss 4 and 5 of the Act[3]:

> "4. Protection of Network:
>
> (1) No person other than the Company shall erect, construct, establish, operate or maintain any network.
>
> (2) Every person who contravenes this section commits an offence, and shall be liable on conviction to a fine not exceeding $1,000 for each day during which the offence continues.

[3] As amended by the Telecommunications Amendment Act 1991 which deleted from section 2 of the Telecommunication Act 1989 the term "network operator" (meaning the Company), and which stated in section 4 that "The principal Act is amended by deleting therefrom every reference to network operator wherever that reference appears and substituting with all necessary modification, reference to the Company."

(3) The High Court may order that any revenue earned by a person in the course of committing an offence against this section be forfeited to the Crown. Every such order shall specify the amount to be forfeited.

(4) Nothing in this section shall prohibit the operation of any telecommunications links by a person other than the Company who owns the links where the operation is in accordance with an agreement with the Company.

5. Telecommunication links – Section 4 shall not apply to:

(a) Any line that is situated entirely on land for the time being wholly owned or occupied by the same person or persons, so long as the line does not run along, across, or over any public thoroughfare and is not, or would not normally be, connected with the network of the Company; or

(b) Any radio frequency produced by radio apparatus licensed pursuant to Part V of this Act."

[14] Section 6 is also relevant:

"6. Interference with network – (1) No person shall, without the agreement of the Company, connect any additional line, apparatus, or equipment to any part of a network owned, leased or operated by the Company."

[15] By definition in s 2 (Interpretation):

"Company" means Telecom Cook Islands Limited a company incorporated under the Companies Act 1970-71;

…

"Line" means a wire or wires or a conductor of any kind (including fibre optic cable) used or intended to be used for the transmission or reception of signs, signals, impulses, writing, images, sounds or intelligence of any nature by means of any electromagnetic system; and includes any pole, insulator, casing, fixing, tunnel, or other equipment or material used or intended to be used for supporting, enclosing, surrounding or protecting any such wire or conductor; and also includes any part of a line;

"Network" means a system comprising of telecommunications links to permit telecommunications, other than any system used solely for broadcasting (as defined in the Broadcasting Act 1989);

…

"Radio Frequency" means electromagnetic waves of frequencies between 9 kilohertz and 3000 gigahertz propagated in space without artificial guide;

> "Radio Frequency Management" is the management of all things pursuant to the Radio Frequency allocation and use including the issue of Radio licences;
>
> …
>
> "Telecommunications" means any transmission, emission or reception of information of any nature including signs, signals, impulse, written matter, images, sounds, instruction, information or intelligence of any kind by wire, radio, optical or other electromagnetic systems;
>
> "Telecommunications link" means a line, radio, frequency or other medium used for telecommunications.[4]

[16] By definition in s 29 of the Act which is the interpretation section for Part V (Licensing and Regulation of Radio Apparatus):

> "Radiocommunication" means any transmission emission, or reception of signs, signals, wiring, images, sounds or intelligence of any nature by electromagnetic waves of frequencies between 9 kilohertz and 3000 gigahertz, propagated in space without artificial guide;
>
> "Radio Apparatus" means any apparatus intended for the purpose of effecting radiocommunications, whether by transmission or reception, or both;

Statutory Interpretation: Approach

[17] There is common ground as to the applicable provisions.

[18] Article 65(2) of the Cook Islands Constitution states:

> "**Construction of law**
> 65
> (1)…
> (2) Every enactment, and every provision thereof shall be deemed remedial, whether its immediate purpose is to direct the doing of anything that the enacting authority deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, **and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the enactment or provision thereof according to its true intent, meaning and spirit. (emphasis provided).**
> (3)…"

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[4] The comma after "radio" in the definition of telecommunications link appears to be an error. The reference should be to "radio frequency".

[19] This provision is consistent with s 5(j) of the Acts Interpretation Act 1924 (NZ) (repealed in New Zealand by the Interpretation Act 1999 but continuing in force in the Cook Islands by s 622 of the Cook Islands Act 1915).

[20] Section 5(j) of the Acts Interpretation Act 1924 (NZ) states:

> "(j) Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act or provision thereof according to its true intent, meaning and spirit."

[21] Section 5(d) of the Acts Interpretation Act 1924 (NZ) relevantly provides:

> "(d) The law should be considered as always speaking, and whenever any matter or thing is expressed in the present tense the same shall be applied to the circumstances as they arise, so that the effect may be given to each Act and every part thereof according to its spirit, true intent and meaning."

[22] In New Zealand, s 5(1) of the Interpretation Act 1999 confirms the purposive approach. It states:

> "(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose".

[23] In *Mervin Communications Limited v. Telecom Cook Islands Limited*[5] the applicant sought a declaratory order which required the interpretation of ss 4 and 5 of the Act and relevant definitions in the Act. Grice J said:

> "18. The modern trend in statutory interpretation of legislation is toward a "purposive" interpretation. The words are to be read in their context and, with a view to giving effect to the purpose of the legislation. However, the actual words remain the most important single factor in statutory interpretation. The most natural meaning of those words in their context taking into account their purpose should be sought. (*Burrows, JF, Statute Law in New Zealand*, 2nd Ed. Butterworths. 1999. Wellington at p119).

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5 *Mervin Communications Limited v. Telecom Cook Islands Limited*, OA 1/08, 29 October 2008 (NZT), Grice J.

> 19. The words "satellite" and "earth station" are not words which actually appear in the Telecommunications Act 1989.
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> 20. In any event, new developments, especially technological often overtake the relevant Act. Normally an "ambulatory" or "updating" approach is applied as long as the developments are within the purpose of the Act.
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> 21. For instance the New Zealand Copyright Act 1962 was held to apply to computer source codes as being within the scope of "literary works" (*International Business Machines Corp v. Computer Imports Limited* [1989] 2 NZLR 395).
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> 22. According to Mr Davies' affidavit evidence, the international satellite communication and earth station had been established by the time the Telecommunications Act 1989 was passed. However at that time there was no satellite communication with the outer islands."

[24] Doherty J adopted the approach of Grice J in determining the two questions of law referred to above.[6]

Evidence of Stuart Leslie Davies

[25] The Crown filed an affidavit by Mr Davies dated 6 February 2020 which the Crown explained in submissions, was to assist the Court as to the intended purpose of the Act.

[26] Mr Mason, while not seeking to cross examine Mr Davies, objected to the evidence being admitted, but if admitted he submitted it should be given little weight. Counsel noted that Mr Davies, not a lawyer, was the author of the first draft of the Bill which preceded the Act, and submitted that in expressing his intentions for the Bill Mr Davies lacked credentials in statutory interpretation and was not in a position to state the policy and purpose of the legislation.

[27] Mr Mason referred to extracts from Hansard 1989 (22 December 1989) noting that while there were references to expanding telecommunication services to the outer islands, there was no mention of exclusivity for Telecom.

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6 See [4] above.

[28] Mr Davies was the Director General of the Cook Islands Post Office from 1987 to 1991, and was appointed Chief Executive Officer of Telecom on 1 April 1991.

[29] Much of the content of Mr Davies' affidavit is factual. He describes two events occurring in parallel in 1989:

> "… First, privatisation of the telecom division of CIPO by the Cook Islands Government. Second, the Government had a desire to improve the telecommunications for the outer islands, which at that time were provided by unreliable Single Sideband (SSB) High Frequency (HF) radio service. The service provided only two radio channels that were shared between all the outer islands. This meant that the phone circuits had to be scheduled to different times for each island and provided poor quality voice circuits."

[30] In 1989 Cable & Wireless PLC was responsible for international communications between the Cook Islands and the outside world and was a monopoly.

[31] Mr Davies says he advised the government that privatising the telecom division of the Cook Islands Post Office and improving the outer islands telecommunications would only be feasible if operated together with international communications.

[32] He recounts that he was asked by the government to set up a company to provide both domestic and international communications. The government wanted the company to be protected by legislation and Mr Davies was tasked to draft a Telecommunications Bill.

[33] Mr Davies then provides his opinion as to the intention of the Act:

> "The intention of the Act was to merge domestic and international telecommunications into a new private company and give the new company a monopoly for all Cook Islands telecommunications. The company was to be called Telecom Cook Islands Limited. The Act in section 2 defines 'Company' to mean Telecom Cook Islands Limited."

[34] He records that on 5 July 1990 Telecom Cook Islands Limited was incorporated as a private Cook Islands company. It was 60 percent owned by the Cook Islands Government and 40 percent by Telecom New Zealand.

[35] Mr Davies explains that Telecom did not exist in 1989 when the Act was passed so when Telecom was incorporated[7] there was an amendment to the Act in 1991 so that the Act and actions before Telecom was incorporated, referred to Telecom specifically and not just any network operator. The term "network operator" in the Act was replaced with "company", the intention being that only Telecom could provide domestic and international telecommunications in the Cook Islands.

[36] Mr Davies states that a monopoly was essential for the operation of Telecom because the improvement in telecommunications involved satellite communications, causing a huge escalation of operating costs. The Outer Island services were not commercially viable (as is still the case today with the exception of Aitutaki). There was considerable doubt that Telecom would be viable. Mr Davies states that s 4 of the Act was a key part of the Act and necessary due to the concern as to the viability of Telecom. He says the intention of s 4 was to ensure that only Telecom could construct, own and operate a telecommunications network in the Cook Islands.

[37] He goes on to explain the exceptions to s 4 in s 5 of the Act.

[38] Section 5(a) was intended to exclude telecommunications networks located entirely on a private individual's property.

[39] Section 5(b) was intended to exclude radio communication services for ships (maritime mobile service located on board a vessel) and the aeronautical mobile service (he notes that s 30(2) of the Act specifically refers to ships and aircraft). Also excluded was the radio amateur service for personal hobby use (HAM).

[40] Mr Davies explains that when the Act was passed a commercial mobile cellular service did not exist in the Cook Islands. It was not appreciated the many extraordinary ways that telecommunications technology could evolve, including mobile cellular technology.

[41] Mr Davies summarises that the overall aim of the Act was to secure for Telecom a monopoly over domestic and international telecommunications, irrespective of the technology

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7 On 5 July 1990.

used. With this security Telecom was expected to improve telecommunications in the Outer Islands and on Rarotonga, which he believes Telecom did despite telecommunications with the Outer Islands running at a commercial loss.

[42] The extracts from Hansard on 22 December 1989 (handed up in Court), when the Telecommunications Bill received its second and third readings, offer little assistance.

[43] Mr Davies' evidence is the best available to the Court as to the factual background and environment in which the Act was passed and as to its purpose and intent. Mr Davies provides relevant helpful evidence from a background of strong experience.

[44] In *Mervin*[8] Grice J quoted extensively from an affidavit filed by Mr Davies and relied upon his evidence as to the background, purpose and intent of the Act, including:[9]

> "…it is clear that the company would not embark on the huge capital expenditure on unprofitable services unless it had a monopoly."

[45] I accept the evidence of Mr Davies and his opinion that the overall aim and purpose of the Act was to secure for Telecom a monopoly over domestic and international communications, irrespective of the technology used.

Orama's Submissions

[46] Orama contends for a literal interpretation of the applicable statutory provisions in seeking a "Yes" answer to the agreed question, namely: that a licensee holding and using radio apparatus issued by the first respondent (Minister) to operate a cell phone network or to communicate with satellites, issued pursuant to Part V of the Act, may operate such network or communicate with such satellites without an agreement with Telecom where the licensee does not seek to use any of Telecom's network.

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8 *Mervin Communications Limited v. Telecom Cook Islands Limited*, OA 1/08, 29 October 2008 (NZT), Grice J.
9 At para 16.

[47] Section 5 of the Act is headed Telecommunications Links. Orama relies principally on subsection (b) of s 5 which excludes from the protection of the network afforded Telecom by s 4, "any radio frequency produced by radio apparatus license pursuant to Part V of the Act".

[48] Mr Mason emphasised in submissions that "the actual words remain the most important single factor in statutory interpretation"[10] and other considerations, even unfortunate consequences "cannot prevail against the clear and express wording of an Act", citing Re: Seaspray Enterprises Limited.[11]

[49] Orama submits that even by taking a purposive approach to the interpretation of ss 4 and 5, the agreement of Telecom cannot be a prerequisite under s 4(4) because by virtue of s 5(b), subsections (1) and (4) of s 4 simply have no application to a licensee of radio apparatus under Part V of the Act, and Doherty J has determined the authority of the Minister to issue such licenses for the purpose of operating a cell phone network and/or ground to satellite communications.

[50] Further, that if on a purposive approach to interpretation it is accepted that s 4 creates monopoly control of all forms of telecommunications, there is nothing to suggest Parliament intended the monopoly to vest solely in Telecom. Rather, that the Crown, either directly or indirectly, should ultimately control telecommunications to ensure the viability financially of extending communications to the outer islands.

[51] Counsel referred to s 6 in support of this position contending that s 6 contemplates the possibility of operations in the network and ownership of a network by a person other than Telecom.

[52] Mr Mason submitted that unless section 5(b) is given the meaning and interpretation for which Orama contends, s 6 is "otiose" because all other network activities are otherwise excluded by s 4.

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10 *Mervin Communications Limited v. Telecom Cook Islands Limited*, OA 1/08, 29 October 2008 (NZT), Grice J.

11 *Re: Seaspray Enterprises Limited*, Application No. 24/2021, 3 May 2021, Williams CJ & Potter J.
I note the issue of statutory interpretation addressed in *Seaspray* arose under a modern statute, the Companies Act 2017 which came into force on 10 December 2019, and the quoted passage related to an emphatic and unambiguous provision that declared a "nullity" companies not re-registered under the 2017 Act within a specified time. The Court considered use of the peremptory "must" as distinct from the discretionary "may" in interpreting the relevant section. The words quoted by Mr Mason must be read in this context.

[53] Mr Mason also submitted that *Mervin*[12] does not materially assist in the interpretation and application of s 5(b) as it relates to a factual situation which fell for determination in terms of the exemption to s 4 under s 5(a). I agree with this submission. The relevance of the *Mervin* judgment to the question before the Court is twofold; the acceptance and reliance of Grice J on the affidavit evidence of Stuart Davies and adoption of the ambulatory approach to interpretation of the statutory provisions in issue.

[54] In summary Orama submitted:

(a) The natural meaning of words used in s 5(b) of the Act mean the first respondent may grant to persons apparatus licenses without those persons being prohibited from or needing consent or approval of Telecom to create a network from radio communications emitted from those apparatus, linking into Telecom's own network excepted.

(b) This interpretation is consistent with the legislative intent of giving the Crown control of telecommunications either through its majority ownership of the second respondent or through the first respondent.

(c) It is consistent with the legislative intent that the control of the first respondent has increased (through technological advances) over time given the Crown no longer has a majority interest in the second respondent (and has not since 1996).

(d) This interpretation of the legislation renders the Act more likely to be saved by Article 64(2) although it is contrary to Article 64(1)[13].

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12 *Mervin Communications Limited v. Telecom Cook Islands Limited*, OA 1/08, 29 October 2008 (NZT), Grice J.

13 Orama refers to the right to "freedom of expression" stated in Art. 64(1) of the Constitution and applied to statutory interpretation by Art. 65(1) of the Constitution.

Respondents' submissions

[55] The respondents submit that a purposive approach should be taken to the interpretation of ss 4 and 5 of the Act, citing from *Commerce Commission v. Fonterra Co-operative Group Ltd*[14]:

> "It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial and other objective of the enactment."

[56] Further reference was made to *Burrows and Carter*, at page 220[15]:

> "… the modern trend is towards a "purposive" interpretation where the words of the legislation are read in their fullest context, and with a view to giving effect to the purpose of the legislation. Briefly put, there is overall a desire that legislation should work as Parliament intended it to work."

The respondents also referred to the adoption by Doherty J of the reasoning of Grice J in *Mervin*[16] that the modern trend in statutory interpretation is towards a purposive approach while the actual words remain the most important single factor.

[57] In relation to the "ambulatory" or "updating" approach when new developments, especially technological, overtake the relevant Act, referred to by Grice J at [20] the respondents cited from *Burrows and Carter* at page 403:

> "(b) Problems caused by the passage of time
> …
> (ii) New developments
> Very often new developments and inventions overtake an old Act. These developments could often not have been foreseen by those who passed it. Questions often arise as to whether these new developments are covered by the Act. The courts normally accept an "ambulatory" or "updating" approach, and find that the Act does cover these developments,

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14 *Commerce Commission v. Fonterra Co-operative Group Ltd* [2007], NZSC 36, at [22].
15 *Burrows and Carter on Statute Law in New Zealand*, 5th Edition, dated June 2015.
16 *Mervin Communications Limited v. Telecom Cook Islands Limited*, OA 1/08, 29 October 2008 (NZT), Grice J.

> provided two conditions are satisfied; first, that these developments are within the purpose of the Act; and, secondly, that the words of the Act, albeit of liberal interpretation, are capable of extending to them.
> …"

[58] The respondents submit that the intention and purpose of the Act was to create a statutory monopoly for Telecom over domestic and international telecommunications irrespective of the technology used. They refer to the evidence of Mr Davies as relevant in determining the intention and purpose. They note further that there is no provision in the Act for a telephone network operator license, only for licenses for radio apparatus. Further, that on 1 January 1990 Telecom was granted an exclusive license by the Cook Islands Government for the "establishment, management and operation of domestic and international Telecommunication and Telecommunication Systems to, from and within the Cook Islands …".

[59] The respondents contend that whether s 4 applies to the present factual situation requires a determination whether the operation of a cell phone network and ground to satellite communications crosses the threshold from a radio frequency produced by licensed radio apparatus permissible under s 5(b) of the Act to a telecommunications network prohibited under s 4 of the Act.

[60] The respondents referred to Orama's application for a licence attached to its letter dated 16 March 2015 and submitted it is clear that Orama's intention is to become a "wireless network operator" (a network that employs radio communications rather than physical line links). The respondent quoted from Orama's letter of 16 March 2015:

> "…That experience, together with the legal clarifications provided by High Court in 2008, has shown us that the only way of becoming a telecommunications service provider in the Cook Islands and establishing a competitive alternative to TCI is to become an wireless network operator. Wireless telecommunications networks, – that is, networks that employ radiocommunications rather than physical line links – are permitted to supply telecommunications service in competition with TCI under the Act provided that they hold an appropriate Radiocommunication Licence issued by the Minister. Accordingly Orama hereby seeks the Minister to exercise the power given to him under subsection 30(2) of the Telecommunications Act 1989 to grant Orama a Radiocommunications Licence…"[17]

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[17] The reference to "legal clarifications provided by the High Court in 2008" appears to be a reference to the judgment in *Mervin Communications Limited v. Telecom Cook Islands Limited*, OA1/08.

[61] The respondents submit it is clear that the use of a cell phone network and ground to satellite communications crosses the threshold from a radio frequency produced by licensed radio apparatus permissible under s 5(b) of the Act to a telecommunications network prohibited under s 4 of the Act. The licensing powers under Part V of the Act and the regulations facilitate the management of the radio spectrum through the approval of specific apparatus and the allocation of radio frequencies, but they do not provide a power to license the establishment and construction of a network.

[62] In summary, the respondents submit that the intent and purpose of s 4 was to provide and protect a monopoly for Telecom in the provision of domestic and international telecommunications, for justifiable commercial reasons. Section 5 was intended to provide exceptions but not exceptions that undermine the Telecom monopoly.

[63] Therefore the answer to the question stated should be "No".

Conclusions

[64] Section 4 of the Act clearly mandates exclusivity for Telecom in all aspects of a telecommunications network in the Cook Islands. By s 4(1) only Telecom is authorised to erect, construct, establish, operate and maintain any network for telecommunications.

[65] Consistently, s 6 prohibits interference with any part of the Telecom network without Telecom's consent.

[66] Mr Davies' evidence explains the purpose and intent of the statutory monopoly conferred on Telecom, that it was essential for the commercial viability of the operator (Telecom) to provide and improve telecommunications throughout the Cook Islands, including particularly, the outer islands.

[67] Section 5 provides two exceptions to the Telecom monopoly conferred by s 4.

[68] Section 5(a) excludes lines (wire or wires or a conductor of any kind) situated entirely on private property and not extending beyond the boundaries of the property (the *Mervin* case concerned the application of the s 5(a) exception)[18].

[69] Section 5(b) excludes "any radio frequency produced by radio apparatus licensed pursuant to Part V of this Act." As Mr Davies explains, in 1989 there was no commercial mobile cellular service in the Cook Islands. The exclusion was intended to apply to the licensed apparatus for radio communication services on ships and aircraft, and the HAM radio service. The evolution of telecommunications technology, including mobile cellular technology which enables the establishment and operation of a radio network for widespread communication, was not possible or even contemplated in 1989. Mr Davies' evidence is helpful in ascertaining and understanding the purpose and intent of s 4 and a limited exceptions to the Telecom monopoly provided by s 5.

[70] Given the clear wording used in s 4 in conferring the Telecom monopoly, to apply on the basis of a literal interpretation, a meaning to s 5(b) which permits the establishment and operation of a radio network such as that proposed by Orama which would infringe and undermine Telecom's monopoly, is not logical or supportable. It would render nugatory or at best compromised, the monopoly conferred on Telecom clearly and plainly by s 4, and would frustrate the purpose and intention of s 4. To suggest that s 5(b) permits a telecommunications network available through advances in technology which would be in competition with Telecom, is to contradict and undermine the clear monopoly provision in s 4.

[71] The "ambulatory" or "updating" approach to statutory interpretation explained by *Burrows and Carter*[19] would include within s 4 and the Telecom monopoly a telecommunications network created entirely by way of radio frequency. Accordingly only with the agreement of Telecom could Orama as a licensee under Part V operate a cell phone network or communicate with satellites.

[72] I have not addressed Orama's submissions on the constitutional issue referred to at [54](d). The question stated can be properly answered by the application of basic principles of statutory

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18 *Mervin Communications Limited v. Telecom Cook Islands Limited*, OA 1/08, 29 October 2008 (NZT), Grice J.

19 See above *Burrows and Carter*, Chapter 12; Time and statutory interpretation, at pg 403.

interpretation. The constitutional issue is directly raised in Orama's application for declaratory orders.

Result

[73] The answer to the question stated is "No".

Costs

[74] I was not addressed on the issue of costs. If costs are an issue on the separate question rather than in a substantive proceeding (whichever of Orama's actions proceeds) the parties should file memoranda within 21 days of the date of this judgment.

Judith Potter, J