[2021] JMCA Civ 34

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS DUNBAR-GREEN JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00022

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST APPELLANT**
AND	**SUPERINTENDENT OF POLICE ANTHONY MCLAUGLIN**	**2ND APPELLANT**
AND	**XTRINET LIMITED**	**RESPONDENT**
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**INTERESTED PARTY**

Ms Althea Jarrett, Director of State Proceedings and Ms Carla Thomas instructed by the Director of State Proceedings for the appellants

Michael Williams and Ms Ashleigh Ximines instructed by Knight Junor Samuels for the respondent

Mrs Andrea Martin-Swaby for the Crown

5, 7 and 8 October 2020 and 9 July 2021

BROOKS JA

[1] This is an appeal by the Attorney General of Jamaica and Superintendent Anthony McLaughlin ('the appellants') against the decision of Pettigrew-Collins J ('the learned judge'), made on 10 March 2020. This decision arose following the hearing of an application brought by Xtrinet Limited ('Xtrinet') for orders, which included the return of

its equipment and documents that were among other things, which had been seized by Superintendent McLaughlin and other police officers. The learned judge granted that order, pending the outcome of the trial.

[2] We heard this appeal on 5, 7 and 8 October 2020 and after considering the material and the helpful submissions of counsel, we made the following orders:

> "1. The appeal is allowed.
>
> 2. The decision and orders of the judge in the court below are set aside.
>
> 3. No order as to costs."

[3] At that time, we promised to put our reasons in writing. We now fulfil that promise, with apologies for the delay.

Background

[4] The background to this case has been set out in a decision of a single judge of this court in **Attorney General and Another v Xtrinet Limited** [2020] JMCA App 14. For these purposes, it is sufficient to state that, in February 2020, a dispute between the Spectrum Management Authority ('the SMA') and Xtrinet came to a head. The SMA which was established under the Telecommunications Act ('the Act') and is the national regulator for the communication medium called the electromagnetic spectrum ('the spectrum'). It is authorized to manage and regulate the spectrum. Xtrinet is a company duly incorporated under the Companies act and engaged in the provision of telecommunications services. The SMA asserted that Xtrinet had no authority to use a particular frequency of the spectrum, as Xtrinet was not licenced so to do. Xtrinet claimed the right to use that frequency of the spectrum because it had purchased the shares and assets of a company called Symbiote Investments Limited ('Symbiote'), which had the right to use the frequency.

[5] On 21 February 2020, a police team, including Superintendent McLaughlin, armed with search warrants, raided Xtrinet's premises at two locations. The police seized the

material mentioned above, which was said to be connected to breaches of section 70 of the Telecommunications Act ('the Act').

[6] On 2 March 2020, Xtrinet filed a claim in the Supreme Court, claiming, among other things, the return of the material, and damages for trespass. Xtrinet also filed an application on the same date for:

a. a declaration that the seizure was illegal; and

b. the return of the material.

The application went before the learned judge, who, on 10 March 2020, ordered the appellants to immediately return Xtrinet's property pending the outcome of the trial of the claim.

[7] On the same day that the learned judge made her order, the appellants filed this appeal seeking to overturn the learned judge's order. A single judge of this court later granted a stay of execution of the learned judge's order until the outcome of this appeal.

Developments subsequent to the learned judge's ruling

[8] On 19 March 2020, after the learned judge made her orders, the Office of the Director of Public Prosecutions ('ODPP') ruled that criminal charges should be laid against Xtrinet. Charges were laid against Xtrinet, a director of Xtrinet, Symbiote and directors and the company secretary of Symbiote, for their use of the spectrum without a spectrum licence. That use, it is asserted, is in contravention of the Act and the common law. The ODPP states that the equipment seized from the search and seizure are required as exhibits to prove that the alleged criminal offences were committed.

[9] The Director of Public Prosecutions has also been added as an interested party in the appeal.

[10] The appellants' amended grounds of appeal are as follows:

> "(a) The learned judge erred in granting order no 2 sought in the Notice of Application of Xtrinet Limited for Court Orders filed on 2 March 2020 in that she failed to recognise that the grant of the order amounted to giving judgment to the

respondent in a case against the appellants at a time when the evidence is incomplete.

(b) ...

(c) The learned judge erred in finding that on the face of it the respondent's business was being carried out in a lawful manner in accordance with the provisions of the Telecommunications Act (the Act) in that she failed to recognise that she did not have sight of all the licences that the respondent expressly and implicitly claimed that it had been issued under the Act.

(d) The learned judge erred in concluding solely on the licences that were before her that the equipment that was seized was not being used in contravention of the Act.

(e) ...

(f) The learned judge erred in failing to recognise that having refused to declare that the search and seizure of equipment, documents and apparatus seized pursuant to section 70 of the Telecommunications Act were illegal, null and void, she could not properly have then gone on to grant any of the other orders sought as all the other orders were predicated on a finding that the warrants were unlawful and consequently, the search and seizure were null and void.

(g) The learned judge erred in not appreciating that having found that she was unable to form a provisional view on the question of whether the search was illegal null and void, she could not have had a high degree of assurance at the interlocutory stage that the claimant would succeed on its claim for the return of the equipment that was seized.

(h) The learned judge misinterpreted section 70 of the Act in concluding that the seizure in this case was unlawful merely because the respondent was in possession of telecommunication licences." (Underlining removed)

The appellants abandoned grounds (b) and (e) above.

[11] The Director of State Proceedings has divided these issues as follows:

i. Grounds (a), (f) and (g); and

ii. Grounds (c), (d) and (h).

[12] Notwithstanding this categorisation, this court will adopt its own. The issues arising on this appeal are simply:

i. Whether the learned judge had sufficient evidence to make the order she did/ If the learned judge had the complete evidence before her (in relation to the spectrum licence and laying of criminal charges) would she have made a different order?

ii. Whether the search and seizure was lawful?

[13] Accordingly, the grounds will be categorised as follows:

i. Grounds (a), (c) and (d); and

ii. Grounds (f), (g) and (h).

Grounds (a), (c) and (d) - Incomplete evidence (spectrum licence and laying of criminal charges)

Submissions for the appellant

[14] Ms Jarrett, on behalf of the appellants, submitted that the learned judge erred when she ordered the return of the equipment seized, as at the time there was insufficient evidence to make such an order. She submitted that section 23 of the Act requires a person to have a spectrum licence to use the spectrum while section 63A(1)(b) provides that it is an offence to use the spectrum without obtaining a spectrum licence. Counsel argued that the learned judge did not consider whether Xtrinet was using the spectrum without the spectrum licence. In failing to do so, Ms Jarrett submitted that the learned judge could not find that Xtrinet was operating legally and the items seized were not being used in contravention of the Act.

[15] Ms Jarrett disputed Xtrinet's position that it had Symbiote's spectrum licence following its acquisition of Symbiote, or that it was operating under a period of

forbearance granted by the SMA. She contended that Symbiote's licences were revoked, and consequently, it could not be passed on to Xtrinet. Learned counsel also contended that the SMA had not granted Xtrinet any forbearance (see paragraph 15 of the Affidavit of Maria Myers-Hamilton filed 1 April 2020). Learned counsel indicated that investigations revealed that there was activity on the spectrum that was previously assigned to Symbiote. She asserted that Xtrinet's use of the spectrum without a spectrum licence or forbearance was a clear breach of the Act. Consequently, criminal charges were laid against Xtrinet. She submitted that if the learned judge had the complete evidence before her, she would not have ordered the return of Xtrinet's property.

Submissions for the interested party

[16] Mrs Martin-Swaby, on behalf of the interested party, agreed with the Director of State Proceedings that there was not enough material before the learned judge that Xtrinet had a spectrum licence and therefore could utilise the spectrum. She stated, however, that based on investigations by technicians from the SMA, the equipment seized had been configured to operate on the spectrum.

[17] Mrs Martin-Swaby argued that, in light of the discussions between the SMA, on the one hand, and Xtrinet and Symbiote, on the other, Xtrinet was aware that a spectrum licence was required to use the spectrum and that it was required to discontinue using the spectrum. Learned counsel, however, acknowledged that the relevant correspondence was not before the learned judge. She contended that if the evidence was before the learned judge, she would not have made the order which she did.

[18] Mrs Martin-Swaby also stated that criminal charges had been laid against Xtrinet, for use of the spectrum without a spectrum licence. This is a change which had occurred since the learned judge's order. This change, counsel submitted, would justify the learned judge's order being set aside. Learned counsel relied on **Hadmor Productions Limited and others v Hamilton and Another** [1982] 1 All ER 1042.

Submissions for Xtrinet

[19] Ms Ximines, on behalf of Xtrinet, submitted that the learned judge considered all that she was required to consider and found that Xtrinet had complied with the Act. Accordingly, learned counsel asserted that the learned judge's order was sound in law. She too relied on **Hadmor Productions Limited and others v Hamilton and Another** and reminded the court of the principle that an appellate court should not interfere with the decision of a judge at first instance, only because this court would have exercised its jurisdiction differently.

[20] Ms Ximines accepted that a spectrum licence is required to utilise the spectrum. She argued that Xtrinet had certain licences of its own and when it acquired Symbiote, by way of a proforma transaction, it also obtained Symbiote's spectrum licence. She indicated that the licences the Minister revoked from Symbiote did not include the spectrum licence. Learned counsel referred this court to **Symbiote Investments Limited v Minister of Science and Technology and Another** [2019] JMCA App 8.

[21] She contended that section 23A(1) of the Act outlines a specific revocation process for the spectrum licence, which was never done, nor was the unexpired portion of the value of Symbiote's spectrum licence refunded. Accordingly, counsel submitted that Symbiote still had a spectrum licence, which it transferred to Xtrinet. She argued that although Xtrinet did not need to apply for a spectrum licence, pursuant to section 17(4) of the Act, it completed the process that it was required to complete. Additionally, out of an abundance of caution, Xtrinet still applied to the Minister for a spectrum licence.

[22] Ms Ximines acknowledged that the laying of the criminal charges was being treated as a subsequent event. Learned counsel, however, argued that it was the appellants who allowed the matter to proceed without ensuring the learned judge had sufficient information. Learned counsel contended that the appellants were aware of this information and could have sought an adjournment to bring the information to the learned judge's attention. To this end, she argued that, strictly speaking, the laying of criminal charges was not "a subsequent event".

[23] Ms Ximines argued that even if the laying of criminal charges is considered to be a change in circumstances, it can only be relevant if it would have caused the learned judge to vary her order. She invited this court to consider that the laying of a criminal charge does not mean that Xtrinet is in breach of the Act and would not impact the civil matter. She relied on **Infochannel Limited v Cable & Wireless Jamaica Limited** (2000) 62 WIR 176. Additionally, learned counsel argued that even in view of the changed circumstances, the learned judge's decision was not so aberrant that no reasonable judge would have reached it.

[24] She also argued that considering the laying of criminal charges is a factor beyond those to be considered as outlined in **American Cyanamid v Ethicon**. Ms Ximines submitted that if the fact that the criminal charges had been laid, was before the learned judge, she would have had to engage in a mini trial, which Lord Diplock, in **American Cyanamid v Ethicon**, had warned should not be done.

Discussion and analysis

[25] It is settled that this court may only review a judge's decision within certain parameters. This was discussed by Lord Diplock in **Hadmor Productions Limited and others v Hamilton and Another** at page 1046:

> "…The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it…."

[26] The appellants and the interested party in the present case, submitted that had the learned judge known that Xtrinet did not possess the relevant spectrum licence, she would not have made the order she did. Section 23 of the Act provides that it is the

Minister who is empowered to grant the licence to use the spectrum. The relevant provision states that the Minister may, on the recommendation of the SMA, and subject to the applicant holding a carrier licence or service provider licence or being eligible for the grant of a carrier licence or service provider licence, grant a spectrum licence authorizing the use of such portion of the spectrum as may be specified therein. A licence to use the spectrum may, therefore, only be granted to an applicant who already holds, or is eligible to hold a carrier licence or a service provider licence.

[27] The Act goes further, at section 63A(1)(b) to state that a person who operates the spectrum, without a spectrum licence is guilty of an offence. It states:

> "**63A.**-(1) A person commits an offence if he engages in any of the following conduct-
> …
>
> (b) engages in the use of the spectrum without first obtaining a spectrum licence.
>
> …"

[28] This court must, therefore, consider whether Xtrinet had a good claim that it was lawfully using the spectrum.

[29] The case of **Symbiote Investments Limited v Minister of Science and Technology and Another** recounted the history between Symbiote and the Minister at paragraphs [8] to [19]. The court noted that the Minister granted Symbiote six telecommunications licences between 2015 and 2016. Symbiote later applied to the Minister for a spectrum licence, which the Minister granted on 14 September 2016 for 15 years. By letter dated 10 April 2018, the Minister informed Symbiote that its licences were revoked, which the Minister confirmed on 12 June 2018. There was no mention of the spectrum licence, however, Symbiote no longer satisfied the pre-condition for holding a spectrum licence.

[30] The SMA informed Symbiote, by letters dated 10 September 2019 (page 107 of bundle 2) and 3 December 2019 (page 133 of bundle 2), that its spectrum licence had been revoked. Additionally, in the letter dated 3 December 2019, the SMA advised Symbiote that the "Radio Frequency Spectrum is neither assignable nor transferrable".

[31] Xtrinet was aware of this position. By letter dated 9 December 2019 (page 134 of bundle 2) it wrote to the Minister protesting the SMA's position. The Minister did not respond, but Xtrinet's position is untenable. Symbiote, having been disqualified from holding a spectrum licence, could not transfer to Xtrinet what it did not have. Accordingly, Xtrinet's submission that it received Symbiote's spectrum licence by way of *pro forma* transfer, that is, "an assignment or transfer from a body corporate to its wholly owned subsidiary or vice versa" cannot succeed. In these circumstances, the fact that there is no evidence of the revocation process, as outlined at section 23 of the Act, having been pursued, is of no moment.

[32] Xtrinet was aware that it did not have a spectrum licence. It applied to the SMA for a spectrum licence. In the letter dated 13 January 2020 (page 137 of bundle 2), sending the application, Mr Hines acknowledged that Xtrinet did not have a spectrum licence. The letter states, in part:

> "…
>
> **RE: Application of Xtrinet Limited for Domestic Mobile Spectrum Licences**
>
> This application has become necessary for the following reasons:
>
> …
>
> 2. Xtrinet does not have a spectrum licence;
>
> 3. The acquisition of the spectrum allocated to Symbiote is necessary by reason that the network and infrastructure is currently being used by Xtrinet to service its own customers an Symbiote's customers together numbering approximately 25,000:

…"

[33] There is no evidence that the SMA granted this application.

[34] Xtrinet's fight for the survival for a spectrum licence did not end there. It also submitted that it was operating under a period of forbearance. While it is accepted that Xtrinet applied for forbearance, there is no evidence that the SMA granted the request for forbearance. It must be concluded, therefore, that Xtrinet did not obtain a spectrum licence or any forbearance.

[35] Despite the absence of a spectrum licence, Xtrinet was utilising the spectrum. Mr Hines admitted that usage in letter dated 18 February 2020 (pages 111-112 of bundle 2), in response to a letter by SMA enquiring whether Xtrinet was using the particular frequency range. Mr Hines indicated that Xtrinet:

(a) was using the spectrum;

(b) did not have a spectrum; and

(c) sought forbearance.

[36] He said, in part, in the letter:

"…

> Xtrinet confirms that it is currently using [spectrum range 746 MHz to 756 MHz] to service the 25,000 customers, most of which were formerly customers of Symbiote which is no longer providing telecommunications services.
>
> As disclosed in its application currently before you, the use of the spectrum became necessary because Xtrinet does not currently have spectrum of its own; the use was for the purpose of continuing to service the customers under the transition plan which was presented to the OUR, the Ministry and the SMA…
>
> Based on the legal construct given to Section 17 of the Telecommunications Act in your letter of December 3, 2019, and following a meeting with the Ministry it has become

> necessary for Xtrinet to make formal application for the aforesaid spectrum.
>
> Xtrinet is pleased that the application is being processed in a timely manner and stands ready facilitate any further request to facilitate the process. Until that process is complete, Xtrinet wishes to propose the following which will put the use of the spectrum within tolerable limits of Part IV of the Act:
>
> > (1) Xtrinet seeks your forbearance in respect of the use of the 746MHz to 756 MHz range for a period of ninety days to facilitate your processing of the application and a reasonable transition process that will minimize inconvenience and loss for the 25,000 customers.
> >
> > …."

[37] In the absence of any forbearance, every limb, on which Xtrinet sought to rely, crumbled.

[38] The SMA also conducted investigations which disclosed that Xtrinet was using the spectrum, without a licence. The SMA's Monitoring and Inspection Department conducted routine monitoring checks between 17 September 2019 and 1 March 2020 and detected activity on frequency range 746-756 MHz, which was to be free from use. This was the same frequency previously utilised by Symbiote. On 13 February 2020, the SMA sent a notice to Xtrinet to cease and desist the use of the spectrum.

[39] Mr Philmore Trowers, the Manager of the Monitoring and Inspection Department of the SMA, provided two statements to the police dated 18 February 2020 and 17 March 2020. These statements outlined the findings of the routine monitoring exercise on the spectrum. The first statement indicated that during the routine checks conducted between 17 September 2019 and 13 February 2020, there was activity on the spectrum range. The second statement records monitoring of the frequency range conducted between 21 February 2020 and 1 March 2020 which revealed that there was no activity on the frequency range, except on 28 February 2020 when technical experts turned on Xtrinet's equipment to conduct tests. Mr Trowers stated:

> "…Based on the results of the monitoring exercises conducted during the period February 21, 2020 to March 1, 2020; no activity was detected in the 700 MHz downlink frequency band 746-756 MHZ, except on February 28, 2020, when the equipment located at the network operating center (NOC) at 4 Eastwood Avenue, Kingston 10 being operated by Xtrinet Limited located was powered on by technical experts as a result of analysis being conducted on the said equipment."

[40] This evidence is particularly pertinent, bearing in mind that the police personnel seized Xtrinet's equipment, documents and apparatus on 21 February 2020. Mr Leroy James, Telecommunications Engineer, who gave evidence for Xtrinet, indicated that the equipment which the police seized cannot demonstrate that it was used for broadcasting on the frequency range. The investigation conducted by the SMA between 21 February 2020 and 1 March 2020 runs counter to Mr James' opinion. The SMA's monitoring exercises indicate that the equipment seized by the police, from Xtrinet, can be used to demonstrate that the equipment and apparatus were being used to access the frequency range, at a time when Xtrinet did not have a spectrum licence. This would support the appellants' contention that the equipment and apparatus were being used in breach of the Act.

[41] If that evidence is accepted, Xtrinet was in breach of the Act.

[42] The learned judge's decision to grant Xtrinet's application for the return of the equipment was based on a finding that the equipment was not being used to contravene the Act (see paragraphs [40] and [47] of the learned judge's judgment). It has been established that this finding by the learned judge was based on an inference that particular facts existed. That inference has now been demonstrated, based on the later information, to be incorrect. On this basis, this court can set aside the learned judge's decision. It is, nonetheless, accepted that there are criminal charges to be considered by the Parish Court and therefore, the statements made here are based solely on what has been placed before this court.

Grounds (f), (g) and (h) - the propriety of the search and seizure

Submissions for the appellant

[43] Ms Jarrett submitted that the search and seizure was lawful. She contended that the other remedies Xtrinet sought, in its notice of application, required the learned judge to find, at the interim stage, that the search and seizure warrants were illegal, null and void. Ms Jarrett argued that Xtrinet's claim also included trespass, which would require a finding that the warrants were unlawful. Learned counsel emphasised, however, that the learned judge did not declare the search and seizure unlawful, nor did she grant the other injunctions that Xtrinet sought. Ms Jarrett submitted that this refusal, at an interlocutory level, highlighted that the learned judge should not have ordered the return of the equipment. Learned counsel also submitted that the refusal indicated that the learned judge did not have a high degree of assurance that a trial judge would find that the order for the return was properly granted.

[44] Ms Jarrett submitted that the search revealed that the equipment was being used in a manner that contravened the Act. She stressed that section 70 of the Act focuses on the equipment that is seized and not on the premises that are searched. Ms Jarrett also submitted that in view of section 70 of the Act, the learned judge could only have ordered the return of the items seized if she found that the search and seizure was unlawful, which finding she did not make.

[45] In the circumstances, learned counsel argued that, in the interests of justice, the items seized should not be returned to Xtrinet. Instead, she submitted that the items should be preserved to be utilised as evidence in the prosecution of the offences. She relied on **B&D Trawling Limited v Cpl Raymond Lewis and the Attorney General of Jamaica** (unreported), Supreme Court, Jamaica, Claim No B 015 of 2001, judgment delivered 6 January 2006.

Submissions for the interested party

[46] Mrs Martin-Swaby submitted that section 70 of the Act permits the police, where they have reasonable grounds to suspect equipment is being used in contravention of the Act, to apply for a search and seizure warrant. She argued that Superintendent McLaughlin and his team obtained a search and seizure warrant in relation to the premises at 4 Eastwood Avenue and 10-12 North End Place, not in relation to Xtrinet or Symbiote.

[47] Mrs Martin-Swaby contended that if Xtrinet is found guilty of the criminal offence, the items seized may be needed as an exhibit in post-conviction proceedings. She therefore argued that the police should retain the items seized. She cited **R v Lushington**, **ex p Otto** [1894] 1 QB 420 which was referred to by **R v Lambert Metropolitan Stipendiary Magistrate, ex p McComb** [1983] QB 551 for this position.

Submissions for Xtrinet

[48] Ms Ximines argued that the search and seizure warrant was unlawful. She contended that although the appellants and the Crown had alleged that Xtrinet had breached section 63 of the Act, that section does not provide for the search and seizure of equipment. Counsel acknowledged that the warrant was issued pursuant to section 70 of the Act. She argued that section 70 of the Act outlines the requirements before a search and seizure warrant can be issued, which included recording specific items. She highlighted that the warrant did not specify the items nor was there evidence before the learned judge that Superintendent McLaughlin and his team satisfied the requirement. She argued however that the learned judge was not presented with sufficient evidence that Superintendent McLaughlin and his team satisfied these requirements. She contended that the proper process under the Act was never followed, including issuing a cease and desist notice. Learned counsel relied on **Infochannel Limited v Cable and Wireless Limited**. She also asserted that Xtrinet has a statutory right to be heard but was never afforded this opportunity.

[49] Learned counsel submitted that it was not proper for the seized items to be retained by the Crown. She asserted that position based on her contention that the fact that section 63, which does not provide for equipment to be seized. Further, she submitted that there was no certainty that the equipment would reach the required admissibility threshold to be used as an exhibit in the criminal trial. Alternatively, counsel suggested that the court could release the equipment on bond in the event that it finds that Xtrinet breached the Act. Ms Ximines invited this court to consider that Xtrinet should have its equipment during this COVID-19 pandemic, where there is greater reliance on internet services for remote learning.

Discussion and analysis

[50] As indicated previously, section 63 of the Act speaks to offences under the Act. The relevant portions of section 63A(1) of the Act states:

> "63A.— (1) A person commits an offence if he engages in any of the following conduct—
>
> …
>
> (b) engages in the use of the spectrum without first obtaining a spectrum licence;
>
> …
>
> (f) fails to comply with a request or directive issued by the [Spectrum Management Authority] or Minister in the manner and within the time frame stipulated;
>
> …"

[51] If the prosecution's case is made out at trial, Xtrinet's breach of section 63A(1) would be its use of the spectrum without a spectrum licence or forbearance from the SMA. It is also noted that the SMA directed Xtrinet, by letter dated 13 February 2020 (page 108 of bundle 2) to cease using frequency range 746 MHz-756MHz or any other frequency on the spectrum. The letter stated:

> "…

Attention: Mr. Livingston Hines

Managing Director

Dear Sirs:

Re: Application for Domestic Mobile Spectrum Licence by Xtrinet Limited

Reference is made to the application submitted on behalf of Xtrinet Limited for spectrum to facilitate operation of a domestic mobile network dated January 15, 2020, which application is still being processed.

The Authority is in the process of investigating broadband signal detected within the frequency range for which you applied, specifically 746 MHz-756 MHz. The detected activity is originating from sites located at …An extract from the Occupancy Scan Report showing coordinates of the location from activity detected from Sutton Street is attached for your information.

Pursuant to the Telecommunications Act, section 63A(1)(b) a person commits an offence if he engages in the use of the spectrum without first obtaining a spectrum licence. Therefore, in the event the foregoing activity is attributable to Xtrinet Limited you are hereby instructed to immediately cease and desist use of the frequency range 746 MHz-756 MHz or any other range within the electromagnetic spectrum…."

[52] Ms Ximines is correct that section 63 does not provide for search and seizure. Her further argument that there is therefore no justification for a warrant under section 70, is, however, not valid. The warrants the police personnel were armed with were pursuant to section 70 of the Act. This section provides:

> "If a constable has reasonable cause to suspect that any equipment is being used or has been used **for the commission of any offence against this Act**, he may apply to a Resident Magistrate for a warrant authorizing him to search the specified apparatus named in the warrant authorizing him to search the specified apparatus named in the warrant and to seize and detain that equipment if the

> search reveals evidence that it is being used or has been used for the commission of an offence as aforesaid." (Emphasis supplied)

[53] Section 70 therefore provides that an officer who has reasonable cause to suspect that equipment is being or has been used to commit an offence under the Act may apply for a search and seizure warrant. Deputy Superintendent Diah deposed that he was investigating Xtrinet's unlawful use of the radio frequency spectrum without a licence, in contravention of the Act. He added that as part of the investigation, he and Superintendent McLaughlin applied for, and were granted the search and seizure warrants by, what was then referred to as a Resident Magistrate (now a judge of the Parish Court).

[54] Thereafter, the police personnel searched the premises at both 4 Eastwood Avenue and 10-12 North End Place. Contrary to Ms Ximines' submission, section 70 of the Act does not suggest that the company's name has to be specified in the warrant, it is the equipment that must be specified. The search warrants for both premises are similarly worded. The one that speaks to 4 Eastwood Avenue states:

> "…To the Constable of J.C.F and to all other Peace Officers in the parish of Kingston and St Andrew
>
> [Whereas] Information hath this day been laid before the undersigned, one of Her Majesty's Parish Court Judge in and for the parish of Kingston and St Andrew that… certain Equipment, Apparatus and [Documents]
>
> In a certain premises, to wit: 4 Eastwood Avenue, Kingston 10.
>
> In the parish of St Andrew in the occupation of one Symbiote and Caricel Contrary to section 70 of [Telecommunications] Act
>
> THESE ARE THEREFORE to command and authorize you Superintendent of Police Anthony McLaughlin with proper assistance to enter the said premises of the said 4 Eastwood Ave, Kingston 10 by day or by night and to search the said

> premises and to seize the Equipment, Apparatus and [documents] used in contravention of the said [Telecommunications] Act…."

[55] In any event, there is no doubt that Xtrinet operated at these locations. Mr Hines has admitted that 4 Eastwood Avenue and 10-12 North End Place are Xtrinet's offices (see paragraphs 5 and 6 of the affidavit of urgency of Livingston Hines in support of notice of pplication of Xtrinet Limited for court orders filed 2 March 2020). Additionally, Symbiote's operations were transferred to Xtrinet. In these circumstances, the fact that the warrants mentioned Symbiote and Caricel does not invalidate them.

[56] Section 70 of the Act restricts the search to "specified apparatus". The search warrants outline that "equipment, apparatus and documents" may be searched. The specified equipment and apparatus were not specified in the warrant. It is to be noted that on the execution of the search warrant for 4 Eastwood Avenue, there is a handwritten note, which indicates that the items seized were on a separate listing because they could not be listed on the warrant. A similar notation, although made after the date of the raid and seizure, was at the back of search warrant for 10-12 North End Place. It indicated that the items were listed on a foolscap paper.

[57] According to section 70, the police, having searched the premises, were only entitled to seize the equipment if "it is being used or has been used for the commission of an offence". There is evidence from the appellants that Xtrinet was, without a spectrum licence, using equipment to access the spectrum. Consequently, by virtue of section 70 of the Act, the police were permitted to search and seize the equipment.

[58] It is noted that section 70 does not contemplate the seizure of documents. The police were restricted to only seizing equipment and apparatus. The search was therefore lawful to the extent that equipment and apparatus were seized. The police are entitled to retain them for the purposes of the criminal trial. The documents on the list have since been returned to Mr Hines (see paragraph 7 of the affidavit of Deputy Superintendent of Police Albert Diah).

[59] Xtrinet cannot argue that they were not given a right to be heard as they had been corresponding with the SMA by way of letter, and had had at least one meeting. Despite the unfavourable outcome, Xtrinet was heard.

Conclusion

[60] The appellants have, since the hearing before the learned judge, demonstrated that Xtrinet:

a. had been utilising the spectrum, without a spectrum licence or forbearance from the SMA; and
b. had disobeyed the SMA's directive to cease using the spectrum.

Accordingly, there was a basis for asserting that Xtrinet was in breach of section 63(A)(1)(b) and 63(A)(1)(f) of the Act.

[61] The learned judge made it clear that she would be loath to make an order that would result in Xtrinet breaching the Act. Accordingly, it can be inferred that had she known that Xtrinet was using the spectrum, without authority to do so, she would not have made the order that she did. This court is therefore entitled to vary the learned judge's order. The laying of criminal charges, on its own, however, would not have been sufficient to cause the learned judge to vary her order.

[62] In the light of these circumstances, Superintendent McLaughlin and his team were correct to apply, pursuant to section 70 of the Act, for a search and seizure warrant. That section only permitted them to seize equipment and/or apparatus that was being used or which had been used in contravention of the Act. The warrants however included a reference to documents. These were not to have been seized. They have since been returned to Xtrinet and, therefore, their return is no longer in issue.

[63] It is for these reasons that I agreed with the orders that are set out at paragraph [2] above.

SIMMONS JA

[64] I have read, in draft, the reasons for judgment penned by Brooks JA. His reasons accord with my own reasons for agreeing to the orders, which have been set out at paragraph [2] above.

DUNBAR-GREEN JA (AG)

[65] I too have read the draft reasons for judgment written by Brooks JA. Those reasons reflect my own reasons for agreeing to the orders, which are set out at paragraph [2] above.