

THE HIGH COURT

COMMERCIAL

JUDICIAL REVIEW

2008 423 J.R.

BETWEEN

NATIONAL BROADBAND LTD.

APPLICANT

AND
THE MINISTER FOR COMMUNICATIONS, ENERGY
AND NATURAL RESOURCES

RESPONDENT

Judgment of Mr. Justice Brian McGovern delivered on the 11th day of July 2008

1. This is an application for a judicial review in which the applicant has been granted leave on 14th April, 2008, to apply for the following reliefs:-

(i) An order of *certiorari* by way of an application for judicial review quashing the respondent's decision, first communicated to the applicant on 14th January, 2008, not to accept submissions as to coverage by way of satellite broadband provision in the respondent's recording and mapping of broadband coverage in the State for the purposes of the tender process for the National Broadband Scheme.

(ii) A declaration by way of an application for judicial review that the respondent's decision, first communicated to the applicant on 14th January, 2008, not to accept submissions as to coverage by way of satellite, broadband provision in the respondent's recording and mapping of broadband coverage in the State for the purposes of the tender process of the National Broadband Scheme is *ultra vires*.

2. The applicant is a limited liability company incorporated in the State and provides satellite, broadband and other telecommunications services. The applicant is authorised by the Commission for Communications Regulation (ComReg) to provide internet access services over satellite, broadband and other services in the State. The respondent is the Minister responsible for the implementation of communications, law and policy in the State, including the promotion throughout the State of access to broadband internet.

3. The respondent has devised a National Broadband Scheme ("the scheme") for the purpose of providing improved access to broadband services in those parts of the State which are not currently served by affordable, high quality broadband, and which appear likely to remain in that state for the foreseeable future ("the unserved areas").

4. On 2nd May, 2007, the respondent commenced a tender process for a contract under the scheme to provide broadband services to the unserved areas. As part of the launch of the tender process, the respondent published an indicative map of the areas presently served with affordable, quality broadband services ("a mapping exercise").

5. The purpose of the mapping exercise was to assist the Department of Communications, Energy and Natural Resources ("the Department") in delimiting those areas to which the contract awarded under the tender process would apply. The map was colour coded and devised along the following lines:-

(i) Identification of those areas which are currently served by broadband providers shown in red;

(ii) Identification of those areas currently without broadband service but in which service providers have indicated that they plan to provide service in the future. These areas are shown in blue;

(iii) Identification of remaining areas where no service is currently provided and in which it is unlikely to be provided in the future. These areas are shown as green.

6. An information memorandum provided with the scheme stated that "further maps will be provided in the Invitation to Participate in Competitive Dialogue ('ITPCD') documentation, which will show the indicative target areas which will be addressed by the NBS contract".

7. Satellite broadband coverage was not included in the map because the respondent contends that its presence in the market had not resulted in quality, affordable service to the unserved areas. In these proceedings, the applicant complains that not to include satellite broadband coverage in the map on the basis that it is not considered to be a commercially or technically viable proposition for the mass consumer market, is a decision or policy which is one that no reasonable decision maker could properly arrive at. The applicant claims that there is no technological or other reason why the respondent could rationally exclude satellite provision from consideration in identifying and mapping broadband coverage for the purposes of the National Broadband Scheme (NBS). The applicant claims that the decision or policy has no basis in fact or in law and is unreasonable, invalid and *ultra vires* the respondent.

8. The respondent states that he formed this view;

(i) Prior to the launch of the scheme, tender process and mapping exercise in May 2007.

(ii) Having surveyed the range of broadband services provided in the State, including satellite broadband and the cost and technical capabilities of same;

(iii) Having consulted widely with relevant stakeholders, including representatives of satellite broadband providers.

9. The applicant also raises the following grounds by way of challenge to the respondent's decision:-

(a) In arriving at his decision, the respondent failed to take into account relevant considerations: i.e. the existing and potential capacity for the provision of satellite broadband coverage to a mass market. Further, in the alternative in making

his decision, he unlawfully excluded from his consideration relevant considerations: i.e. the actual potential for coverage by way of satellite provision to the mass market.

(b) The respondent's decision was arrived at without any consultation with the applicant or other satellite broadband providers and his decision constitutes an unlawful fettering of his powers and is, consequently, *ultra vires*.

(c) In addition, the applicant claims that the decision to exclude consideration of the provision of broadband by means of satellite technology constitutes a breach of European Union rules on State aids. The successful bidder in the NBS process will receive assistance from the respondent to develop a competing network in "green" areas where the applicant already provides a service without requiring any such assistance. A preferred bidder in the NBS will obtain State funding to compete with the applicant and other satellite providers in the green areas, which will result in a distortion of competition in the provision of services in those areas and put the applicant at a competitive disadvantage. This, it is claimed, is in breach of EC and Irish competition law rules and the obligation contained in article 10 of the EC Treaty to abstain from any measures which could jeopardise the objectives of the EC Treaty including the promotion of competition

10. I have considered the affidavits and exhibits and the extensive written submissions presented by both parties to the court.

11. The respondent raises a number of points by way of opposition to the claim. He says that the applicant has been guilty of delay in bringing the application. He claims that there were suitable and effective alternative remedies which were not availed of by the applicant and that the respondent's decision not to include satellite broadband coverage in its National Broadband Scheme broadband coverage mapping exercise is not a decision that gives rise to a justiciable issue. The respondent also maintains that the application is an abuse of process insofar as it amounts to an indirect challenge to the respondent's decision to establish the National Broadband Scheme and the tender process thereunder where the applicant has not obtained leave to challenge the scheme or the tender process. The respondent says that the applicant should not be permitted to advance a claim that the provision of State aid for the NBS is in breach of Irish and EU law. The respondent formally notified the scheme to the European Commission on 22nd August, 2007, and the Commission deemed the scheme compatible with EU rules on State aid in a decision communicated to the respondent on 25th September, 2007. SES Astra made a submission to the European Commission on 18th January, 2008, calling on it to revoke its authorisation and to open a full investigation into the matter. In the course of the submission it referred to "SES Astra and its Irish partners, Cross Country Broadband Ltd. and National Broadband Ltd ..." In his affidavit grounding the application for Judicial Review Mr. John Keating confirms that the applicant is a partner of SES Astra SA. The applicant did not seek leave to challenge the European Commission's decision on State aid.

Findings of fact

12. I am satisfied that in carrying out its review of the broadband market, the Department met with a number of parties involved in providing the service within the State. One of these parties is Mr. John O'Brien, then Managing Director of Cross Country Broadband Ltd. Mr. O'Brien was a Director of the applicant from its incorporation on 17th February, 2007, until 24th October, 2007. He was Secretary to the applicant from 19th February, 2007, until 17th August, 2007. He was also a Director and Secretary of Cross Country Broadband Ltd. from 18th July, 2005, up until 17th August, 2007, when he resigned as a Secretary (but not as a Director). On 17th August, 2007, Mr. John Keating, who swore the grounding affidavit on behalf of the applicant, became Director and Secretary of both Cross Country Broadband Ltd. and the applicant company. He resigned as a Director and Secretary of Cross Country Broadband Ltd. on 27th January, 2008. This information is verified by documents produced from the company's registration office.

13. I accept the evidence that Mr. Ken Spratt, a Principal Officer of the Department, met with Mr. John O'Brien on 30th October, 2006, when Mr. O'Brien made submissions in relation to the capacity and functionality of satellite broadband services. He informed the Department that Cross Country Broadband Ltd. had a contract with SES Astra for the provision of one-way satellite broadband systems throughout the State and that Cross Country Broadband Ltd. was registered with ComReg for the provision of broadband services anywhere in the State. He acknowledged some of the limitations of satellite broadband systems and the discussions included the question of the high price of installation costs. Mr. O'Brien was referred to a member of the NBS project team and email communication between the parties followed.

14. I am satisfied that the evidence also discloses that extensive consultation took place between the Department and groups involved in the provision of broadband and that these discussions included satellite broadband providers. Mr. O'Brien was involved in these discussions and it should have come as no surprise to him that the Department was not including satellite broadband coverage in its National Broadband Scheme broadband coverage mapping exercise. Because of Mr. O'Brien's involvement with the applicant company, and the fact that both he and Mr. Keating overlapped for a period of time as officers of the applicant, the applicant knew, or ought to have known, of the respondent's attitude on this issue. While it may be technically correct for the applicant to maintain that it was not consulted, it is clear that providers of satellite broadband were consulted and the views of the industry were taken into account. Furthermore, I accept the evidence that the applicant had a contract with SES Astra for provision of the same satellite technology services as those discussed by Mr. O'Brien in connection with Cross Country Broadband Ltd. at a meeting with the Department in October 2006 and in an email sent to the Department on 3rd December, 2006.

15. The respondent was in contact with the EU Commission in relation to the proposed scheme, since October 2006. The issue of satellite provision of broadband was raised with the Commission as part of these discussions and the Commission was informed of the Department's view that satellite provision of broadband was not seen as a technology viable for use for the mass market. The respondent had evidence available to it to show that at that time the number of subscribers to satellite broadband represented less than 0.6% of all broadband subscriptions in the State. The Department was also of the view that satellite broadband suffered from certain technical difficulties which affected its performance and there was a large discrepancy between cost of availing of satellite broadband services and services provided by other methods of delivery. I accept that these matters were canvassed by the Department with the EU Commission. The Department formally notified the scheme for the Commission's approval in August 2007, and the Commission published its decision in November 2007, ruling that the scheme was compatible with State aid rules of the EU. I am satisfied that the Commission took into account a number of facts including the material supplied to it concerning satellite providers.

16. If the applicant was unhappy with the Commission's decision, it could have sought an annulment by the court of first instance under article 320 of the EC Treaty. Or, it could have requested the Commission to initiate the procedure leading to the revocation of the decision on the grounds that it was based on incorrect information (article 9, Regulation 659/99).

17. SES Astra instructed their lawyers, Messrs. Cleary, Gottlieb, Steen & Hamilton Llp. to write to the European Commission on 18th January, 2008. This letter complained about the Commission's authorisation of the National Broadband Scheme, and it is clear from the letter that the lawyers were aware of the provisions of article 9, Regulation 659/99 and article 230 of the EC Treaty. The applicant has not produced any evidence to show that the Commission has acted on its complaint and the applicant has produced no evidence to show that it proceeded by way of application to the court at first instance in relation to this matter.

18. The first action taken by the applicant in relation to the scheme was an e-mail sent on 13th January, 2008, from Mr. John Keating and copied to Mr. John O'Brien. This e-mail sought details of the format for submitting details of coverage for the applicant's satellite broadband service, with a view to its inclusion in the National Broadband Scheme tender map. The applicant's challenge in these proceedings, is to the respondent's recording and mapping of broadband coverage within the State and the refusal to accept submissions from the applicant as to coverage by way of satellite broadband provision in connection with the recording and mapping for the purposes of the tender process. The applicant does not challenge the scheme itself or the tender process under it.

Conclusion

19. The remedy of *certiorari* is discretionary. The court is entitled to take into account whether there were effective alternative remedies which could to have been taken by the applicant. It seems to me that there was such a remedy available to the applicant, namely, a challenge to the scheme under article 230 of the EC Treaty. Or the applicant could have requested the Commission to initiate a procedure leading to the revocation of the decision on the grounds that it was based on incorrect information. (article 9, Regulation 659/99). While it appears that an application has been made under article 9 by SES Astra there is no information as to the outcome of the process. There is no challenge to the scheme itself or the tender process under it. It seems to me that the mapping exercise is an integral part of the scheme and tender process and that no legal consequences for the applicant flow from the exclusion of satellite service provision in the map itself. There was nothing to prevent the applicant becoming involved in the tender process, though it appears not to have done so. Therefore, even if the applicant did not anticipate that satellite coverage would be excluded from the NBS mapping, the decision of the respondent on this point does not give rise to a justiciable issue. The EU Commission has ruled that the scheme is fully compatible with EU State aid rules. The applicant has not discharged the burden of proof required to show that this court should hold that the mapping process amounted to a breach of these rules or was based on incorrect information.

20. I hold that the applicant did consider and assess the cost and capability of satellite technology to provide broadband services when drawing up the scheme and the mapping exercise. If the applicant is correct that a decision was made without hearing it, the point seems to be a purely technical one. After all, submissions were heard on behalf of satellite providers including from Mr. O'Brien acting on behalf of a company using similar technology, and Mr. O'Brien subsequently became a director of the applicant company which was using the same satellite system. The respondent assessed the penetration of satellite broadband in the market, and its cost and technical limitations, in reaching its decision not to include satellite broadband in the mapping exercise. In those circumstances, I find no evidence of irrationality or unreasonableness in the decision taken by the respondent. If the applicant is correct that its views weren't heard, that does not render the decision susceptible to legal challenge since the position of satellite broadband providers, generally, was considered as were the submissions of Mr. O'Brien who had a close connection with the applicant and was making his arguments on behalf of a Company using the same satellite system as the applicant company.

21. Having regard to the information available to Mr. O'Brien and which can be imputed to the applicant company, I accept the respondent's submission on the issue of delay and hold that the applicant could, and ought to have commenced this application at an earlier date. The applicant must have been aware that the tender process was at an advanced stage when it commenced these proceedings and that it was intended to award the contract in July 2008.

22. In the circumstances, I refuse this application.