BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2007/0095

IN THE MATTER OF THE TLECOMMUNICATIONS ACT, 2006
OF THE LAWS OF THE VIRGIN ISLANDS

AND IN THE MATTER OF AN APPLICATION BY DIGICEL LIMITED

BETWEEN:

DIGICEL LIMITED

Claimant

and

THE TELECOMMUNICATIONS REGULATORY COMMISSION

Defendant

Appearances:

Mr. Paul Webster Q.C. with Mr. Kerry Anderson of O'Neal Webster for the Claimant
Mr. Anthony Astaphan Q.C. with Ms. Benedicta Samuels Richardson of Samuels Richardson & Co. for the Defendant
Mr. Gerard Farara Q.C. of Farara Kerins for Caribbean Cellular Telephone Company Limited (Interested Party)
Mr. Jovan Herberg with Keisha Durham of Harney Westwood and Riegels for Cable and Wireless (WI) Limited (Interested Party)
Mr. Terrance Neal with Mr. Kevon Swan of Mc W. Todman & Co. for BVI Cable TV Limited (Interested Party)

2007: May 18th and 25th

JUDGMENT

(Administrative law – Judicial review – whether regulatory commission established by statute acting ultra vires its statutory powers by promulgating an application procedure ostensibly in accordance with Ministerial policy which fetters its discretion to grant licences– whether Ministerial policy exceeds the purposes for which power to make granted by the Act – whether policy binding on Commission – Telecommunication Act 2006)

[1] **Joseph -Olivetti J.**: In these modern times telecommunication services can be likened to the blood vessels through which course the economic lifeblood of nations and the industry itself is generally lucrative, I understand. Accordingly, when a country liberalizes its

telecommunications services industry prospective suppliers are attracted to it like magnets to metal. In 2005 the Government of the British Virgin Islands ("the BVI") took the decision to open up its telecommunications services industry and introduced legislation, the Telecommunications Act ("the Act") in 2006, to achieve that result. Now, Digicel Ltd. ("Digicel") complains that it has been denied the right to apply for a licence under the Act and to have its application considered in accordance with the Act.

[2] On 4th May Digicel was granted leave to apply for judicial review and an interim injunction prohibiting the Telecommunications Regulatory Commission ("the Commission") from issuing any licences prior to the determination of its claim.

[3] The grant of the injunction did not go unremarked and as a result, on the return date for the injunction, Cable & Wireless (W.I) Ltd ("Cable and Wireless") and Caribbean Cellular Telephone Ltd. ("CCT") appeared and were given leave as interested parties under CPR 2000 R. 56.11 to make written submissions and to file affidavit evidence to be relied on at the hearing of the claim. Properly, Digicel did not express any objection. That hearing was also regarded as the first hearing having regard to the nature of the relief sought and the internal timetables involved and directions were given for an expedited trial.

[4] On the day of the hearing of the claim itself, BVI Cable TV Ltd. ("Cable TV") was granted the like facility. The interested parties filed their affidavit evidence and written submissions with alacrity. (Cable TV in anticipation of the court granting its application had filed its submissions and affidavit evidence in advance).

[5] For the sake of completeness, I must add that on the return date to consider the injunction, the Commission applied for its discharge and to strike out the claim for judicial review. This was on the basis that the relief sought had been granted as the Commission since the grant of leave had extended an invitation to apply to Digicel by way of amendment to the Invitation Document referred to hereafter by inserting the words, **"from all persons, including each of the three current licensed suppliers…"** which words were no doubt meant to answer Digicel's challenge. The arguments advanced in support of the application failed to persuade the court that Digicel no longer had grounds for valid complaint and was in due course dismissed with costs of $1,500.00 to Digicel and the injunction remains in force until the determination of the claim.

The Judicial Review Claim

[6] Digicel issued a Fixed Date Claim Form ("FDCF") on 9th May and subsequently amended it on the 16th. In its Amended Claim Form Digicel sought the following relief:-

> "(a) A declaration that the terms on which the Claimant has been invited to apply for a telecommunications licence under the Act are unreasonable and amount to a denial of the Claimant's right to apply for a licence in accordance with the provisions of the Act;
>
> (b) An order of mandamus requiring the Defendant to consider and determine the Claimant's application of February 16, 2007 (as may be amended) for a mobile telecommunications licence in accordance with the provisions of the Act;
>
> (c) An injunction prohibiting the Defendant from issuing telecommunications licences pending the determination of this claim;
>
> (d) A declaration that the Defendant in determining applications for licences under the Act is not bound by the contents of the policy document entitled "Telecommunications Liberalization in the British Virgin Islands" dated 10th April 2007 as amended on 3rd May 2007 ("the policy document");
>
> (e) Costs."

[7] It is remarked that the only substantive amendment to the original FDCF was the inclusion of the prayer for relief at paragraph (d) thereof. Cable TV took issue with this at the hearing submitting that it is not a proper amendment as this was a claim for judicial review and leave had not been obtained to add this prayer. It is convenient to address this now.

[8] Digicel sought leave to apply for judicial review under CPR Part 56 and in particular for an order of Mandamus against the Commission. See the ex parte application filed 30th April at T.B. Tab 1. Leave was granted in terms of the order of 4th May (T.B. Tab 9) which reflected the relief claimed in the application. All applications for judicial review are classed as applications for an administrative order. See R. 56.1(2) And an order for mandamus is specifically included in the term "judicial review." see R. 56.1(3

[9] On making an application for leave for judicial review an applicant is required to, inter alia, state the relief sought. (R. 56.3(3)(b). And, the Court has power to allow the application for leave to be amended (R. 56.4(6). Rule 56.8(1) headed '**Joinder of claims for other relief**' provides that an applicant may, where permitted by substantive law, include in an application for an administrative order a claim for any other relief or remedy that is related or connected to the subject matter of his application. Further R. 56.8(2) even contemplates the court granting further remedies like damages where there is no claim for that particular relief but where the facts of the case justify such a remedy and the court is satisfied that such a remedy could have been sought when the claim was issued.

[10] Strictly speaking Digicel ought to have sought leave to amend its claim. However, I am of the view that the inclusion of a prayer for a declaration having regard to the terms of the prayer and to the substantive grounds of the claim is open to Digicel under substantive law and is not such a relief as to take it out of the ambit of the application for which leave was granted. Furthermore, the court has power to rectify procedural errors by virtue of R. 26.9 on or without an application being made. In all the circumstances I would exercise my discretion to remedy this procedural error by granting leave to include this relief in the FDCF as none of the parties have been prejudiced by the amendment. I note that the Commission did not object and that of the three interested parties only one objected but made no claim to having been prejudiced. Accordingly, the court will treat the relief as having been made with leave.

The Facts

[11] The facts are undisputed and are contained in the two affidavits of Ms. Lisa Lewis, the Group Projects Director on behalf of Digicel, the two affidavits of Dr. Joseph Archibald Q.C. the Chairman of the Commission, the affidavits of Mr. Rob Lyons the General Manager of CCT, Mr. Vance Lewis the Chief Executive Officer on behalf of Cable and Wireless and Ms. Luanne Hodge the General Manager on behalf of Cable TV.

[12] The court is indebted to learned Counsel for Digicel, Mr. Webster Q.C. whose concise summary of the facts in his written submissions the court has unabashedly made its own subject to minor additions as indicated.

[13] Digicel is a company incorporated under the laws of Bermuda. It is the ultimate parent company of a number of subsidiary and affiliated companies primarily in the Caribbean which have been engaged in providing cellular telephone services in the Caribbean under the name or style "Digicel" since 2001.

[14] The Commission is the Telecommunications Regulatory Commission, a statutory corporation created by section 5 of the Act and is charged with the responsibility of licensing, regulating and developing the telecommunications services industry and service providers in the BVI.

[15] In October 2005 Digicel applied to the Minister of Communications and Works ("the Minister") for a licence to provide mobile telecommunications service in the BVI. The application was acknowledged by the Minister in the Legislative Council and Digicel was advised that its application would be forwarded to the Commission once it was formed

[16] The Act came into force on **26th October 2006** and by **12th January** a quorum of Commissioners had been appointed to sit on the Commission.

[17] Mr. David Iverson, Chief Executive Officer of the Commission wrote to Digicel's solicitors by letter of 5th February in response to a letter from Digicel's solicitors inquiring as to the status of Digicel's application, indicating, among other things, that the application of October 2005 was, **"an unsolicited proposal**" and that licences would be issued "**as a result of the Ministry policy paper detailing the parameters of competition that will be implemented, and an invitation process derived therefrom**". He went on to indicate in the letter that the invitation process would first be published in the Gazette and that that had not yet occurred. A similar letter dated 19th January was sent by the Minister to Digicel.

[18] Digicel disagreed with Mr. Iverson's interpretation of the Act and submitted an application pursuant to the Act under cover of its solicitors' letter dated 16th February copied to the Minister. **There was no response to this letter.**

[19] Instead, Mr. Iverson, **in a radio interview**, broadcasted in the BVI on 21st March, indicated that Digicel's application was, "**deficient",** and was in fact a proposal and could not be considered an application.

[20] Further letters by Digicel to the Commission and the Minister remain unanswered.

[21] On 20th April the Policy Document (**'the Policy Document"**) was published in the Gazette together with another document dated 20th April entitled "**Invitation to apply for Telecommunications Licence ("the Invitation")."** This specifically invited applications from the three interested parties alone. See Tab 8.

[22] On May 7th, after the court's order, the Commission published an Amended Invitation (**"the Amended Invitation"**) in the Gazette which invited applications from **all persons** including the three interested parties (see Tab 20) and confirmed by **a press release** on May 7th that it had Digicel's application under consideration. The deadline for submitting applications was extended from May 4th 2007 to 25th May 2007.

[23] On May 8th Digicel wrote to the Commission indicating that certain criteria and deadlines in the Amended Invitation made it impossible for it to submit a proper application and that the Amended Invitation was so skewed towards the existing three invitees, the Interested Parties, that its application could not be considered fairly.

[24] On May 9th the Chairman of the Commission advised Digicel's solicitors that the Commission would consider Digicel's application without applying the provisions objected to by Digicel in their letter of May 8th.

[25] On 10th May Digicel's solicitors again wrote to the Commission pointing out that even with the objectionable provisions removed Digicel's application would necessarily be woefully inadequate alongside the three invitees and Digicel's right to apply was therefore rendered illusory. In other words the apparent right to apply is not in accordance with the stated principles of the Act.

[26] I must add that all the interested parties in their affidavit evidence established that they are all existing service providers here with substantial investment in the industry in the BVI and that their enterprises will be adversely affected by these proceedings as their temporary licences granted under the Act will expire on the 31st May, 2007. This is borne out by the evidence of the Commission.

[27] Mr. Vance Lewis' concerns expressed in paragraph 5 of his affidavit(Tab.26) is perhaps a good indicator of the stance of the interested parties:-

> **"It is important to highlight that the delay in the TRC's determination and consequent granting of licences under the new telecommunications regime by virtue of these proceedings is extremely undesirable and prejudicial in**

the BVI market. This is as a result of the fact that the issuance of licences is necessary in order to enable the current service providers, including C&W, to continue its operation of the existing telecommunications network in the BVI since the TRC has determined that their licences are to expire on the 31st May 2007. It of grave concern to C & W and no doubt the other service providers that there may be no issuance of licences upon the expiration of the current licences should the Applicant be allowed to disrupt the timeline set by the TRC with respect to the application process."

[28] The interested parties also sought to show that the Policy Document was based on sound economic and public interest principles.

[29] At this juncture it is useful to remind ourselves that that in these proceedings the court is not called upon to deal with the merits of the Policy Document as in judicial review proceedings the "**Courts judge the lawfulness not the wisdom of the decision"**[1].

The Case for Digicel

[30] The nub of Digicel's submissions is that having regard to section 15 of the Act, Digicel and any other telecommunications services provider has a right to apply for a licence and to expect such applications to be dealt with on "an objective, transparent and non-discriminatory basis" in accordance with the provisions of the Act.

[31] Mr. Webster Q.C. says that the reality of the case is that the Minister has issued the Government's policy as set out in the Policy Document. The policy is to the effect that licences would be **granted to only the three named invitees** identified in the Policy Document. These are the interested parties who are the established service providers. The policy is incorporated in the Invitation wholesale and as a result the Invitation is heavily skewed in favour of the interested parties in that it contains requirements that can only be attainable by them and not by Digicel or any other applicant within the limited time allowed for applying. The effect of this is that Digicel's application has been disposed of

---

[1] Lord Keith **– R. v. Secretary of State for Trade and Industry ex. p. Loncho PLC** [1989] 1 WLR 525, 536.cited at De Smith p. 312 or 92.

without consideration by the Commission. That policy, says Digicel, is outside the scope of the Minister's powers under section 4 of the Act as it exceeds the purpose for which the power was given and therefore cannot bind the Commission.

[32] The amendment to the Invitation is of little consequence as the substance of the Invitation remains the same. Further, even if the unattainable stipulations are removed, compliance with the remaining stipulations will not allow Digicel to revise its application to the standard which is comparable to that of the interested parties.

[33] The Invitation forms part of the Telecommunications Code ("the Code") and as such is subordinate or delegated legislation and amenable to review by the courts. The Policy Document is a statutory document within the meaning of the Interpretation Act Cap. 136 Section 2 and therefore the Court has power to review it also. In short ,Mr. Webster is asking the Court to declare that the Invitation is ultra vires the Commission's powers under the Act and that the Commission is not bound by the Policy Document as it too is ultra iv vires the powers of the Minister under the Act. He made it abundantly clear that he is relying not on the principle which is now famously know as 'Wednesbury unreasonableness' but on the principle of illegality.

[34] Mr. Webster relied in the main on the following authorities namely, **Halsburys Laws of England 4th Ed. Volume 44 paragraph 1000**, **Attorney General v Barker and another**[2], **Ex parte Barbados Telephone Company Ltd.**[3], **Ex parte Davis**[4], **T.S. Mosiyiwa Holdings (Pvt) Ltd. and Another v Minister of Information, Posts and Telecommunications**[5].

The Case for the Commission

[35] Mr. Astaphan Q.C.'s submissions on behalf of the Commission in essence are as follows. Monopolies, says learned counsel, existed in telecommunications services in the BVI and elsewhere for several decades and the Government of the BVI decided to liberalize the industry but on a **transitional and phased basis**. This is not a novel proposition as it has occurred in a number of OECS jurisdictions and CARICOM. The purpose of a phased

---

[2] (1984) 38 WIR 48
[3] (1978) 33 WIR 45
[4] 1872 LJJ 526
[5] (1997) 4 LRC 160

introduction is to prevent disruption to established operators and ensure a smooth transition towards liberalization.

[36] There is no constitutional or legal obligation on the Government to open the market immediately to all applicants, entrants or full competition.

[37] Counsel urged that the policy to have a phased introduction was not adopted arbitrarily or in isolation having regard to the facts and material considered by the Government in the Policy Document which is dated **10th January 2007** and that policy cannot be impugned on the '**Wednesbury unreasonableness'** grounds.

[38] Furthermore, the Act constitutes the legislative framework for liberalization and most importantly it made express and specific provision for and reserved the right of the Minister to make policies and issue policy directives to the Commission. The Commission is obliged under the Act to comply with all applicable policy and policy directives in granting, refusing and determining applications for licences. Consequently, the Commission cannot issue any Telecommunications Code which conflicts with applicable policy or policy directives. See section 15(3) and (7) of the Act. In fact, counsel urged, the amendment to the Invitation was not a proper amendment at all as it was inconsistent with the Policy Document. (Clearly, then this amendment was made without the benefit of counsel's advice and the Commission is resiling from its effect.)

[39] Digicel, says Mr. Astaphan, has no right or unfettered right to apply for a licence. It can only apply in the manner prescribed in the Invitation. It cannot do so, as is conceded, and therefore it has no right to apply.

[40] Mr. Astaphan argues that the Invitation is not inconsistent with the Act or any alleged right to apply. It forms part of the Code and therefore is subordinate legislation under the Act and was lawfully issued. The Invitation properly took the Policy Document into account and is consistent with the legislative purpose and intent of section 94. Section 94 enables the Commission to continue licences of licensed operators but on a non-exclusive basis. And, it is not discriminatory as a decision limiting operators during the transitional period is not and cannot be considered discriminatory.

[41] Mr. Astaphan also points out that the Constitution of the BVI does not have fundamental rights and freedom provisions but even if it did, the absence of immediate competition does not raise any viable freedom of expression issues.

[42] With respect to the Commission's obligation to determine applications under section 15(7) on an "**objective, transparent and non-discriminatory basis**", learned counsel submitted that this means, "**no more than that the Respondent is required to act on published not private criteria and material, and must exercise its discretion in accordance with the law. "Non-discriminatory" means that in considering applications before it, the Respondent cannot grant or refuse an application on different criteria for different applicants. In other words, it cannot be subjective or selective. It must act consistently.**"

[43] Mr. Astaphan relied in the main on **Padfield and others v. Minister of Agriculture, Fisheries and Food and others**[6], **British Oxygen Co. Ltd. v. Minister of Technology**[7], **Associated Provincial Picture Houses Limited v. Wednesbury Corporation**[8].

Submissions of the Interested Parties

[44] Learned Counsel for the interested parties supported the Commission's position and I intend no discourtesy to counsel if I do not attempt to summarize their arguments save as to that on the right to freedom of expression as I think that the main points are covered in my summary of the Commission's arguments.

[45] For the sake of completeness I will however say something on the freedom of expression issue which was more fully explored by Mr. Herberg, learned counsel for Cable and Wireless in his submissions. Learned counsel's argument is to the effect that there is no Bill of Rights in our Constitution and that and that to succeed on grounds that its right to freedom of expression has been infringed, Digicel must establish in the first place that Article 10 of the European Convention on Human Rights ("ECHR") applies to the BVI and that there is a right of individual petition in respect of alleged breaches. In any event say counsel this is not an unqualified right having regard to Article 10(2). Counsel reserved the right to address this issue further if warranted.

[46] First, the ECHR was extended to the BVI by England on 23rd October 1953. And second, and more importantly, the right to freedom of expression in a democratic country is recognized and protected at common law. See **De Smith op.cit. para.** 6-053. In any

[6] [1968] A.C. 997
[7] (1971) A.C. 610
[8] (1948) 1 K.B. 223

event, Digicel is not relying on a deprivation of this right and there is no need to consider these issues further however tempting it might be to explore them..

[47] Authorities cited by the interested parties included **De Smith, op.cit para 13-021, para 13-029, DaCosta v Minister of National Security**[9], **Burroughs v. Katwaroo**[10], **R v Devon CC ex pr G.**[11], **Attorney General v Lopinot Limestone Ltd**[12].

Issues Arising

[48] The main issue as I see it is whether the Commission acted intra vires the Act in issuing the Invitation Document which incorporated in the main the Policy Document. In considering this issue one must perforce consider the legality of the Policy Document and whether or not the Commission is bound by it.

Court's Analysis

[49] I can think of no better place to begin than with Lord Diplock's dicta in **CCSU v. Minister of Civil Service**[13] where he conveniently classified the three heads upon which administrative action is subject to control by judicial review. He labeled them as illegality, irrationality or "Wednesbury unreasonableness" and procedural impropriety.

[50] Of illegality he explained: - **"by "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."**

[51] Of procedural impropriety he said:- **"I have described the third head as "procedural impropriety" rather than failure to observed basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are**

---

[9] 38 WIR 1, 9D
[10] 40 WIR 287, 310c,
[11] (1988) 3 WLR 42, 57A
[12] 34 WIR 229, 331h et seq
[13] (1985) p. 410 – 411 D – B

expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

[52] Here, Digicel is relying on illegality. **de Smith** op. cit. summarized the general principles on illegality thus:-.

> **"An administrative decision is flawed if it is illegal. A decision is illegal if: (1) it contravenes or exceeds the terms of the power which authorizes the making of the decision; or (2) it purports an objective other than that for which the power to make the decision was conferred.**
>
> **The task for courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the power in order to determine whether the decision falls within its "four corners". In so doing the courts enforce the rule of law, requiring administrative bodies to act within the bounds of the powers they have been given. They also act as guardians of Parliament's will – seeking to ensure that the exercise of power is what Parliament intended."** (Emphasis added)

[53] Counsel was at pains to establish that both the Invitation and the Policy Document because of their nature (subsidiary legislation and statutory document) were subject to judicial review. However, the 'beneficent remedy' of judicial review has come such a long way since the concept was first invoked that now the source of the decision-making power be it by statute or the Royal Prerogative is no longer of cardinal importance as virtually no administrative or executive action can lightly be said to be immune from review by the courts. Only matters concerning what the judges have referred to as 'high policy' matters may be immune from judicial review.[14].

[54] I will now consider the validity of the Invitation. It is common ground that the Invitation is part of the Telecommunications Code and in law, subordinate legislation. The Invitation on its face states that it was issued by the Commission under sections 15(2), 91(3) and 91(4)

---

[14] See R v Criminal Injuries Compensation Board ex. P.[1995] 1 All ER 870. Held where a question arose in proceedings as to the legality of any action taken by the executive the court as a general rule had jurisdiction to entertain the question unless the court's powers in that regard had been removed or restricted by Parliament.

of the Act and that it shall be made part of the Commission's Telecommunications Code[15]. See Tab 8 (2nd document).

[55] Section 91 of the Act gives the Commission power to issue such guidelines, standards and other requirements relating to telecommunications as it thinks fit, which shall constitute the Telecommunications Code and to publish the same on its website and in the Gazette.

[56] Sections 15(2), states-

> **"Subject to subsection (10), a person who wishes to operate a network or provide a service described in subsection (1) shall apply to the Commission for a licence in the manner prescribed in the Telecommunications Code."**

[57] There can be no doubt in the light of the foregoing provisions that the Commission has authority to issue a Telecommunications Code and to make provisions for applying for a licence in the Code. The Invitation is clearly part of the Code even if it presently forms the whole Code. It purports to set out the procedure for applying for a licence which is by invitation to the persons designated therein, the three interested parties.

[58] And in para. 1.2 the Invitation states:-

> **"This Invitation for Applications is being issued in accordance with the Telecommunications Act, 2006, (Act No. 10 of 2006), and the Minister's policy pronouncement on "Telecommunications Liberalization in the British Virgin Islands" dated January 10, 2007. Applications in reply to this Invitation shall be due by close of business on May 4, 2007."[16]**

[59] In para 2(1) the Invitation recites under the sub- heading **'transition period'** that licences to be issued in response to the Invitation will be limited to the three current operators '**in order to avoid undue turmoil in the telecommunications marketplace**' and that 36 months after the Minister would conduct a market analysis to determine whether an additional entrant shall be licensed and that the new entrant shall be determined by a

---

[15] As of date no further guidelines or standards have been issued by the Commission and therefore at present the Amended Invitation constitutes the Code.

[16] This deadline was extended to 25 May by the Amended Invitation as already noted.

comparative invitation process. As can be seen when one examines the Policy Document this mirrors paras. 4.7 and 4.8 of the Policy Document. The true effect of the Invitation is that it restricts applications to the three persons named therein. I also note the short time given for making applications pursuant to the Invitation which strikes one as extremely limited having regard to the nature of the subject matter of such applications. And on perusal of the entire Invitation I agree with counsel for Digicel that the application is skewed in favour of the interested parties specifically named therein. Clearly it was not contemplated that any other person would be applying for a licence.

[60] Was the Commission acting properly, that is, in accordance with the Act, in so faithfully adopting and implementing the Policy Document? In answering this question it seems to me that one must also necessarily consider whether the Policy Document itself is in accordance with the Act.

[61] Before doing this however I will consider the Commission's functions and powers under the Act and its obligations vis a vis ministerial policy.

[62] The Commission is vested with a wide range of powers and functions as set out in section 6 of the Act. The material provisions for our purposes are as follows:

> "**6. Subject to the provisions of this Act, the Commission shall**
>
> **(a) advise the Minister on positions and policies relating to telecommunications issues at international, regional and national levels;** ...
>
> **(d) be responsible for the regulation of licensees and authorization holders and for ensuring fair competition among licensees and all other operators of telecommunications networks or providers of telecommunications services;** ...
>
> **(e) determine applications for licences and frequency authorizations for any of the purposes specified in this Act and monitor, enforce**

and ensure effective compliance therewith and to issue instructions accordingly;…

(i) determine which telecommunications services should be made available, pursuant to section 28, throughout the Virgin Islands and establish and monitor the funding mechanisms therefore;…

(r) promote the systematic development of telecommunications throughout the Virgin Islands;…

(u) do all such other things as are necessary or expedient to give effect to its functions specified in paragraphs (a) to (t)."

[63] The Act mandates the Commission to be responsible for establishing its own policy (S.8(1)(b) and in formulating its policy **to take account of such policy directions** as may be given by the Minister in the exercise of the Minister's functions under section 4.

[64] The section concerned with licensing is section 15. The material provisions are as follows:-

"15. (1) No person shall operate a telecommunications network or provide a telecommunications service without a licence granted by the Commission.

15. (2) Subject to subsection (10), a person who wishes to operate a network or provide a service described in subsection (1) shall apply to the Commission for a licence in the manner prescribed in the Telecommunications Code.

15. (3) The Commission may grant or refuse any application for a licence, based on applicable policies and the Regulations."

15 (7) Subject to any policy directives issues by the Minister under section 4, the Commission shall determine applications for all licences on an objective, transparent and non-discriminatory basis."

[65] Clearly, it can be seen that section 15 does not confer a right to apply to Digicel as such. However to my mind that is not a decisive factor against entertaining the challenge. See Neill LJ in **R v Criminal Injuries Compensation Board** at page 880 – "in order to ascertain what role if any the court can play, it may often be necessary to take account of a number of factors including the following (a) the source of the power exercised by the executive; (b) the subject matter and the nature of the decision or action taken by the executive; (c) the basis of the challenge; (d) the interest of the person seeking the court's assistance; and (e) the remedy sought."

[66] It is remarked that in this case the challenge was entertained although not successful even though the applicant had no legal right to compensation from the scheme.

[67] Having regard to the strictures imposed by section 15(1) it follows that the Act contemplates that **anyone** who is desirous of providing a service can apply once he or she can meets the criteria laid down in the Code for making applications. The Act imposes no other barriers on a prospective applicant. Digicel has a legitimate expectation that any application procedure adopted would be one that falls within the four corners of the legislation and this gives it a sufficient interest to make this claim if it can establish as it alleges that the application procedure introduced by the Commission is illegal.

[68] As can be seen from section 15(7) the Commission has a duty in carrying out its functions to take account of ministerial policy and policy directives as conveyed to it by the Minister. However, to my mind this imparts no more than that the Commission should take **account of** or consider ministerial policy in determining whether or not to grant licences as the grant of a licence is a matter in the Commission's sole discretion as it alone has been vested with the authority to issue licences not he Minister. It does not mean that ministerial policy is the only relevant concern and it does not mean that the Commission must without exercising its own deliberate judgment simply rubber stamp the Minister's decision which appears to be the effect of the Invitation as this would be to defeat the purpose f of the Act as stated in its long title. "**There is nothing wrong with having a policy, provided always that it is appreciated that each application must be**

considered on its own merits." [17]This is true of the Commission's own policy as well as Ministerial policy. By restricting applications as it did the Commission clearly did not exercise its discretion in framing the Invitation.

[69] Now to the Minister's powers to make policy and give policy directives to the Commission. First, Section 4 provides:-

> **"4. (1) The Minister shall be responsible for**
>
> **(a) developing and reviewing telecommunications policies consistent with the purposes of this Act; (Emphasis added) and**
>
> **(b) matters of international telecommunications affecting the Virgin Islands, including international, regional and bilateral frequency coordination.**
>
> **(2) In the exercise of his functions and powers under this Act, the Minister shall consult with the Commission.**" (Emphasis added)

[70] Thus, it can be seen that the Minister can only make **policies which are consistent with the purpose and objective of the Act**. Even if it were not expressly stated as it was in section 4(1) (9) such an interpretation would have been given by the courts.

[71] Furthermore, in carrying out his functions and duties the Minister is obliged to **consult** with the Commission. Making policies is one of his duties or functions and therefore it is clear that Parliament intended that in developing policies he should consult with the Commission. This makes eminent sense having regard to the Commission's functions and to the fact that Parliament took pains to ensure that it is manned with persons knowledgeable in the field. It also has the power to command experts. See section 7(4).

---

[17] Policy:- 13-032 De Smith

[72] The matter of consultation was not specifically addressed by counsel but on the face of the documents before me it is questionable whether that procedural safeguard was met when the Policy Document was drawn up and as it is a matter of law the court cannot ignore it. Nowhere on its face does the Policy Document refer to the policy being formulated **after consultation** with the Commission. The Policy Document, as already adverted to, is not signed by the Minister and ex facie appears to be a statement of Government policy and an explanation of the Act. There is no evidence laid before the Court to establish that **the Minister** (1) developed the policy document, and (2) that he consulted with the Commission in so doing. Indeed, having regard to the date of the Policy Document (January 10th 2006) and when the Commissioners were appointed (January 12th 2006) according to the evidence before the court, he could not have so consulted.

[73] Accordingly, the Policy Document is not telecommunications policy which has been made in accordance with the Act and cannot bind the Commission. However, if I am mistaken in so holding I will, go on to look at substance of the document to consider whether or not it is ultra vires to the Act.

[74] The Policy Document which is entitled "Telecommunications Liberalization in the British Virgin Islands" is dated **10th January 2007** and was Gazetted on 20th April 2007. The copy on file (TB Tab 8) is unsigned. Now, to the contents. It gives an explanation of the Act. It explains the objectives of the changes sought to be achieved by the Act and the Government's plans for the detailed implementation of the Act. The policy enunciated therein is said to have been developed on the basis of a cost study conducted by a telecommunications economist. From that study it is stated that the Government concluded that it would 'implement a policy that allows three operators in the fixed and cellular mobile voice markets but eventually may admit up to four operators in the market.' (para 4.6).

[75] And for our purposes, the document states under '**Opening the Market**':-

> **"4.7. The BVIG accordingly intends to offer revised licences, on appropriate terms, <u>to the three existing network operators in the BVI</u>. It is**

the intent to allow each licensee to fully participate in all business areas of the telecommunications industry, including voice, data, wireless video programming, and Internet services, subject to such limitations as may be necessary for the effective management of the telecommunications industry. (Emphasis added)

4.8 The BVIG also intends to review the market to determine if and when a new operator may enter the market. The Minister responsible for telecommunications shall conduct a market analysis after thirty-six months to determine whether an additional entrant shall be licensed. <u>This new entrant will be whoever has, in the opinion of the BVIG, demonstrated that it best matches the criteria for market entry and has made the best case for entering the BVI telecommunications market.</u>" (Emphasis added)

[76] The Policy Document purports to limit licences to the three established operators during what has been termed the transitional phase. Clearly, the amount of service providers a market can sustain is a matter which is not within the domain of the court to determine. In other words it is not a justiciable issue as such matters fall to be determined by Government policy. However, the Policy Document goes on **to direct** that 3 licences be issued to the three existing providers during what is termed the transitional period of 36 months and indicated that only those three entities **be invited to apply**. Accordingly, when one looks at the Invitation it is inescapable the Invitation was geared towards achieving just that.

[77] Was this stipulation or restriction or directive as to the specific persons to be licensed and the manner of application (by invitation only) within the powers of the Minister if it can be said that the Policy Document was his and that he arrived at it after consultation with the Commission?

[78] First, what are policies or policy directions? Policy is defined by *The Concise Oxford Dictionary 9th Edn.* thus "**a course or principle of action adopted or proposed by a government, party, business or individual**".

[79] When one looks at the power given to the Minister to make policy in consultation with the Commission within the context of the Act as a whole, clearly it was intended to be general policies and policy directives meant to develop courses or principles of action to achieve the liberalization of the telecommunications services industry **in accordance with the Act**. At this juncture it is useful to bear in mind again the **long title of the Act** which is **"to establish a Telecommunications Regulatory Commission to license, regulate and develop the telecommunications services industry in the Virgin Islands and to provide for other matters connected therewith."**

[80] In my judgment the Act does not contemplate that the Minister could direct the Commission to issue licences to specific persons as the Minister has sought to do in his Policy Document. Section 15(2) of the Act speaks to any person being able to apply for a licence. The Minister cannot limit the persons who can apply or decide on the manner or form of such application. These are not matters of general policy and therefore do not fall within his domain. To do so would be to usurp the functions of the Commission and defeat the very purpose of the Act by encroaching on the specific functions of the Commission. The Act gives **the Commission** the power to issue licences to any person based on applicable policies and subject to any policy directives issued by the Minister under section 15.4. See 15(3) and 15(7). But, those directives cannot extend to the Minister identifying persons and directing the Commission to restrict applications and licenses to them as if he were to do so it would render the establishment of the Commission mere window dressing.

[81] Furthermore, the policy that only existing providers should be licensed within the first 36 months is clearly repugnant to the Act. Parliament did address the issue or at least one issue which it obviously viewed as of importance. The Act makes provisions to ensure little or no disruption in services by giving the Commission power to extend the licences of existing providers albeit on a non-exclusive basis for a period of at least three months or such later date as the Commission may determine. See section 94.

[82] And what is more important for our purposes are the provisions of Section 93(1). This stipulates as follows:-

> **"Where prior to the coming into force of this Act, a person who was licensed under the Telecommunications Act to provide a public telecommunications network or public telecommunications service loses any existing right pursuant to such licence and such loss results in pecuniary or other quantifiable disadvantage, the person shall be entitled to seek compensation for such loss."**

[83] This establishes beyond any question that the Act itself expressly contemplated the possibility that persons who held licences under the repealed Telecommunications Act might not receive a licence under the Act and provided machinery for compensation. The Minister in making his own provision for established providers alone to be licensed during the first 36 months seemingly did not take account of that section. He is thus seeking to achieve by way of policy something that falls outside the scope of his authority. If Parliament intended that the existing providers be licensed without more then Parliament would undoubtedly have said so and neither the Minister nor the Commission can achieve this result by way of policy directives or the Invitation Document.

[84] Accordingly, the Policy Document is ultra vires the Minister's powers in so far as it purports to require the Commission to restrict licenses to existing providers in the transition phase and the Commission is not bound by it.

[85] On this issue of the Minister's powers I must mention that Mr. Herberg submitted that Digicel could not challenge the Policy Document as the Minister was not made a party to the action. In my judgment, it was not necessary to do so as the Commission is relying on the Policy Document as justification for the Invitation and Digicel was entitled to challenge the Commission's Invitation without joining the Minister. In any event I note that the process was served on the Attorney General as this matter involves matters of public interest and that the Attorney General made an appearance on the hearing of the application for leave on the 4th May. Clearly then the Minister had an opportunity to intervene if he saw fit.

Conclusion

[86] In conclusion, for the foregoing reasons Digicel's application for judicial review succeeds and I will grant the relief prayed for at paras. a, b and d of the Amended Fixed Date Claim Form-:

(1) A declaration that the terms on which the Claimant has been invited to apply for a telecommunications licence under the Act are unreasonable and amount to a denial of the Claimant's right to apply for a licence in accordance with the provisions of the Act.

(2) An order of mandamus requiring the Defendant to consider and determine the Claimant's application of February 16, 2007 (as may be amended) for a mobile telecommunications licence in accordance with the provisions of the Act.

(3) A declaration that the Defendant in determining applications for licences under the Act is not bound by the contents of the policy document entitled "Telecommunications Liberalization in the British Virgin Islands" dated 10th April 2007.

[87] With respect to costs, my attention was drawn to CPR 56 by Mr. Astaphan and he made an application that should this action fail then the order for costs made against the commission on the unsuccessful application to discharge should be revoked.

[88] Rule 56 (6) clearly mandates that no order for costs should be made **against an applicant** unless the applicant acted unreasonably in making the application or his conduct was in some way worthy of censure in bringing it. The Rule does not speak to costs of a successful applicant and in that case the normal rule will apply. Accordingly, the Commission is to pay Digicel's prescribed costs based on the default value fixed by CPR 65.5(2)(b)(iii) for non-monetary claims. The interested parties are to bear their own costs.

[89] The court expresses its thanks to counsel for their flawlessly prepared trial bundles, written submissions and the wealth of authorities cited and for adhering faithfully to court fixtures and timeframes imposed for oral arguments. The Court appreciates how difficult it is for advocates to resist the compulsion albeit learned to embellish and expand on their written submissions however comprehensive and commends counsel. It goes without saying that this welcome assistance from the Bar enabled the Court to meet the internal timetable imposed by the very nature of this litigation.

Rita Joseph-Olivetti
High Court Judge