



the Court prevent Digicel, a licensed provider of cellular telephone services, from using a cellular telephone base station (hereinafter called “the cell site”) which Digicel has constructed very near to his home.

The current task of the court is to consider an application by Mr. Azar that Digicel should be prevented from using the cell site during (a) the course of the action and the court’s decision thereon, or, (b) at least until 4<sup>th</sup> March 2004 which was the date originally set for the hearing of this application, with both sides scheduled to be present.

At the present hearing both sides presented evidence and made thorough submissions for which I am grateful to Counsel for both parties.

I shall first outline the relevant facts before assessing the law in relation to the application.

### **The Background facts**

The facts are as follows:

1. Mr. Azar and his wife reside at premises 47a Hope Road in Saint Andrew. He is not the owner of those premises but the registered proprietor has died and in her will has left the premises to him. His title to the property or lack thereof, is not, at this stage, considered a barrier to his success in his quest in this case.

2. According to Mr. Azar he and his wife are visited on an almost daily basis by their five grandchildren the oldest of which is five years.
3. Digicel has constructed the base station in question at premises No 49A Hope Road, which are, in Mr. Azar's estimation, approximately 150 feet from Mr. Azar's home.
4. According to Mr. David Hall, Digicel's chief operating officer, permission to build the cell site was granted to Digicel by the Town and Country Planning Authority (TCPA) as well as the Kingston and Saint Andrew Corporation (KSAC). More will be said in this Judgment concerning these approvals.
5. The cell site was constructed rapidly and Mr. Hall has testified that it was activated on the 23<sup>rd</sup> December 2003. More will also be said concerning the importance of this date. Photographs of the mast of the cell site shows a structure designed to look like a Royal Palm tree. Mr. Azar estimates its height at over fifty feet.
6. Mr. Azar first brought the matter to the attention of the court on the 24<sup>th</sup> December 2003 when he sought and obtained an interim injunction, which ordered Digicel for a period of fourteen days to cease construction of the cell site in any manner whatsoever, and not to activate the said cell site.

7. When the present application came before the court, evidence was presented by Mr. Azar that, despite the order of the court, Digicel had continued to have work done on the cell site and on the 27<sup>th</sup> December Mr. Azar himself saw workmen on the mast or tower of the cell site.

This evidence was of course of serious concern to the court.

Mr. David Hall, in his affidavit, however sought to explain firstly that the cell site had in fact been activated on the 23<sup>rd</sup> December 2003 (that is before the injunction was ordered) and secondly that Digicel had no notice of the injunction until Mr. Azar brought it to the attention of the workmen on the site. Mr. Hall says that the workmen were conducting grounding operations to make the cell site safe against lightning strikes. Some doubt was thrown by Mr. Azar on the veracity of that statement, as he says he was told by the workmen that they were installing warning lighting to guide planes passing overhead. Despite this, some documentary evidence was produced by Digicel's Rohan Pottinger ostensibly to establish that the site was activated on the 23<sup>rd</sup> December.

Mr. Hall's evidence is that attempts at service of the formal order notifying it of the injunction did not come to the notice of Digicel because:

- (a) Digicel's office closed early the 24<sup>th</sup> December 2003 for the Christmas holidays and the faxed copy of the formal order was not seen until Monday 29<sup>th</sup> December 2003.
- (b) The copy of the formal order which was served by hand was delivered to a security guard at the building where Digicel's offices are located. He was unable to bring the matter to the attention of anyone in authority (supposedly for the same reason of the early closure for the Christmas Holidays).

With that background it should be noted that in this present application Mr. Azar has asked, among other things, that the court orders Digicel to deactivate the site until the abovementioned originally scheduled hearing of the application for an interim injunction.

Digicel has of course resisted this application.

### **Assessing the Issues**

I shall approach the assessment of the issues by firstly, considering the major reason that Mr. Azar has brought this suit and seeks this injunction.

Secondly, I shall examine whether Digicel has legitimate authority to establish this cell site.

Thirdly, I shall examine whether Mr. Azar's reason is sufficient to have the court prevent Digicel from carrying on with the allegedly approved activity.

Finally, I shall consider whether the evidence available at this stage when taken as a whole would justify the court in ordering Digicel to deactivate the cell site pending the trial of the action.

Mr. Azar's reason for this action and application

Mr. Azar's action is primarily based on a principle which is summarized in paragraph 12 of his affidavit sworn to on 24<sup>th</sup> December 2003, where he says that the cell site;

“poses an immediate health risk to me and my family ... as it is proven scientifically that cell site base stations emit harmful radio frequency (RF) radiation...”

At paragraph 14 of the said affidavit Mr. Azar also states:

“As a survivor of prostate cancer I am extremely worried about the operation of this site in such close proximity to my home and verily fear that as time goes by it may have a negative impact on my health.”

In addition to the fear for his health and that of his family Mr. Azar has also raised the matter that the cell site will result in the lowering of the value of his property. He says at paragraph 21 of his said affidavit that:

“The erection of these poles are (sic) obtrusive and unsightly and are aesthetically unbecoming and will affect the value of

my property and those of neighbouring properties as a result of the health risks attendant on its operation.”

Mr. Azar has, in support of his contention, provided documentation from persons said to have specialist knowledge in this particular field. The documentation purports to show the harmful effects of the Radio Frequency Radiation (RFR) emitted from cell sites.

Digicel’s Authority to establish this cell site

In his affidavit Mr. David Hall deposed that Digicel, in establishing this cell site has complied with all the requirements of the National Environment and Planning Agency (NEPA) and the Kingston and Saint Andrew Corporation (KSAC).

He deposed that, in respect of this site, planning permission was obtained from the Town and County Planning Authority (TCPA) and building permission from the KSAC.

The NEPA guidelines were in fact exhibited by Mr. Azar in his attempt to show that Digicel had failed to comply with the requirements of giving notice of the application for approval of the construction. These guidelines show that they were formulated against the background of, according to the document, the “public debate about possible adverse effects on human health. The concerns are related to the emission of radio frequency (RF) signals on the general population...”

The document in its preamble goes on to say:

“The Town and County Planning Authority has formulated this document for guidance in the determination of Applications for Telecommunication mast and ancillaries.”

It is significant that the guidelines contemplate the necessity of these cell sites. They contemplate (at page 2) that consideration must be given to educational institutions and residential areas, among others, in locating these cell sites.

At page 3, the guidelines under the heading “Risk Area”, say:

“It is expected that R F fields to which the public will be exposed will be kept to the lowest practical level commensurate with the telecommunication system operating effectively...”

My final quote from the document is from page 4 under the heading “Health” where the guidelines say;

“At present it is not possible to say that exposure to radio frequency radiation even at levels below international guidelines is totally without potential health effects. The gaps in knowledge are sufficient to justify a precautionary approach. The international safety guidelines for exposure of the public to the radio waves produced by cellular phones and base stations will be adopted.”

These guidelines are not only for the use of the operators such as Digicel, but also for the use of the TCPA in assessing applications for planning approval to place cell sites.

The documentary proof of the approvals granted by the TCPA and KSAC was exhibited to Mr. Hall's Affidavit. Each had its own set of conditions with which it required Digicel to comply in establishing the cell site.

It is beyond dispute that Digicel was given the necessary approvals to establish and operate the cell site. It is presumed that all that should have been done was in fact done by the TCPA and the KSAC in granting their respective approvals. That presumption may be rebutted by evidence to the contrary. Mr. Miller on behalf of Mr. Azar has submitted that because of certain alleged breaches by Digicel of the guidelines and of the Kingston and Saint Andrew Building Act and the 1938 Regulations thereunder, particularly in respect of giving notice to the community, these approvals are subject to challenge and are in fact voidable.

He cited in support, the case of Gordon Macpherson v The City of Edinburgh Council and Vodafone UK Ltd. [2003] Scot CS 36 (18 February 2003) where the Scottish Court of Sessions reviewed the decision of the city of Edinburgh Council to grant approval to Vodafone to erect a

telecommunications mast near to Mr. McPherson's land. Mr. MacPherson in that case had successfully demonstrated that there were breaches in the requirements for giving notice to adjoining owners. The court after considering all the circumstances reduced the approval, which had been given to Vodafone. Mr. Manning has submitted that this court is not one for the judicial review of those approvals. I accept Mr. Manning's submission as being correct, and find that the approvals must stand as valid in this case as between Mr. Azar and Digicel, until an order of a court of judicial review reverses those approvals or any of them.

Is Mr. Azar's reason sufficient to prevent Digicel from carrying on with the allegedly approved activity?

I must make it clear that at this stage I am not in possession of all the evidence, of which a judge at the trial will be possessed. This present assessment must be viewed only in the context of an application made before trial. The decision after a trial may or may not be consistent with my views in this judgment.

I have already mentioned that Mr. Azar provided documents downloaded from the Internet on which he leans for support in alleging the harmful effects of RFR. These documents allege that RFR can adversely affect blood pressure and the reproductive tract, and facilitate the growth of

cancerous cells. They also allege links between RFR and a variety of maladies including sleep disorders, fatigue, anxiety, stress, epileptic fits, burning sensations and shaking.

Mr. Hall in turn also provided scientific information, this allegedly written by a Dr. John Moulder a professor of Radiation Oncology Radiology and Pharmacology/Toxicology) at the Medical college of Wisconsin. While recognizing the body of expert opinion on the deleterious effect of RFR on the human body, Dr. Moulder opines that the levels of RFR generated by cellular phone technology have not been shown to be sufficient to have that effect.

A World Health Authority fact sheet (Revised June 2000) downloaded from the Internet and exhibited by Mr. Hall assesses the then available research to conclude that exposure to RFR is unlikely to induce or promote cancers. The report goes on to say that scientists have reported that use of mobile phones have been linked to changes in brain activity, reaction times and sleep patterns. It says however, that “these effects are small and have no apparent health significance” (page 3).

At this stage the court is not expected to make a ruling as to which body of opinion is right.

Following the guidance of the case of American Cyanamid v Ethicon [1975] 1 ALL E.R. 504, the major authority on the consideration of applications for injunctions, I have to consider certain questions. I first have to consider whether Mr. Azar has an arguable case. Mr. Manning for the Defendant has cited the case of "The Siskina" (1979) A.C. 210 for the proposition that Mr. Azar must show that he has a cause of action known to law. Mr. Manning has pointed to Mr. Azar's claim form and has noted that apart from a claim for an injunction (which is not a cause of action), the claim is for a declaration that the omission of radiation waves from a cell site base station is dangerous to health. This Mr. Manning says is not a legal issue and therefore Mr. Azar does not have an arguable case. He submitted that the omission of RFR does not constitute a legal wrong actionable by a neighbour unless the neighbour can show more.

That submission is well grounded in law. It must be pointed out however that Mr. Azar's Particulars of Claim, which would have the details of his case and the basis for it, has not yet been filed. It is still therefore open to him to formulate the action under a known head of civil wrong, and it is my view that based on the facts as have been outlined, he will be able to do so.

I therefore find that bearing in mind the body of opinion concerning injury to health from RFR being emitted, or to be emitted from the cell site Mr. Azar does have an arguable case.

If Mr. Azar were to succeed at the trial of the action then I think it is clear that he could be awarded the relief of a grant of a permanent injunction against Digicel using that cell site.

The next question to be answered is whether damages would be an adequate remedy for the loss Mr. Azar would suffer if no injunction were granted. Bearing in mind the fact that we are dealing with human health I believe that the answer in the negative is clear.

Mr. Manning on the other hand has submitted that damages would similarly not be an adequate remedy for Digicel if it were to succeed at the trial. He has submitted that this cell site is needed to provide a more satisfactory service to Digicel's customers. He also submitted that the telecommunications market was so competitive that unsatisfactory customer service would result in loss of goodwill and an advantage to Digicel's competitors which could not "be assessed by way of damages."

Accepting this position for the moment the question for the court then is, where does the balance of convenience lie, is it in favour of Mr. Azar's health or in favour of Digicel's viability and profit. In this regard Mr. Azar

has deposed that he has significant assets which would be sufficient support for his undertaking to compensate Digicel for any loss it would suffer from the absence of the cell site should it succeed at trial.

Also relevant is the fact, though not strictly the subject of direct evidence, but certainly capable of inference and perhaps even of judicial notice, that cell sites exist elsewhere in the island. Is there anything unique about Mr. Azar's situation, which makes his location worthy of considerations different in law from those for the other sites? I have seen no such evidence. The fact that 153 persons have joined with Mr. Azar in signing a petition protesting the presence of the cell site does not make it unique in law. Nor indeed does the presence of an infant school allegedly in close proximity to the cell site make Mr. Azar's position unique. He is the applicant. The effect on him must be shown to be special.

I find that he has not demonstrated that special quality.

Finally, on the question of the balance of convenience I have considered the fact that no conclusive evidence has been shown one way or other at this stage on the issue of Mr. Azar's health concerns.

I therefore find that the balance of convenience is somewhat, though not overwhelmingly, in favour of Digicel being allowed to carry on an authorized activity at this time.

I am confident to so find, because even if I were to consider the balance as even and therefore have had to consider the preservation of the *status quo*, the result would be in Digicel's favour. This is because I accept that the cell site was activated prior to the granting of the injunction.

Should Digicel be ordered to deactivate the cell site?

I have left for last, the consideration of the request by Mr. Azar that Digicel be ordered to deactivate the cell site until the date of the originally scheduled hearing or the determination of the case.

This is a request for a mandatory injunction.

The cases of *Locabail International Finance Ltd. v. Agroexport and others* [1986] 1 ALL E.R. 901 and *Shepherd Homes Ltd v Sandham* [1970] 3 ALL E.R. 402 are authority for the principle that the court is far more reluctant at an interlocutory stage, such as this is, to grant a mandatory injunction than it is to grant a prohibitory injunction. This reluctance will only be overcome if the court thinks, "that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff." (*Locabail* at p902a)

The standard is higher for mandatory injunctions than prohibitory ones. The court at this stage must consider whether the court at trial would

most likely be satisfied that the interim mandatory injunction had rightly been granted.

Despite the fact that the court had some concerns about the swiftness of the Defendant's construction of the cell site and the presence of its workmen at the site carrying out work on the 27<sup>th</sup> December 2003, I am not satisfied that this is a proper case for the grant of a mandatory injunction. If, as I have found, that Mr. Azar was unable to show that he would be entitled to a prohibitory injunction, he clearly would not be entitled to secure a mandatory injunction.

### Conclusion

This is application for an order to have Digicel deactivate its recently constructed cell site and for it to cease construction at the cell site until the determination of this action at trial.

The applicant Mr. Azar has however, failed to show that his contention that the cell site so threatens his health that it amounts to a civil wrong which ought to be stopped immediately. He has also failed to meet the strict requirements, which the courts have laid down for the granting of mandatory injunctions.

In the circumstances the application for the interim injunction is refused.

As I am of the view that the issues were fully argued there is no need for a hearing of the matter again on the scheduled date of March 4, 2004 and that appointment fixture is hereby vacated.

Costs of the application are awarded to the Defendant in the sum of \$16,000.00 pursuant to item 5, Table 2, Appendix B of Order 65 of the CPR 2002.