

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV 2006/0996

BETWEEN:

CARIACCESS COMMUNICATIONS (ST. LUCIA) LTD

Claimant

and

(1) CABLE AND WIRELESS (WEST INDIES) LTD
(2) THE NATIONAL TELECOMMUNICATIONS REGULATORY
COMMISSION

Defendants

Appearances :

Mr. R. Marks in association with Ms. N. Augustin for Claimant

Mr. M. Maragh for 1st Defendant

Mr. D. Theodore for 2nd Defendant

2006: February 13,
March 5,

JUDGMENT

Mason J

[1] The Telecommunications Act No. 27 of 2000 of Saint Lucia (hereinafter referred to as "the Act") was enacted to provide for the regulation of telecommunications, to establish the National Telecommunications Regulatory Commission, and for related or incidental matters.

[2] By Section 2 (1), it is stated that the principal object of the Act is to, inter alia, regulate the telecommunications sector in Saint Lucia. The Act continues by

subsection 2 to state that without limiting the generality of subsection (1), the objects of the Act are to ensure,

- (a) open entry, market liberalization and competition in telecommunications;
- (b) policies and practices in relation to the management of telecommunications are in harmony with those of ECTEL;
- (c) the operation of a universal service regime so as to ensure the widest possible access to telecommunications at an affordable rate by the people of Saint Lucia in order to enable them to share in the freedom to communicate over an efficient and modern telecommunications network;
- (d) fair pricing and the use of cost-based pricing methods by telecommunications providers in Saint Lucia;
- (e) fair competition practices by telecommunications providers;
- (f) fair competition practices by telecommunications providers;
- (g) the public interest and national security are preserved;
- (h) the application of appropriate standards in the operation of telecommunications;
- (i) the overall development of telecommunications in the interest of the sustainable development of Saint Lucia.

[3] Part 2 of the Act is concerned with the establishment of the National Telecommunications Regulatory Commission (hereinafter alternatively referred to as “the 2nd Defendant” or “the Commission”) and provides for its functions and powers. Those functions as set out in section 11 are to:

- (a) advise the Minister on the formulation of national policy on telecommunications matters with a view to ensuring the efficient, economic and harmonized development of the telecommunication and broadcasting services and radio communications of Saint Lucia;

- (b) ensure compliance with the Government's international obligations on telecommunications;
- (c) be responsible for technical regulation and the setting of technical standards of telecommunications and ensure compatibility with international standards;
- (d) plan, supervise, regulate and manage the use of the radio frequency spectrum in conjunction with ECTEL, including the assignment and registration of radio frequencies to be used by all stations operating in Saint Lucia or on any ship, aircraft, vessel, or other floating or airborne contrivance or spacecraft registered in Saint Lucia;
- (e) regulate prices for telecommunications services;
- (f) advise the Minister in all matters related to tariffs for telecommunications service;
- (g) collect all fees prescribed and any other tariffs levied under this Act or regulations;
- (h) receive and review applications for licences and advise the Minister accordingly;
- (i) monitor and ensure that licensees comply with the conditions attached to their licences;
- (j) review proposed interconnection agreements by telecommunications providers and recommend to the Minister whether or not he or she should approve such agreements;
- (k) investigate and resolve any dispute relating to interconnections or sharing of infrastructure between telecommunications providers;
- (l) investigate and resolve complaints related to harmful interference;
- (m) monitor anti-competitive practices in the telecommunications sector and advise the national body responsible for the regulation of anti-competitive practices accordingly;
- (n) maintain a register of licensees and frequency authorization holders;
- (o) provide the Minister with such information as he or she may require;

- (p) undertake in conjunction with other institutions and entities where practicable, training, manpower planning, seminars and conferences in areas of national and regional importance in telecommunications;
- (q) report to and advise the Minister on the legal, technical, financial, economic aspects of telecommunications, and the social impact of telecommunications;
- (r) manage the universal service fund;
- (s) perform such other functions as are prescribed.

[4] By section 12 (1) the Commissioner is empowered "to do all things necessary or convenient to be done for or in connection with the performance of its functions

[5] Section 12 (2) provides

"Without limiting the generality of subsection (1), the Commission has the power to-

- (a) acquire information relevant to the performance of its function including whether or not a person is in breach of a licence, frequency authorization or this Act;
- (b) require payment of fees;
- (c) initiate legal proceedings against a licensee or authorized frequency holder for the purposes of compliance;
- (d) hold public hearing pertaining to its functions;
- (e) sit as a tribunal,
- (f) do anything incidental to its powers

[6] In addition the Commission by section 17 (2) is established as a telecommunications tribunal and by subparagraph (a) is empowered to:

"hear and determine disputes between licensees of telecommunications services"

and by subparagraph (f)

“of its own motion or at the instance of the Minister, to review and determine the rate payable for any telecommunications service.”

- [7] In the case at bar, the Claimant is a company duly registered under the laws of Saint Lucia, is a subsidiary of Cariaccess Communications (St. Vincent) Ltd and together with Cariaccess Communications (Dominica) Ltd and Cariaccess (Grenada) Ltd was set up to provide the Eastern Caribbean with **“creative and competitive”** access to internet services.
- [8] The 1st Defendant is a company duly incorporated under the Laws of Saint Lucia and provides telecommunications services to the Eastern Caribbean including Saint Lucia.
- [9] The 2nd Defendant is the Commission referred to above at paragraph 3 as having been established under section 7 (1) of the Act.

PLEADINGS

- [10] By Claim Form and Statement of Claim filed on 29th December 2006, the Claimant commenced an action against the two (2) Defendants claiming for:
- (1) three (3) declarations relating to the two (2) Defendants' discrete statutory duties;
 - (2) an injunction against the 1st Defendant;
 - (3) an order of mandamus with respect to the 2nd Defendant;
 - (4) damages both special and general;
 - (5) interest;
 - (6) costs.
- [11] By Notice of Application supported by Affidavit also filed on 29th December 2006, the Claimant applied for an injunction to restrain the 1st Defendant whether by

itself, its licensees, subsidiaries, affiliates or howsoever from connecting new customers for internet services in Saint Lucia until it has interconnected the Claimant to its network or until further order of the Court.

[12] The 1st Defendant then by Notice of Application supported by Affidavit filed on 15th January 2007, later amended and filed on 25th January 2007, sought to have both the Claimant's application for injunction and Claim Form and Statement of Claim struck out and dismissed.

[13] On 12th February 2007 the 2nd Defendant filed a Defence to the Claimant's Claim and Statement of Claim. Since that Defence does not strictly touch and concern the present applications - for injunction and for dismissal of the Claimant's action - it will not be considered at this juncture except in relation to the contents of its paragraph 5 to which the Court will refer in order to substantiate the Court's observations.

Claimant 's Case

[14] The case for the Claimant is that after having been granted a licence for the provision of internet services on 5th February 2003 by the Minister of Communications, Transport and Public Utilities under the Act, it wrote to the 1st Defendant requesting interconnection to the 1st Defendant's network. The 1st Defendant responded quoting rates which in the opinion of the Claimant were exorbitant, unreasonable and not reflective of a fair cost based pricing for the provision of the services requested as is required under the provisions of the Act. As a consequence the Claimant complained to the 2nd Defendant and requested its intervention to have the matter resolved but the 2nd Defendant has to date failed or refused to intervene. The Claimant states that with the issuing of the licence and in anticipation of being interconnected to the 1st Defendant's network, the Claimant prepared facilities for the operation of an internet business in Saint Lucia. The Claimant's business was intended to operate in competition with that of the 1st

Defendant, its subsidiaries, affiliates and/or licensees. As a result, the Claimant avers that it has suffered loss.

1st Defendant's Grounds for Application

[15] In its grounds for the support of the application for striking out of the Claimant's Claim Form and Statement of Claim, the 1st Defendant contends:

1. that the Claimant has no locus standi to maintain any action, claim or proceeding against the 1st Defendant for any cause of action connected with any alleged breach of the Act for since the Claimant does not possess and has not at any material time possessed the requisite or any licence under or pursuant to the Act, the Claimant is not a telecommunications provider within the meaning of the Act.
2. that the Claimant's action is premature as no formal complaint has been or could be made by the Claimant to the 2nd Defendant in accordance with the provisions of the Act relating to complaints.
3. that since the Act creates a comprehensive regulatory scheme to regulate the provision of telecommunications services in Saint Lucia and within that scheme is established a comprehensive dispute resolution scheme for dealing with regulatory disputes between telecommunications providers thus making such matters within the jurisdiction of the Commission, the Court does not possess the jurisdiction to hear the dispute or to grant the declaratory or injunctive relief requested by the Claimant, given the only limited recourse to the Courts provided for in the legislative scheme.

4. that should the Court find that it has jurisdiction to hear the claim, the Court should decline to exercise its jurisdiction on the basis that the Commission is the more suitable and appropriate forum for this dispute, given the nature and subject matter of the dispute, the evidence and expertise required to resolve such dispute (as regards costing and technical matters and the broader regulatory framework) and the comprehensive dispute resolution scheme found in the Act which places such disputes properly and primarily before the Commission.

[16] It was agreed at the hearing that the applications by the first Defendant would be considered first.

SUBMISSIONS AND FINDINGS

The question of locus standi

[17] Counsel for the 1st Defendant argues that the Claimant is not licensed because it has failed to complete the condition precedent to its licence becoming effective, that it is a clear prerequisite to the grant of a licence that the applicant pay the relevant fees. And by virtue of the fact that the Claimant has not been issued a valid and executed licence to operate telecommunications network or provide telecommunications services in Saint Lucia pursuant to the Act, the Claimant is not a telecommunications provider and so does not have the standing to bring its Claim and its Application for injunctive relief before the Court.

[18] Counsel submits that the 2nd Schedule to the Act by Part 2 (b), section 30 (2) of the Act, the Telecommunications (Licensing and Authorisation) Regulations 2002 and the Telecommunications (Fees) Regulations 2002 all bear testimony to Parliament's intention that no licence was to be effected until the prescribed fees have been paid.

- [19] Counsel states that the requirement to pay the prescribed licence fees is a mandatory requirement and is not a mere technicality, administrative prerequisite or a directory requirement, it is a fundamental obligation which cannot be overlooked by the Court.
- [20] Counsel for the Claimant on the other hand argues that the power to grant a licence is vested in the Minister and it is not open to either of the Defendants to challenge the exercise of this power or to fetter the rights conferred upon the licensee by virtue of this decision of the Executive. The licence having been granted through the letter of February 2003, non payment of the fee is not fatal to the rights of the Claimant, for payment of the fee is merely procedural and it is only the Minister who can change the circumstances of the Claimant by revoking, suspending or refusing to renew the licence. The payment of the licence fee is a condition that can be met at anytime before the Claimant decides to commence operations under the licence.
- [21] Counsel argues further that the 2nd Defendant was created by the Act and as such can only exercise powers within the legal framework provided and therefore cannot suspend or revoke the licence after it is granted. To allow the 2nd Defendant to summarily extinguish or suspend the rights of the licensee for default of payment, would mean that the 2nd Defendant would be afforded greater power than that which the Act confers on the Minister.

Findings

- [22] By section 6 (1) (c) of the Act, the Minister is empowered to grant a class licence.
By subsection (3)

“The Minister on receipt of a recommendation from ECTEL shall by notice published in the Gazette, specify the

telecommunications networks and services that are subject toa class licence

By sub section 4 it is provided that

4. "In the exercise of his or her powers the Minister shall consult with the Commission".

[23] By letter dated 5th February 2003, the Minister of Telecommunications, Works, Transport and Public Utilities communicated the following to the Claimant:

5th February, 2003

*Mr. Randall Bain,
Cariaccess Communications (St. Lucia) Ltd.,
P. O. Box 946,
John Compton Highway,
Castries*

Dear Mr. Bain,

RE: AWARD OF FULL INTERNET SERVICE LICENCE

Further to your application for a class licence for the providing of internet service. I am pleased to inform you that Cariaccess Communications (St. Lucia) Ltd., is hereby granted a licence for the provision of that service.

Please find attached the invoice for payment of the licence fees, payable at the NTRC Offices at Vide Bouteille. Upon payment of the full amount and

presentation of your receipt, to the Ministry of Communications, Works, Transport and Public Utilities, the licence will be signed and issued.

We look forward to your provision of a satisfactory service to the St. Lucian customer.

Yours sincerely,

FELIX FINISTERRE
MINISTER

Attachment

[24] It is clear from the contents of that letter that it is conditional upon the payment of all prescribed fees to the offices of the Commission and the presentation of the receipt for the fees to the Ministry that the licence will be issued.

[25] A class licence is defined by the Act as “a licence, issued on the same terms to each applicant of a category of users in respect of the operation of a type of telecommunications network or telecommunications service specified under section 6”.

[26] Section 33 speaks to the content of a class licence:

- 1) The Minister may, in granting a class licence include all or any of the terms and conditions specified in Part 1 of Schedule 2.
- 2) A class licence shall include the terms and conditions specified in Part 2 of Schedule 2

[27] Part 2 of Schedule 2 to the Act states:

“Licencesgranted under this Act shall contain all of the following conditions

- (a)
- (b) a condition stipulating that the licenceshall only enter into force upon payment by the licensee ...to ECTEL or the Commission of the prescribed fee”.
- (c) to (m).....

[28] By Section 11 (1) (g) of the Act the function of the Commission is to collect all fees prescribed and other tariffs levied under this Act or regulations; by section 11 (1) (j) to monitor and ensure that licensees comply with the conditions attached to their licences and by section 11 (n) to maintain a register of licences and frequency authorized holders.

[29] By section 12 :

- 1) “The Commission shall have the power to do all things necessary or convenient to be done for or in connection with the performance of its functions
- 2. Without limiting the generality of subsection (1), the Commission has the power to –
 - a)
 - b) require payment of fees
 - c) to (e)
 - f) do anything incidental to its powers”

[30] Section 40 of the Act provides:

- a. “The Minister may suspend or revoke a licence, or vary a term and condition of that licence if it is not a statutory

term or condition by a notice in writing served on the licensee.

- b. The Minister may suspend, revoke or refuse to renew a licence where –
 - (a) to (c)
 - (d) the licensee is in default of payment of the licence or renewal fee or any other money owed to the Government
 - (e) to (f)
- c. Before suspending or revoking a licence under subsection (2), the Minister shall give the licensee one month notice in writing of his or her intention to do so, specifying the grounds on which it (sic) proposes to suspend or revoke the licence, and shall give the licensee an opportunity –
 - a) to present his or her views;
 - b) to remedy the breach of the licence or terms and conditions; or
 - c) to submit to the Minister within such time as the minister may specify, a written statement of objections to the suspension or revocation of the licence, which the Minister shall take into account before reaching a decision.

[31] It is evident from these sections of the Act just quoted that while it is the power of the Minister alone to grant, revoke, vary, suspend or refuse to renew a licence, it is incumbent upon and in keeping with the powers of the Commission conferred by the Act to ensure that the condition precedent to the issue of the licence – payment of fees - is fulfilled.

- [32] In the second paragraph of a letter of April 20, 2004 written by the second Defendant to the Claimant (reproduced in full at paragraph) the second Defendant advises the Claimant of its inability to intervene in any problems which it may be experiencing in completing its interconnection agreement with the first Defendant until the Claimant had "taken up" its licence thereby becoming licensed to provide telecommunications service.
- [33] Counsel for the Claimant seems to be suggesting that the Commission by ensuring that the condition is complied with, is usurping the powers conferred on the Minister. I am not of the view that it is the intention of the second Defendant to countermand or usurp the power or decision of the Minister in the grant of the licence. In my judgment the Commission is merely seeking to fulfill its mandate by subtly requesting the payment of fees. In any event, the Commission cannot seek to suspend or revoke what is not in effect.
- [34] While the Claimant accepts by Part 2(b) of the Second Schedule to the Act that even though granted, the licence is not in force as the prescribed fee has not been paid, the Claimant seems to be arguing that on the basis of nomenclature alone – being referred to as a licensee within the provisions of the Act - it is guaranteed the same rights, benefits and privileges as another licensee who has complied with the stipulation, paid his fees and has been issued with a licence. It appears contradictory to believe that although the licence is not in force, benefits, rights and privileges can still accrue. I do not believe that such was contemplated by the Act.
- [35] It was argued by Counsel for the Claimant that payment of the fee is a "mere procedural requirement" but in my judgment being a precondition to the issue of the licence it is a "procedural requirement" that is fundamental to the question of whether a licence is issued and the issue of a licence is in turn crucial to the authorization to operate as a telecommunications provider. Non payment of the prescribed fee while not being fatal to the approval for the grant of licence (which

is what the Minister's letter amounts to) is fatal to any operation in the telecommunications sector for by section 28 of the Act, it is a serious offence to establish or operate a telecommunications network or operate a telecommunications service without a licence. The Claimant is not yet in possession of its licence.

[36] Further while it is accepted that the licence as granted has no deadline or timeframe imposed upon it for the licence fee to be paid, one has to look to the actual document (licence) which as provided by the Schedule to the Act contains the terms and conditions and the parameters within which the licensee will be allowed to operate. In addition the issuance of the licence allows the Commission to treat to any complaint or dispute which may arise between telecommunications providers – holders of licences. And so unless the licence is issued, the Claimant cannot insist upon the intervention of the second Defendant (no formal complaint notwithstanding) and in seeking so to do is premature in its application

[37] The exhibited example of an issued licence supports my conclusion.

[38] Without attempting to dissect that document, it would be instructive to refer to some pertinent sections. The document is divided into two (2) parts: Part 1 – The Licence and Part II – Licence Conditions. In Part 1 under the caption "Licence" it is stated: "The licence shall be known as (name inserted) Full Provision Internet Service Licence (year). Included under the interpretation section "Effective Date" means (date licence issued); Licensee means (name of person to whom licence issued is inserted here)". Still in Part I under the caption "Precondition": The rights of the Licensee set out in this licence shall not take effect until the Licensee shall have paid to the Government the fees set out in the Act".

[39] The document is dated and signed by the Minister and the person to whom the licence is granted. Appended to the document are two (2) annexes: Annex A containing the list of licensed services which the licensee is authorized to provide

to the public, using facilities owned and operated by the licensee or other licensed operations and Annex B listing the parameters of the quality of service obligations which the licensee is required to meet.

[40] Thus it is not the nomenclature – title of licensee – but the actual signed and issued document which invokes the power of the Claimant under the Act and entitles it to be called and operate as a telecommunications provider.

[41] I have likened the grant of a licence in this sense to the grant of a driver's licence e.g. on completion of the test, the learner driver if he has been successful is given a paper which indicates that he has passed the test and that on payment of the prescribed fee, he will be issued with a licence. If that person without paying the fee enters a vehicle drives off and is later apprehended by the Police, he cannot claim that he has passed his test and is therefore a driver. It is only when he can produce the document which indicates that he has passed his test and paid the prescribed fee, that he is entitled to be referred to as a licensed driver.

[42] In the premises it would be premature to consider the Claimant a telecommunications provider because it has not been licensed under the Act to operate a telecommunications network or to provide telecommunications services (section 3). Consequently the Claimant does not have locus standi to bring this action.

[43] In the event that I am wrong and at the Claimant does in fact have locus standi to bring this action, I shall look now at the question of jurisdiction of the Court.

The Court's jurisdiction and whether it should be exercised

In support of its contention that the Court lacks jurisdiction to hear the claim, Counsel for the first Defendant submits that the Act explicitly makes allowance for the Court to play only a limited role in that there are only two (2) provisions within

the Act that specifically grant powers to the court: sections 18(5) and 57. Counsel suggests that the regulatory scheme is a matter of public law and policy dealing with the regulation of essential services to be provided to the public. Counsel maintains that in light of Parliament's clear grant of broad powers to the Commission to deal with the relationship between service providers and in the absence of any similar grant of powers to the Court, Parliament's intent must be interpreted as excluding these broad matters from the court's review.

Counsel for the first Defendant continues that the court lacks jurisdiction because there is no legitimate cause of action under the heading of "breach of statutory duty" even in the event that any such duty has been breached (which is denied) and that the regulatory scheme established by the Act and its accompanying regulations does not give rise to a civil right of action of breach of the statutory \ duties arising under the Act.

[44] Counsel states that at common law, the general proposition is that in the ordinary case, a breach of statutory duty does not by itself give rise to any private law right of action for whether a private law cause of action arises is always a question of Parliamentary intent and statutory construction and where Parliament fails to express its intent clearly, English courts have indicated that there are two (2) carefully circumscribed exceptions to the general position, where such breach may give rise to a cause of action.

[45] Counsel cited the case of Lonrho Ltd v Shell Petroleum Co., Ltd (1982) AC 173 in which he said that Lord Diplock explained that the basic proposition is that where an Act creates an obligation and enforces it in a specific manner, performance cannot be enforced in any other manner. Counsel referred to the two exceptions adumbrated by Lord Diplock viz.

- (1) where it is evident that the obligation provided for by the Act was imposed for the benefit and protection of a particular class of individuals and
- (2) where the Act creates a public right and a particular member of the public suffers damage different from that which was common to all the rest of the public

[46] Counsel posited that in the present case, these two (2) exceptions are not met because on a construction of the Act, the legislation was not brought into force for the benefit of a particular class, the telecommunications service providers, nor to give rise to public "rights" for the benefit of the public at large. Rather the Act was introduced for the benefit of the public interest and the development of the telecommunications industry and in order to foster competition in the market.

[47] Counsel suggests that in the event that the Court decided that it has jurisdiction, it should decline to exercise such jurisdiction on the basis that the Commission is the proper forum in which the dispute should be resolved. Counsel bases his argument on the fact of the nature and subject matter of the dispute, the expertise and evidence required to resolve the dispute and the comprehensive and flexible dispute resolution scheme established by the Act, all elements which suggest that the Commission is better placed to resolve the dispute.

[48] Counsel for the first Defendant also argues that since the Claimant has not yet lodged a formal complaint with the Commission in order for that body to attempt to resolve the dispute, then the Claimant's action is premature. In addition if the Claimant had brought its complaint before the Commission and was subsequently willing to accept the result reached by the Commission, the Claimant would be in a position to appeal to the Court of Appeal. And so since the parties have never had the benefit of the Commissioner's adjudication of the matter nor has the Court had the benefit of the Commission's prior consideration of the issues within its competence, the Court is not in a position to adjudicate on questions of this

nature and should therefore decline in favour of the Commission to act on the matter.

[49] In response Counsel for the Claimant accepted that the Act was intended to provide better telecommunications services to the Saint Lucia public but argued that whether it gives a right to the Claimant would be determined taking into account the circumstances and the intent of Parliament. Counsel suggested that the question to be asked is whether the authority is a public body exercising public functions in a judicial review context and not on terms of private law duties or obligations. This was the reasoning in the case of Emtel (Mauritius) Limited v The Ministry of Telecommunications et al Privy Council Appeal No. 56 of 1999.

[50] Counsel submits that in addition to or in the alternative to its rights as a licensee, the Act by Section 15 provides the Claimant with rights as an "aggrieved person". The Claimant would qualify as such for having invested money and time in setting up its business expecting that the first Defendant would act in accordance with the express objectives in section 2 of the Act, the first Defendant has now breached its obligations by its series of deliberate acts of overpricing. The second Defendant by virtue of this section – section 15 - was obliged to investigate the Claimant's complaint.

[51] Counsel states that despite numerous emails, letters etc there was absolutely no communication between the second Defendant and the Claimant; that there is sufficient evidence of its pleas to the second Defendant for its intervention over a three year period and by failing to act, the second Defendant left the Claimant with no other option but to apply to the Court for relief. Counsel is of the view that in order for jurisdiction to be taken away from the Court in these situations the Act must clearly preclude the jurisdiction of the Court.

[52] Counsel referred the Court to the Privy Council case of Cable and Wireless (Dominica) Limited and Marpin Telecommunications Appeal No. 15 of 2000 which Counsel states illustrates that the effect of similar actions on the part of the first Defendant's sister company can even result in infringement of the constitutional rights of a person. Counsel suggests that this underscores the importance of policing and regulating the first Defendant's practices and policies as it could lead to the possible breach of fundamental rights enshrined in the constitution and thus enforceable by all, that when a body such as the second Defendant performs such public function, it must be subject to review by the Court as was held in the Emtel case.

Findings

[53] The Claimant's complaint is that the first Defendant is hindering the Claimant's ability to interconnect to the first Defendant's network in that the interconnection rates quoted by the first Defendant are unlawful and not reasonable cost based rates. As a consequence the first Defendant is in breach of its statutory duties as set out in sections 45 and 47 and more specifically the following sections:

[54] Section 45

- (1) Subject to subsection (5), a telecommunications provider who operates a public telecommunications network shall not refuse, obstruct, or in any way impede another telecommunications provider from making an interconnection with his or her telecommunications network
- (2) A telecommunications provider to whom a request for interconnection is made, shall, in writing, respond to the request within a period of four (4) weeks from the date of the request
- (3) A telecommunication provider in granting a request under subsection

- (4) shall agree, with the person making the request, the date the interconnection shall be effected
- (5) A telecommunications provider to whom a request for interconnection is made may in his or her response refuse that request in writing on reasonable technical grounds only
- (6) A telecommunications provider on receipt of a refusal for interconnection may refer that refusal to the Commission for review and possible dispute resolution
- (7) A telecommunication provider providing an interconnection service in accordance with this section shall impose reasonable cost based rates, and such other reasonable terms and conditions as the Commission may, on the recommendation of ECTEL, determine
- (8) Any interconnection service provided by a telecommunications provider under the provision of subsection (7) above shall be on terms which are not less favourable than-
 - (a) those of the provider of the interconnection service;
 - (b) the service of non-affiliated suppliers; or
 - (c) the services of the subsidiaries or affiliates of the provider of the interconnection service
- (9) A telecommunications provider shall not, in respect to any rates charged for interconnection services provided to another telecommunications provider, vary the rates on the basis of the type of customer to be served, or on the type of services that the telecommunications provider requesting the interconnection services intends to provide.

[55] Section 47 COST OF INTERCONNECTION

- (1) The cost of establishing any interconnection to the telecommunications network of another telecommunications provider requesting the interconnection
- (2) The cost referred to in subsection (1) shall be based on cost-oriented rates that are-
 - (a) reasonable and arrived at in a transplant manner having regard to economic feasibility; and
 - (b) sufficiently unbundled such that the provider requesting the interconnection service does not have to pay for network components that are not required for the interconnection service to be provided

[56] I should wish to advert to the evidence adduced in the Affidavit in support which seeks to situate the claims of the Claimant.

[57] That Affidavit reveals that subsequent to the grant of the licence by the Minister in February 2003, the Claimant wrote to the first Defendant requesting "a quotation for immediate installation and monthly service for the provision of" certain services related to its newly acquired status of internet service provider.

The Affidavit continues:

4. "In the build up to the application for licence in Saint Lucia, the Claimant entered into negotiations with the first Defendant with regard to interconnection rates, which discussions and negotiations at all times were made in contemplation of the anticipated Saint Lucia licence.

5. To this end the following course of events and communications, though referencing Saint Vincent and Grenada also encompasses (sic) matters pertaining to the Saint Lucia licence”.

[58] The Affidavit then proceeds to chronicle the discussions and negotiations with respect to rates which took place in 2002 between the Claimant and the first Defendant in relation to Saint Vincent. It should be noted that the date of the letter granting approval for the licence in Saint Lucia is 2003.

[59] In its later Affidavit in Reply to Notice and Amended Notice of Application of the first Defendant in response to the first Defendant's assertion that its (the Claimant's) action is premature and that the first Defendant is not aware of a complaint filed in Saint Lucia by the Claimant with which the jurisdiction of the second Defendant would be invoked, the Claimant refers to a letter addressed to the Commission.

[60] It is instructive to have the contents of that letter reproduced.

April 19th, 2004

*Mr. Eldon Mathurin,
Chairman
NTRC
ST. LUCIA
“BY FAX AND BY MAIL”*

Dear Sir,

We are past being “very concerned” and are now “horrified” that C&W has effectively managed to “block” our applications under the Law to the NTRC in St. Vincent for an arbitration hearing, in our ongoing impasse with the

monopoly there, which is effectively also the same status of our "interconnection" in St. Lucia since C&W have one OECS-wide ISP interconnection offer.

For over a year and three quarters, we have twice formally asked for some assistance in getting our dial-up network connected up to the PSTN in St. Vincent, but as of today's date, NOTHING has happened: we gather the same prevails in St. Lucia.

This is hurting not only our company, but also the high-tech entrepreneurial spirit in our country along with the country's sliding position in the global tech arena, whilst it appears that C&W continues to overcharge the public consumer as they please, and block licensed companies such as ours.

Please find a copy of a letter to the Prime Minister asking for some guidance and help with this untenable situation: again, we also look to the NTRC for support.

*Sincerely,
Cariaccess Communications*

.....
*Anthony A. R. Gunn
Managing Director*

[61] A cursory reading of the letter would give the impression that a complaint has been made to the second Defendant about the actions of the first Defendant in Saint Lucia. However all that letter reveals is the concern that a similar situation as that in Saint Vincent might exist in Saint Lucia: *"our ongoing impasse with the monopoly there (St. Vincent) which is effectively also the same status of*

our interconnection in St. Lucia we gather the same prevails in St. Lucia" and that the Claimant is seeking the support of the second Defendant".

[62] In my opinion a formal complaint has first to be made to the Commission in Saint Lucia about the first Defendant's actions in relation to its activities in Saint Lucia in spite of the fact of the "OECS wide ISP interconnection offer". A suggestion that the Saint Vincent situation should "encompass" Saint Lucia cannot suffice nor would an oblique reference that the complaint made to the Commission in Saint Vincent is equivalent to a complaint made in Saint Lucia. I would believe that each Commission is governed by the provisions of the Act in its own country. I find therefore that the second Defendant cannot be made to act because there has been no complaint made to it as required by the Act.

[63] Produced in evidence was a copy of a letter dated 20th April, 2004 from the second Defendant to the Claimant (referred to earlier at paragraph) which supports this view. That letter reads as follows:

20th April, 2004

*Mr. Anthony A. R. Gunn
Cariaccess Communications Limited
P. O. Box 846,
Castries*

Dear Mr. Gunn,

*Re: Delays in the Completion of Interconnection Negotiations with
the Incumbent Operator in St. Vincent and the Grenadines*

Your letter of April 19th refers.

Although we empathise with the problems that your firm has been experiencing in St. Vincent and the Grenadines with respect to the completion of an interconnection agreement with Cable & Wireless, we are unclear as to the assistance that is being sought from the National Telecommunications Regulatory Commission (NTRC) in St. Lucia. We have, however, taken the liberty of forwarding your complaint to the NTRC in St. Vincent for its attention and action.

Note that we have been informed that the Minister in St. Lucia has offered your company an Internet Service Provider Licence, but to date, this licence has not yet been taken up. It is therefore stressed that, the Commission, as guided by the Telecommunications (Interconnection) Regulations 2002, does not have a basis to intervene in any problems that are being experienced in completing an interconnection agreement in St. Lucia, until your company is licenced to provide telecommunications service within this jurisdiction.

Please be guided accordingly.

Yours sincerely,

Michele S. Marius

Coordinator

cc: Hon. Felix Finisterre, Minister, MCWT&PU

[64] I stated earlier that I would refer to paragraph 5 of the second Defendant's Defence. I am in agreement with the contents of that paragraph which reads in part:

"This Defendant states that the Claimant by letter dated April 19, 2004 requested the support of this Defendant in a matter involving

Cable & Wireless in Saint Vincent and the Grenadines. The said letter primarily served as notification to this Defendant of the Claimant's intention to write to the Prime Minister to request his intervention in the matter. For the avoidance of all doubt this Defendant states that at no time did the Claimant make any complaint to, and request the intervention of, this Defendant in relation to any decision of the First Defendant or any telecommunication provider. At all material times the Claimant and the First Defendant were engaged in the negotiation of the terms of an agreement between themselves and the First Defendant had made no decision against the Claimant which was ever communicated to this Defendant".

[65] *In addition the Claimant avers that it is a licensee or alternatively an aggrieved person. Without determining at this juncture into which category the Claimant fits, it has to be accepted that before the Commission can intervene to investigate the complaint of an aggrieved person under section 15 of the Act or to resolve the dispute between licences under section 17(2), such complaint or dispute must first be communicated to the Commission. The Claimant has not furnished the Commission with a complaint.*

[66] Section 15 provides:

COMMISSION TO INVESTIGATE COMPLAINTS

- (1) The Commission shall investigate a complaint by a person who is aggrieved by the actions or conduct of a telecommunications provider in respect of a decision against that person

(2) The Commission shall investigate a complaint only where that person has first sought redress for the complaint from that telecommunications provider and that complaint has not been amicably resolved

[67] Section 17 (2) states that the Commission is established as a telecommunications tribunal and by subparagraph (a) to hear and determine disputes between licensees of telecommunications services.

[68] As stated at paragraph 3 above, in addition to being designated a dispute resolutions tribunal, the Commission was established to oversee and regulate the provision of telecommunications services in Saint Lucia. Significant among the Commission's functions – as it relates to the present case – is its obligation to: -
regulate prices for telecommunications services (section 11 (1)(a))
review proposed interconnection agreements (section 11 (1) (i))
investigate and resolve disputes relating to interconnections (section 11 (1) (k))

[69] The provisions of the Act are buttressed by a number of Regulations e.g. the Telecommunications (Interconnection) Regulations No. 11 of 2002 which by its regulation 27 in dealing with the question of dispute resolution, at paragraph 1 states:

“where an interconnection provider and an interconnecting operator are unable, after having negotiated in good faith for a reasonable period, to agree the terms and conditions of an interconnection agreement, either party may request the assistance of the Commission in resolving the dispute”.

[70] As suggested by Counsel for the first Defendant, the role given to the Court is a limited one. By section 18 (5) it is only after the Commission has adjudicated and determined a matter that

“Any partyshall be entitled as of right to appeal to the Court of Appeal from any judgment, order or award of the Commission”.

Further by section 57:

“The court may, on application of the Commission or an interested party –

- a) make an order for failure of any equipment used for the Commission of the offence, and*
- b) grant an order restraining a person from engaging in activities to the Act”.*

[71] In view of the foregoing and without more, it would seem that jurisdiction reposes in the hands of the Commission.

[72] But can the Commission’s jurisdiction preclude or oust the Court’s jurisdiction?

[73] I wish at this juncture to express gratitude to both Counsel for the legal authorities cited which, although not all referred to here, I found very helpful.

[74] I must admit to being swayed by the contention of the Claimant that an ouster of the court’s jurisdiction cannot be implied but must be stated in clear and unambiguous language for in the words of Viscount Simonds in Pyx Granite Co., Ltd v Ministry of Housing and Local Government (1960) AC 260, 286:

It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words".

And again Taylor J in R.V. Secretary of State for the Home Department ex parte Ruddock (1987), 1 WLR 1482 at 1492:

"(The citizen) has a right to come to the courts for (a remedy), and it is well established that even where statute is relied upon, only the most clear and unequivocal words would entitle the courts to deny (him) access".

[75] But this is not enough to assist the Claimant in its quest for even when the Claimant urged that under the Act it could be considered "a person who is aggrieved" and since the Act clearly expressed its intent that such a person had a right to complain and that the second Defendant, the Commission, was mandated to act, the question remains whether there was indeed a complaint which the Commission could investigate" I have already decided that there was none.

[76] Counsel for the first Defendant in expanding his argument that the Act and its regulations do not give rise to a civil right of action for breach of the statutory duties under the Act, referred to the judgment of Lord Diplock in the Lonrho case (supra) which I unabashedly adopt because I am in agreement with Counsel for the first Defendant that the Claimant does not fall within the exceptions declared by Lord Diplock who opined:

"Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory obligation or for contravening the statutory prohibition which the Act creates, there are two classes of exception to this general rule.

The first is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals.....

The second exception is where the statute creates a public right (i.e. a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what(is) described as "particular, direct and substantial" damage "other and different from that which was common to all the rest of the public".

[77] As stated previously, the Act was enacted principally to regulate the telecommunications sector of which telecommunications providers are a part and while so doing the Act states by section (2) it must be ensured among other things that the public interest must be preserved. In other words the Act was not passed for the benefit and protection of private rights and interests but rather for the benefit of the public interest.

[78] This position is reinforced by the House of Lords case of X (Minors) v Bedfordshire County Council (1995) 2 AC 633 in which Lord Browne – Wilkinson analyzed problems raised by the question - to what extent are authorities charged with statutory duties liable in damages to individuals injured by the authorities as a result of a breach of statutory duty simpliciter, or as a result of the careless performance of a statutory duty, or as a result of the breach of the common law duty of care.

[79] Lord Browne-Wilkinson began by stating:

"The question is whether, if Parliament has imposed a statutory duty on an authority to carry out a particular function, a plaintiff who has

suffered damage in consequence of the authority's performance or non-performance of that function has a right of action in damages against the authority. It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action

He continued with respect to the breach of statutory duty:

"The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does not provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy.

Although the question is one of statutory construction and therefore each case turns on the provision in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general.

[80] Counsel for the Claimant sought to rely on the cases of Emtel (supra) and Marpin (supra) to show respectively when and in what circumstances a civil right action would arise and that the effect of actions such as the first Defendants can result in the infringement of constitutional rights. I have however declined to accept the submissions of Counsel because the cases though instructive did not specifically inform the case at hand.

[81] **Emtel** dealt with the question of whether leave to apply for judicial review ought to have been granted.

{82} The Privy Council in the judgment delivered by Lord Bingham of Cornhill .stated
“The Authority was a public body exercising public functions and its powers and duties must be analyzed for judicial review purposes in a public law context, not in terms of private law duties or obligations. Any person or body with a sufficient interest, could, if reasonable grounds were shown, challenge the manner in which its functions were exercisedthe Authority had power but failed to enforce”....

- [83] Marpin on the other hand, was concerned with the constitutional guarantee of freedom of communication. The question for the Court was an “objective” one: whether, in authorizing and granting exclusivity, the Act and the licence make provision that is reasonably required for the purpose of protecting the rights and freedoms of other persons.
- [84] As stated the questions to be resolved in those cases are not apposite to the present case
- [85] In addition to the fact that no complaint has yet been made to the second Defendant I have therefore come to the conclusion that no action for breach of statutory duty imposed by the Act can be maintained by the Claimant against either of the Defendants. The Act has invested the Commission with the authority to handle complaints and disputes and has in turn given the Claimant a right of appeal to the Court of Appeal should it not be satisfied with a decision of the Commission. In addition while the Act provides protection to the Claimant as part of a class of individuals and regulates the conduct of telecommunications providers, it cannot be said to have been passed for the Claimant’s benefit but rather for the benefit of society in general.
- [86] This was the decision in the case of Cutler v Wandsworth Stadium Ltd (1948) 1KB 291 where the Defendants were the proprietors and occupiers of a racing track and the plaintiff was a bookmaker who attended race meetings at the track for the purpose of bookmaking. The plaintiff brought an action alleging that the defendants were in breach of their statutory duty under the Betting and Lotteries Act in that they failed to provide space on the track for bookmakers where they could conveniently carry on their bookmaking. The House of Lords in considering the question whether the plaintiff could bring a private law action in respect of the alleged breach of statutory duty determined that while the Act did benefit the bookmakers, it could not be said that that was its primary purpose but rather that

"the intention of the legislature was to ensure that the public should have what it was presumed to want".

[87] However even if I am wrong in my view with respect to the jurisdiction of the court, and the non existence of a formal complaint, I shall decline such jurisdiction in favour of the second Defendant for the following reasons.

[88] There exists within the Act a comprehensive regulatory scheme which is designed to manage and regulate the provision of telecommunications services in Saint Lucia. Within the Act and its accompanying Regulations there exists also a comprehensive dispute resolution mechanism.

[89] It is my view that given the various technical and other issues which would likely arise in the field of telecommunications and the other policies which the Commission would necessarily have to consider, that it was evidently within the contemplation of the legislature that by giving the Commission such wide ranging responsibilities, that the Commission would be best placed to ensure that the objects of the Act are realised.

[90] This is also evident from the requirements regarding the qualifications of the commissioners. By section 8 (1) of the Act it is provided:

"The commissioners shall be persons of recognised standing and experience, all of whom may be drawn from the following disciplines

- :

a) *finance and accounting;*

b) *telecommunications;*

c) *economics*

d) *law; or*

e) *other related fields except that at least one of the commissioners should be a person of recognised standing and experience in telecommunications”.*

[91] Thus I am of the opinion that Parliament having entrusted this expert body with the task of fulfilling the intentions of Parliament in this specialist sphere, the court should be very hesitant to interfere.

[92] I am further persuaded by the suggestion of Counsel for the first Defendant that the decision in the Canadian case of Shaw Cablesystem (SMR) Ltd v MTS Communications Inc (2004) MJ. NO 505 (Manitoba Court of Queen's Bench) whose facts are similar is easily applicable to our case. In the Shaw case, it was asserted that it was Parliament's determination that the policies of the Act would be best achieved if they are regulated by a single independent public authority with particular expertise in the area and that the comprehensive dispute resolution scheme that was established was plainly intended to govern all aspects of the relationship between the parties.

[93] In the belief that the Commission is better placed than the court to make a more competent assessment of what is intended by the Act, that it should first be given the opportunity to achieve what it was set up to do, I am prepared to defer to the Commission.

Whether there is a right to Injunctive Relief

[94] The grant of an interlocutory injunction is a remedy that is both temporary and discretionary.

[95] Part 17 2 (3) of the Civil Procedure Rules 2000 provides that the Court may grant an interim remedy only if:

- a) the matter is urgent; or
- b) it is otherwise necessary to do so in the interests of justice

[96] Counsel for the first Defendant suggests that if the matter were considered to be urgent by the Claimant, it is expected that there would have been a response to the first Defendant's latest proposal of rates in January 2006 or that there would have been a more timely application. Counsel is of the view that the Claimant's behaviour amounts to acquiescence which undermines the Claimant's application for injunction.

[97] The Claimant refutes the first Defendant's suggestion that it has been tardy and states at paragraph 18 of the Affidavit in Reply to Notice and Amended Notice of Application of the first Defendant:

" I also wish to confirm and inform that on several other occasions the Claimant wrote, emailed and/or physically met with the NTRC, ECTEL, Ministry of Communications and Ministry of Finance officials, BOTH BEFORE AND AFTER being awarded the LICENCE and literally begged for help, guidance and support and were told that our situation would be "looked into" but to date nothing has been undertaken by any of the above in this regard, contrary to the express provisions of the Act".

And also at paragraph 24:

"The fact that the Claimant exercised faith in the NTRC for four (4) years in the hope that it would intervene in the impasse does not reduce the situation of urgency in fact this has become even more critical as it is now apparent that despite its stance of good faith in the NTRC the Claimant is now faced with the result that despite

such passage of substantial time the NTRC has not and is not likely to act upon its complaint”.

[98] Without delving into the facts contained in the Affidavits, I am of the opinion that this matter being of crucial importance to the operation of the Claimant's activities, that the delay in bringing this action is inexcusable and there cannot be said that the matter is urgent.

[99] There being no urgency displayed by the Claimant, it remains to be determined whether it would be “in the interests of justice” to grant an injunction to restrain the Defendant in its future activities.

[100] This will be done in keeping with the guidelines as set out in the oft cited American Cyanamid Co v Ethicon Ltd (1975) AC 397

Serious Issue to be tried:

[101] As stated in Blackstone Civil Practice 2004 at paragraph 37.20, the court need only to investigate the merits of the case to a limited extent. All that needs to be shown is that the Claimant's cause of action has substance and reality. Beyond that it does not matter as to what would be the Claimant's chance of success.

[102] It is argued by Counsel for the first Defendant that in view of the fact that the Claimant is not in possession of a licence for the provision of telecommunications services, the Claimant is not in a position to bring its claim or to ask the Court for an injunction, given that only licensed operators are permitted to establish and operate such services. Counsel for the Claimant is of the view that a licence was granted to the Claimant but because of the overpricing of their services by the first Defendant, the Claimant was prevented from entering the market and so serious questions remain to be tried such as the issues of breach of statutory duty and the infringement of the Claimant's fundamental rights.

[103] I am reminded by the words of Lord Diplock in the American Cyanamid case:

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence or affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial".

[104] Taking into account that the Application for injunction, though filed together with the Claim Form and Statement of Claim, has to be heard on its merits and all the Claimant's needs to establish that it has a prima facie case on the merits, I am of the view that the issue of whether or not the Claimant is a licensee, whether there was a breach of statutory duties under the Act, whether there was overpricing by the first Defendant, whether the first Defendant is in a dominant position as regards the provision of telecommunications services, whether the first Defendant has obstructed the Claimant from interconnecting to the first Defendant's network, are all serious issues to be tried.

Adequacy of Damages

[105] Having so decided, then I must go on to consider the question of whether the Claimant can be adequately compensated by an award of damages.

[106] Counsel for the Defendant contends that the Claimant has not proved that damages would not be an adequate remedy nor has it substantiated its claim in respect of the irreparable harm it will allegedly suffer in the event that the injunction is denied nor has the Claimant quantified the damages it anticipates it will suffer.

[107] The Claimant in response through its Affidavit in Reply to Notice and Amended Notice of Application of first Defendant deposed to by the CEO of the Claimant states at paragraph 21:

“In fact the damages claimed in the tens of millions of dollars by the Claimant clearly indicates that irreparable harm is being experienced to Cariaccess and its shareholders who have injected both cash and loan equity into the company and are now forced to stand by and watch this investment rust and ebb away as the market and technology changes”.

[108] Then the Claimant continues in paragraph 22 to say that it has suffered and will continue to suffer irreparable harm through loss of business opportunity including market share and profits each day that it is deprived of the opportunity to compete for new subscribers as a result of the direct actions of the first Defendant and damages cannot adequately compensate for such loss.

[109] I am again guided by the statements of Lord Diplock in the American Cyanamid case:

“If damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoyed, he would be adequately compensated under the plaintiff’s undertaking as to damages for the loss he would have sustained by being prevented from doing so

between the time of the application and the time of the trial. If damages in the measure recoverable under such as undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction”.

[110] The Claimant while referring to the small size of Saint Lucia and the limited business opportunities in the market for internet services, yet bases its connotation of irreparable harm on vague references to sum of “ tens of millions of dollars”. In addition the Claimant in its Affidavit has stated that the first Defendant is capable of being compensated in damages and gives an undertaking for any loss that the first Defendant may suffer should the matter be resolved in its favour at trial. In my opinion a mere undertaking in damages will not suffice, the Claimant has to indicate to the court its ability to satisfy any award of damages that might be made against it.

[111] “The extent to which the disadvantages to each party could be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in arising where the balance of convenience lies”.

[112] I am satisfied that neither party can properly quantify any damages that would be suffered or state whether in fact an award of damages would be adequate and “it is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises”.

Balance of Convenience

[113] Both parties suggest that the balance of convenience lies in its favour.

[114] Counsel for the first Defendant states that the unavoidable inconvenience to the public is only heightened by the fact that the first Defendant is currently the only provider of retail internet services in St. Lucia and to grant an injunction would impact negatively on the public by depriving any person who currently does not have the service from obtaining access.

[115] For its part the Claimant indicates that the injunctive relief sought is narrow in that it does not encroach upon or interfere with the extensive internet subscribers to the first Defendant, that the population of Saint Lucia is and has been prejudiced in that they have not been able to benefit from the competition provided for by the Act.

[116] To the extent that "the Court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case" I find myself persuaded by the argument that it would be preferable to maintain the status quo.

[117] Lord Diplock commented that in order to determine where the balance of convenience lies, a number of factors ought to be considered and it has to be determined what weight ought to be attached to these factors. In our case there are factors to be weighed such as the need for competition as provided for by the Act, the economic benefit to the Claimant, the constraints to the business of the first Defendant, the interests of the public, the benefits to the public .

[118] And so Lord Diplock advises:

" Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo".

for if the first Defendant is to be restrained from doing something in which he has not yet become involved, then if he succeeds at trial, it would only be a question of delaying implementation, however

“to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at trial”.

[119] I am of the belief that to interrupt the first Defendant at this stage would be of a much greater inconvenience to the public of Saint Lucia, no matter how narrow as suggested by the Claimant or how short the duration of such injunction would be.

[120] Also of greater significance and to be taken into account is that the Claimant has yet to be issued its licence – in spite of the assurance that the prescribed fee could be immediately paid, there still needs to be considered the practicalities in the issuing of the licence. It also has to be taken into account that the Claimant has yet to lodge its complaint with the second Defendant and the resolution of any subsequent dispute regarding over pricing as alleged by the Claimant. The time factor involved has to be measured against the consequential inconvenience to the general public in these circumstances.

[121] As argued by the first Defendant, the grant of an injunction at this stage would be depriving any person in St. Lucia who does not currently have internet access from obtaining such services and the effects of such injunction could materially hamper the personal as well as the commercial lives of the general public.

[122] In the premises I refuse the application by the Claimant for a grant of injunction.

ORDER

1. The Claim and Statement of Claim of the Claimant are hereby struck out and dismissed.
2. The Claimant's Application for grant of injunction is hereby refused.
3. Costs to the First Defendant to be assessed by the Court if not agreed by the parties.

SANDRA MASON Q. C.

High Court Judge