EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
[Civil]

Claim No. BVIHCV 179/2012

IN THE MATTER OF THE TELECOMMUNICATIONS ACT 2006

OF THE LAWS OF THE VIRGIN ISLANDS

AND IN THE MATTER OF AN APPLICATION BY CABLE & WIRELESS BVI LIMITED

BETWEEN:

CABLE & WIRELESS BVI LIMITED ("LIME BVI")

Claimant/Respondent

AND

THE TELECOMMUNICATIONS REGULATORY COMMISSION ("TRC")

Defendant/Applicant

Appearances:
Mr. Brain Marc Kennelly for the Applicant
Ms. Keisha Durham and Kissock Laing for the Respondent

2013: August 9th

JUDGMENT

[1] ELLIS J: This is an application by the Applicant, Telecommunication Regulatory Commission ("TRC") in which it seeks to set aside the ex parte order the Honourable Mr Justice Redhead dated 28th June 2012 which granted LIME BVI leave to apply for judicial review and suspended in the interim, the TRC's decision dated 1st June 2012 regarding LIME BVIs pricing practices in relation to mobile calls made from the BVI to other Caribbean Islands (the Decision).

[2] The Application is brought within the context of a somewhat protracted history between the Parties which is critical to the matters in issue. For that reason the relevant background is summarised below.

BACKGROUND

[3] By a written complaint to the TRC dated 14 July 2009 Caribbean Cellular Telephone Ltd. (CCT) claimed that LIME BVI (by certain "All Talk Calling Plans") was charging average retail prices to its mobile customers for calls to LIME affiliates in other Caribbean jurisdictions which were below the wholesale charges available to CCT from those LIME mobile network operators.

[4] This price differential was claimed to be extremely damaging to CCT. In order to run a viable business, CCT needed to be competitive in pricing calls to LIME mobile customers in other Caribbean countries. CCT could not, however, profitably cut its retail prices to match those of LIME BVI because CCT had to pay wholesale charges to LIME affiliates which were significantly higher than the retail prices offered by LIME BVI for calls to those LIME affiliates.

[5] The TRC conducted an extensive investigation into the compliant. The TRC gave LIME BVI notice of its concerns in two substantial documents on 17 June and 4 October 2011. LIME BVI responded in correspondence of 11 August 2011 and 14 October 2011 and the TRC contends that the Company was afforded an opportunity to challenge the TRC's concerns at an oral hearing before a panel of the Board of the TRC.

[6] The TRC contends that after considering LIME BVI's submissions, the recommendation of the investigation team and with the benefit of external and independent legal and economic advice, the Board of the TRC took the Decision on 1 June 2012.

[7] The TRC's position is that it considered the CCT complaint in light of section 75(1) (a) (iii) of the Telecommunications Act, 2006 (the "Act") which provides that the Commission may take enforcement action against a licensee or authorization holder if in the opinion of the Commission, the licensee or authorization holder is carrying on or is likely to carry on business in a manner that

is detrimental to the public interest, including in an anti-competitive manner, or detrimental to the interest of clients, creditors or investors.

[8] The TRC found that carrying on "business in a manner that is detrimental to the public interest, including in an anti-competitive manner" included participating in a "margin squeeze". The TRC Decision defined a "margin squeeze" as follows:

> *"a margin squeeze occurs when there is such a narrow margin between an integrated provider's price for selling essential inputs to a rival and its downstream price that the rival cannot survive or effectively compete. A margin squeeze can arise only when (a) an upstream firm produces an input for which there are no good economic substitutes, (b) the upstream firm sells that input to one or more downstream firms and (c) the upstream firm also directly competes in that downstream market against those firms".*

[9] In investigating whether a margin squeeze existed, the TRC adopted a well-established margin squeeze test in economics known as "the equally efficient operator test". On this test, the TRC found that there was a margin squeeze from January 2009 to August 2010 between the relevant average retail price paid by LIME BVI customers to make calls to other LIME affiliate numbers (fixed and mobile) in the Caribbean ($0.03pm) and the average wholesale price charged to LIME BVI to terminate calls to other LIME affiliate numbers in the Caribbean ($0.164pm) and other LIME affiliate fix numbers in the Caribbean ($0.0865). Thus, the wholesale charge for termination was over five times the retail price to make the call to the terminating mobile network and nearly three times the retail price to make the call to the terminating fixed network.

[10] On the basis of the facts set out in the Decision, LIME BVI was found to have incurred average monthly losses of ($28,905) from January 2009 to August 2010. The margin squeeze was found to have ceased when LIME BVI began to earn low but positive revenues on these calls after August 2010. The TRC found that the effect of this conduct would have had significant commercial implications for CCT because CCT's inability to offer a comparable Caribbean plan meant that it could not compete on the broader market for mobile subscription in the BVI on an equal basis with LIME BVI.

[11] The TRC found that "*continuation of the margin squeeze may be expected to contribute to CCT's declining market share of subscribers, falling prepaid subscribers, falling prepaid revenues and increasing losses...Over time, it is realistic to suppose that CCT would be forced to exit the market or would be absorbed into a competitor's operations, leaving two mobile network operators in the BVI market*". The TRC further found that competition and ultimately consumers would be harmed by the reduction of the number of competitors in the market.

[12] The TRC therefore ordered LIME BVI under section 75(2)(g) of the Act to desist from offering in the BVI the relevant "All Talk Calling Plans" to the extent that they contributed to the margin squeeze identified in the Decision. Furthermore, the TRC imposed a fine on LIME BVI under section 75(2)(b) of the Act by reason of its anti-competitive conduct in the sum of $493,665.

[13] On 26 June 2012, LIME BVI applied by an ex parte Notice of Application to the Court for leave to apply for judicial review of the Decision. This application was supported by the affidavit of Sean Auguste dated 26 June 2012. On 28 June 2012, Counsel for LIME BVI appeared before the Honourable Mr Justice Redhead in an ex parte hearing. The Court granted the following relief to LIME BVI:

i. Leave to apply for judicial review in respect of the Decision; and
ii. A declaration that the grant of leave to make a claim for judicial relief operate as a stay of the Decision, thus preventing any party from seeking to rely on the Decision pending the determination of the judicial review.

[14] On 29 June 2012, LIME BVI notified the TRC that leave to apply for judicial review had been granted and that the Decision suspended by order of the Court. By letter dated 10 July 2012 Forbes Hare, solicitors for the TRC, wrote to Harney Westwood & Riegels ("Harneys"), solicitors for LIME BVI, to request inter alia that Harneys send to Forbes Hare all documents and materials relied on before the Court on 28 June 2012. On 18 July 2012 the TRC formally applied to the Court for the disclosure of these materials. The TRC also applied for an extension of time to make an application pursuant to CPR Part11.16 to set aside or vary the ex parte Order.

[15] Further to LIME BVI being granted the Order for leave, a Fixed Date Claim Form was filed on 13 July 2012 and came on for its first hearing on 24 July 2012. An order was made by this Honourable Court adjourning this first hearing to the first available date after the expiration of the time period given to the TRC for making or obtaining a determination in respect of its application to set aside the Order permitting Judicial Review

[16] Following the hearing of an application filed by LIME BVI on 13th July 2012, the Honourable Mr Justice Wallbank by order dated 17 July 2012 directed LIME BVI to deliver to Forbes Hare forthwith copies of all documents filed at Court on behalf of LIME BVI in these proceedings, and in particular any skeleton argument for the ex parte hearing, the original and typed up notes of that hearing and a transcript when available. Time to apply to set aside or vary the Ex Parte Order was extended to 14 days following the supply of the transcript and costs order was made against LIME BVI.

[17] On 9th October 2012, the TRC filed the subject Application in which it seeks an order to set aside the ex parte order of the Honourable Mr Justice Redhead. The grounds upon which the TRC relies are set out in the Affidavit of Joanna Jerrard – Dunne dated 9th October 2012 in which she contends:

i. That Cable & Wireless BVI Limited doing business as LIME (C&W) contrary to its duty to the Court, failed to give full and frank disclosure to the Court in respect of its material filed and submissions made in the course of its ex parte 28 June 0212 application which resulted in the ex parte order.

ii. C&W failed to give notice of the 28 June 2012 application to the TRC in circumstances where it should properly have been given.

iii. C&W erred in referring the Court to incorrect provisions of the Civil Procedural Rules and compounded its errors with additional procedural failures.

iv. C&W did not follow the correct procedures in relation to obtaining ex parte interim relief and, as a result there was no assessment of the merits of granting such relief which resulted in the application being fatally flawed.

The Applicant's Case

[18] The TRC contends that in advancing the ex parte Application for leave, LIME BVI owed two relevant duties to the Court:

i. A duty of candour.
ii. A duty to make full and frank disclosure.

[19] Counsel for the Applicant submitted that persons who seek the leave of the Court to apply for judicial review are under an important duty to make full and frank disclosure to the Court of material facts including those adverse to the application:[1] This includes a duty to cite adverse authorities to the Court.

[20] In regard to the duty to identify the likely defences to the judicial review, Counsel for the TRC submitted that an applicant seeking leave is under a positive duty to make reasonable inquiries as to what such defence might be, by reference to all of the relevant facts and legal principles. Counsel submitted that the proper discharge if these duties is particularly important where an application is made ex parte.[2]

[21] Counsel for the TRC submitted that at the ex parte hearing on 28 June 2012, LIME BVI failed to adequately discharge its duty to the Court. The TRC submitted that at no point in the proceedings did Counsel for LIME BVI draw to the attention of the Court either (1) the relevant legal test for the grant of leave in judicial review (which the TRC contends LIME BVI did not satisfy); or (2) the weaknesses in LIME BVI's application for judicial review. In regard to the latter, the TRC submitted that neither in its affidavit evidence nor in the oral submissions made to the Court did LIME BVI suggest what the case against it might be.

[22] Counsel for the TRC relied on the judgment of Bingham J in Siporex v Comdel [1986] 2 Lloyds LR 428 at 437in which he held it is not sufficient for an applicant on an ex parte application to rely on "*general statements*" and mere "*exhibiting" of "documents*". Instead "*he must identify the crucial*

[1] R v Leeds City Council ex p. Hendry (1994) 6 Admin LR 439
[2] In support the Applicant relied on Marc Rich & Co Holding GmbH v Krasner [1999] CLY 487, in which the English Court of Appeal approved the dictum of Bingham J in Siporex Trade v Comdel

points for and against the application". The TRC submitted that no point, principle or authority potentially adverse to LIME BVI's case was drawn to the attention of the Court.

[23] Counsel for the TRC complained that LIME BVI failed to bring to the Court's attention the fact that a judicial review court must show particular restraint in second guessing the assessments of an expert and experienced decision-maker such as the TRC. R v Director General of Telecommunications, ex p. Cellcom Ltd. [1999] ECC 314. Counsel also alleged that LIME BVI did not bring to Court's attention the fact that not every failure in analysis by a decision-maker requires or permits its decision to be quashed. So that if the reviewing court is satisfied that a reasonable decision-maker in the position of the TRC would still have reached the same decision, the Court may decline to quash the decision R v Broadcasting Complaints Commission ex p. Owen [1985] QB 1153 at 1177. Counsel for the TRC also contended that although Mr Auguste exhibited the Decision to his affidavit, he failed to draw the Court's attention to any part of it which contradicted the arguments which he made. This apparent failure was not cured by Counsel for LIME BVI who drew the Court's attention to only to those parts of the decision which supported his client's case.

[24] Counsel submitted that the countervailing arguments are easily identifiable in the Decision and would have been clear to LIME BVI had it made any reasonable enquiries based on the facts and legal principles available to it. The TRC posited that had LIME BVI brought to the Court's attention the TRC's likely defence to the proposed judicial review grounds, the Court would have seen that LIME BVI's claim lacked reasonable prospects of success.

[35] Counsel for the TRC submitted that the fact that potential defences were contained in the Decision and other exhibited documents which were before the Court is no answer. On the authority of Siporex and Cable & Wireless (Cayman Islands) Ltd v Information and Communications Technology Authority[3]. it is not sufficient in an ex parte application to bury the countervailing arguments in exhibits to the evidence adduced. An applicant must fairly and squarely take the Court to these contrary arguments which a respondent might make if it were in court resisting the application.

[3] [2007] CILR 273

[36] The TRC submitted that there is no question of the material non-disclosure being innocent. In TRC's view LIME BVI is an experienced operator and is part of a corporate group with extensive regulatory and legal experience. LIME BVI's affiliate in the Cayman Islands was involved in litigation in 2007 and 2008 arising out of a similar failure to comply with this duty in a judicial review leave application so that LIME BVI's solicitors and Counsel were and are well aware of the duties owed to the Court by an applicant for leave to apply for judicial review in an ex parte hearing.

[37] In light of the deliberate material non-disclosure, Counsel for the TRC submitted that LIME BVI should be deprived of the advantage (the grant of leave and the stay of the Decision) which it has derived as a result of its breach of duty. Counsel for TRC submitted that this is not a case where the Court should exercise its discretion, to continue the order notwithstanding the proof of material non-disclosure. Because the breach of the duty was substantial, the TRC submitted that the Court should "strongly incline towards setting its order aside and not renewing it"[4], there being no "plainly deserving circumstances" justifying a re-grant of leave or of the interim relief.[5]

[38] Alternatively, the TRC submitted that if the Court is minded to continue the grant of leave, then there is plainly no basis for continuing the interim relief in the form of the stay. Counsel for the TRC submitted to the Court that this would be a proper response to non-disclosure by an applicant for leave.[6]

[39] Separate and apart from its breach of the duty to disclose, Counsel for the TRC also contended that LIME BVI actually misled the Court by maintaining that CPR Part 56.4(8) allowed the learned judge, without more, to suspend the decision under challenge. Counsel for the TRC argued that the CPR makes a clear distinction between a "stay of proceedings" under CPR Part 56.4(8) and "interim relief" under CPR Part 56.4(9) and he submitted that where a "stay of proceedings" essentially amounted to interim relief enjoining the decision of a public authority, the application should be made under CPR Part 56.5 (9) and not CPR Part 56.4 (8).

[4] Re OJSC Ank Yugraneft at page 104

[5] Cable & Wireless (Cayman Islands) Ltd. [2007] CILR 273 per Smellie CJ at paragraph 59

[6] R(MS) v Secretary of State for the Home Department [2010] EWHC 2400 (Admin) at [1]

[40] Counsel suggested that as a matter of principle, it is plain that the suspension of a decision of a public authority should be by way of an injunction under CPR Part 56.4 (9) must satisfy the requirements set out in the American Cyanamid Co. Ltd. v Ethicon[7]. This is because the courts have developed principles which apply to applications for interim relief in judicial review proceedings that strike the correct balance between the private interests of the applicant and the public interest sought to be protected by the respondent.

[41] The TRC submitted that neither CPR Part 56.4(9) nor any of the common law requirements for the grant of interim relief in judicial review were brought to the attention of the Court. LIME BVI made no attempt at the leave hearing to satisfy the requirements for the grant of interim relief. Had the learned judge been properly informed and had the relevant principles of American Cyanamid been applied, the TRC submitted that no interim relief would have been granted against it.

[42] In applying the American Cyanamid principles, Counsel for the TRC submitted that the Notice of Application contains no candid assessment of the balance of convenience, rather this is simply assumed to weigh in favour of LIME BVI. In addition no consideration is paid to the public interest. As a result of the grant of interim relief, the TRC is restrained from properly performing its statutory role of regulation of the telecommunications market and ensuring fair completion among licensees.

[43] The Decision requires that LIME BVI "desist from re-offering the All Talk Plus plan to the extent that it constitutes an anti-competitive margin squeeze on CCT. The TRC noted that a similar order has been applied to Digicel BVI, (a LIME competitor) which has withdrawn its Caribbean plans which form the basis of the anti-competitive behaviour. In light of the order of interim relief made in favour of LIME BVI, LIME BVI is now free to offer the All Talk Plus plan. This creates a potential unfair advantage for LIME BVI as well as allowing for a renewal of the margin squeeze on CCT. With the benefit of its interim relief, LIME BVI can continue to offer consumers lower rates and may attract consumers from Digicel BVI since Digicel BVI, in compliance with the order of the TRC, no longer offers its Caribbean plans to consumers.

[7] [1975] AC 396

[44] The TRC contended that if the usage by LIME All Talk Plans customers is sufficiently high, as a result of the monthly charge to consumers for these plans and the resulting low charge per minute, LIME BVI may again breach section 75(1) (a)(iii) of the Act on the basis set out in the Decision.

[45] The TRC also noted that the Notice of Application dated 26 June 2012 LIME BVI seeks a stay of the Decision *"in light of the fact that it would be unjust for it to be compelled to pay the fine which forms part of the Decision being challenged in these proceedings pending the determination of the same..."* Counsel for the TRC therefore submitted this potential loss is purely financial and could easily have been remedied by repayment to LIME BVI of the fine in the event that LIME BVI succeeded in its judicial review so that damages would have been an adequate remedy in the circumstances.

[46] Finally, Counsel for the Applicant submitted that LIME BVI's ex parte application also failed to respect important procedural protections in ex parte applications. First, the TRC submitted that LIME BVI failed to give notice of its application in circumstances where it should properly have been given. The TRC grounds this contention on the basis that an application for the stay of the Decision is properly characterised as an application for interim relief. Counsel for the TRC submitted that CPR Part17.3(2) provides that the Court may grant an interim remedy on application made without notice if it appears to the Court that there are good reasons for not giving notice. In addition, CPR Part 17.3(3) requires that the evidence in support of an application made without giving notice must state the reasons why notice has not been given.

[47] The TRC submitted that in the case at bar, the evidence in support of LIME BVI's application for a stay did not set out any reason why notice had not been given, nor did the Notice of Application give any justification for having proceeded on an ex parte basis. It also does not appear that LIME BVI brought this omission to the attention of the learned Judge who would have to consider whether it was appropriate to grant the relief sought on an ex parte basis.

[48] The TRC submitted that LIME BVI was notified of the Decision on 1 June 2012, and was fully aware of the background to the Decision at that time, having participated in the investigation which led to it. Notwithstanding this, LIME BVI waited until 26 June 2012 before making its application on

an urgent basis, largely on the ground that the fine imposed in the Decision was due to be paid on 30 June 2012. Counsel for the TRC submitted that had LIME BVI acted expeditiously in filing its application, there would have been little or no urgency and sufficient time to apply on notice to the TRC.

[49] Secondly The TRC submitted that CPR Part 11.15 requires that where an order is made on an ex parte basis, the applicant must serve a copy of the application and any evidence in support on all other parties. LIME BVI was also bound by the obligation to take a note of any ex parte hearing by the applicant to such proceedings and serve that note on the TRC "with all expedition".[8] The TRC contended that LIME BVI disregarded this obligation and served its note of the hearing only when it was compelled to do so by order of this Court dated 17 July 2012 and even then delayed in providing its for a full week following the Court's order.

[50] Thirdly, under CPR Part 11.16, an order made on ex parte application must contain a statement telling the respondent of the right to make an application to set aside that order pursuant to CPR Part 11.16. The draft order which was provided to the learned judge by LIME BVI contained no such. The order in this form was sealed and was accordingly defective.

[51] Fourthly, CPR Part 56.4(3) (b) requires that where an application for leave in judicial review includes a claim for immediate interim relief, the judge must direct that a hearing in open Court be fixed. This was not brought to the attention of the learned judge by LIME BVI and he did not direct a hearing in open Court as required by the CPR.

[52] Finally, the TRC submitted that CPR Part 56.7(4)(b)(i) requires that the affidavit in support of an application for an administrative order must state the nature of relief sought and identify any interim relief that the applicant has sought. The TRC noted that Mr Auguste's affidavit failed to do so.

[8] Interoute Telecommunications (UK) Limited v Fashion Gossip Limited (The Times, 10 November 1999) per Lightman

[53] The TRC submitted that the amalgam of the breaches by LIME BVI was deliberate and inexcusable given that it is an experienced litigator who would have received the Decision since 1 June 2012. In the premises the TRC asks that the both the interim relief and the order granting leave to apply for judicial review should be set aside.

The Respondent's Case

[54] The Application was trenchantly opposed by the Respondent who contends that the Order granting leave to apply for judicial review should not be set aside and that a first hearing for the judicial review claim should be scheduled by the Court in consultation with the Parties.

[55] The Respondent submitted that the ex-parte application for leave to apply for judicial review was made on an urgent basis and sets out a number of compelling grounds disclosing an arguable case being made out for judicial review of the Decision. LIME BVI did not merely summarize but rather set out in fair detail its grounds for seeking judicial review of the Decision so that the Court could appreciate that its claim was not a frivolous one. These grounds were further set out in and supported by the affidavit of Sean Auguste dated 26 June 2012.

[56] The application was supported by a certificate of urgency which clearly identified the basis of the urgent application. Counsel suggested that the Court reviewed LIME BVI's application and evidence in support in advance of hearing and at its conclusion, granted the order sought by LIME (BV).

[57] Counsel noted that the CPR very clearly sets out in CPR 56.3(3) a total of eleven points which must be covered in an application for leave to apply for judicial review and she submitted that LIME BVI's ex parte application satisfied all of the relevant requirements under CPR 56.3(3) and (4). She therefore concluded that the application and evidence filed in support on behalf of LIME BVI provided sufficient material to the Court to establish an arguable case for judicial review.

[58] LIME BVI contended that it has made a prima facie case demonstrating that the Decision of the TRC which relates to the manner in which LIME BVI carried on its business from January 2009 to

August 2010 is ultra vires given that the TRC exceeded the scope of its power to take enforcement action which is prescribed under section 75 (1) (a) (iii) and is limited to the manner in which business is being carried on or is likely to be carried on. In addition, LIME BVI identified three irrelevant considerations which were taken into consideration by the TRC thereby making the Decision irrational/unreasonable and in any event ultra vires based on established principles of public law.

[59] Moreover, LIME BVI submitted that CPR Part 56.4 (2) provides that the Court may give leave or grant permission without hearing the applicant. It is only in limited circumstances as set out in CPR Part 56.4 (3) that a judge must direct that a hearing in open court be fixed. These circumstances include: (1) where a judge is minded to refuse the application or (2) is otherwise of the view that a hearing would be desirable in the interest of justice or (3) where the application includes a claim for interim relief.

[60] LIME BVI submitted that its application did not include a claim for interim relief. Further, the Judge gave no indication that the justice of the case required that this matter to be heard in open court, neither did he demonstrate that he was minded to refuse the application. They submitted that in fact the transcript of this hearing demonstrates that the learned Judge had no difficulty with proceeding with the ex parte application in the manner in which it was conducted and the circumstances of this hearing did not warrant that a hearing in open court be fixed.

[61] Counsel for the Respondent submitted the Court should only exercise its inherent jurisdiction to set aside the Order for leave to apply for Judicial Review where the TRC can establish that there was a failure on the part of LIME BVI to disclose material facts. She argued that the TRC have identified no specific facts which should have been disclosed to the Court or which were material to the exercise of the Court's discretion to grant the Order permitting Judicial Review.

[62] Lime BVI further argued that the TRC has also failed to identify any relevant statutory provisions which were not identified to the Court by LIME BVI at the ex parte hearing. It submitted that in fact, the transcript demonstrates that Counsel referred the Court to the relevant provisions of the Telecommunications Act 2006, which were highlighted in its application.

[63] LIME BVI submitted that rather than demonstrating that there was deliberate non disclosure or a deliberate attempt to mislead the Court in any way, the TRC has merely highlighted a number of procedural points based on its understanding of judicial review proceedings and the standard for obtaining permission which are not set out in the relevant provisions of the CPR nor supported by case law.

[64] LIME BVI submitted that the ex parte application for leave is in the nature of an administrative procedure which is intended simply as a filter for frivolous, vexatious or hopeless applications for judicial review. Consequently, as noted by Smellie CJ of the Court of Appeal of the Cayman Islands:

> "...leave will often necessarily be granted without going into the material in depth, provided that there appears, prima facie, an arguable case for the grant of the relief claimed by the applicant."

[65] With respect to the failure to give notice of the application leave to apply for judicial review of the LIME BVI submitted that CPR Part 56.3(2) clearly provides for the application for leave to be made without notice. Counsel submitted that the TRC has not identified any reason for giving notice that is sufficiently compelling such that CPR 56.3 (2) should not apply. LIME BVI rejected out of hand the contention that LIME BVI's application for a stay under CPR 56.4 (8) should be characterised as an application for interim relief so as to warrant the giving of notice to the TRC. It further submitted that this would not in any event constitute a ground on which the Court should set aside the Order for leave to apply for Judicial Review.

[66] LIME BVI then dealt summarily with the allegation of procedural failures made by the TRC. It contended that the TRC's objections were largely addressed in the Order of 17 July 2012. In any event LIME BVI submitted that it would rely on the dicta of Popplewell J in R v Secretary of State for the Home Department ex parte Beecham[9] which clearly posits that procedural objections do not have any great attraction in public law cases. Counsel argued that none of the matters raised in the Application have any merit in the context of challenging the Order for leave to apply for Judicial Review which was granted to LIME BVI.

[9] [1995] QBD 2

[67] Additionally the Respondent submitted that the requirement under CPR Part 56.7(4) (b) (i) which was referred to in paragraph 16(e) of the affidavit in support of the Application relates to the affidavit in support of the application/claim for judicial review and not an affidavit in support of an application pursuant to CPR 56.3 for leave to apply for judicial review. Counsel for the TRC submitted that the affidavit of Sean Auguste dated 26 June 2012 was filed in support of the latter and not CPR 56.7(4)(b)(i).

[68] LIME BVI also rejected the TRC's contention that LIME BVI's application for the stay was advanced on an incorrect legal basis or that it failed to draw the correct and relevant legal provisions to the attention of the Court. Counsel for the TRC suggested that the objections made by the TRC are based on its flawed reasoning regarding applications for a stay under CPR Part 56.4(8). She argued that CPR 56.4(8) is based on the English R.S.C Ord. 53 r. 3 (10) which is similarly worded. The principles governing this procedural rule have been set out by the English Court of Appeal in the case of Regina v Secretary of State for Education and Science, Ex parte Avon Country Council[10]. The Court in that case construed the stay of proceedings in a broad manner with Glidewell L.J. observing that "a stay of proceedings" is apt to include decisions made by a governmental official/authority. Counsel noted that the Court in that case also clarified that a stay is distinct from and not to be confused with an injunction in civil proceedings. Indeed the Court expressly stated that:

> "An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has finally been determined is, in my view, correctly described as a stay".

[69] Counsel for LIME BVI submitted that the Court has a wide discretion on leave applications to order that the grant of leave operate as a stay where what is being sought is an order for certiorari. Moreover, she submitted that CPR 56.4(8) clearly mandates that the Court must give a direction in circumstances where the application is for an order of certiorari as to whether the grant of leave operates as a stay of the proceedings. She noted that this mandatory directive was highlighted to the Court by LIME BVI at the ex parte hearing. As LIME BVI's application specifically sought an

[10] [1991]AC 588, 560 - 563

order for certiorari, Counsel contended that it is on this basis that it sought to engage the Court's power to grant a stay of the proceedings.

[70] Counsel for LIME BVI submitted that the courts have only condescended to draw an analogy between a stay of proceedings and the grant of interim (injunctive) relief in circumstances where the court has determined that the grant of a stay against a public body would detrimentally affect the operations of a third party. In such a case the applicant would normally be expected to give a cross undertaking in damages to the third party and the Court would be reluctant to grant a stay in the absence of such a cross undertaking. In this case, there is no evidence that the operations of a third party would be detrimentally affected neither is there any evidence that a third party might suffer loss as a result of the suspension of the Decision.

[71] LIME BVI submitted the affidavit evidence advanced by the TRC in regard to the possible loss or detriment to third parties is wholly unsubstantiated. Moreover it argued that the Decision clearly states that it is not carrying out an anti-competitive margin squeeze on CCT as its All Talk plan which was held to have had such an effect was operational within a limited time frame which has now past (i.e. January 2009 to August 2010). Further, LIME BVI argued that it had discontinued the Plan of its own volition without being ordered to do so and that there is no evidence that it has reintroduced this plan or is currently carrying out its business in this manner.

[72] Consequently, Counsel for LIME BVI submitted that given the nature of the Decision, there was no need in the context of a stay to explore loss or prejudice to third parties or the public interest as suggested by the TRC. A stay or suspension of the Decision, not to mention the Decision itself, did not impact on LIME BVI'S operations at present neither could a stay of the Decision prejudice or have any impact on third parties. She submitted that in fact the only operative aspect of the Decision which would have been suspended by virtue of the stay would have been the fine which was ordered to be paid by 30 June 2012.

[73] In all the circumstances Counsel for LIME BVI submitted that the order granting the stay of the Decision rightly formed part of the Order for leave to apply for Judicial Review and should not be set aside or overturned.

COURT'S ANALYSIS AND FINDINGS

Full and Frank Disclosure

[74] Courts have always required of those persons who seek *ex parte* orders a high standard of candour and responsibility. The duty of an applicant on an *ex parte* application to make full disclosure of all facts material to the determination of his or her right to the relief, is a crucial burden which must be discharged. In considering the applicant's obligation, the courts have drawn no distinction between an order in the nature of an injunction and an order which creates or confirms rights which otherwise would not exist. So that the obligation of candour and diligence also exists in the case where an applicant seeks leave to apply for judicial review.

[75] An ex parte applicant for leave is therefore under an important duty to make full and frank disclosure to the court of all material facts and matters, including matters which would militate against the grant of leave or relief. R v Leeds City Council ex parte Hendry

[76] Of course, the extent of the disclosure required will depend upon the particular facts in each case, but it is now abundantly clear that an applicant must make a full and fair disclosure of all matters within his or her knowledge which are material to the proceedings and which favour of the other party. The remit or extent of the duty and the principles to be applied by a court in considering its application have been helpfully set out by the Court in the case of R v Lloyds of London ex parte Briggs[11] which adopted the requirements of the duty of full and frank disclosure in the context of ex parte injunctions set out and summarized by Gibson LJ in Brinks Mat Ltd. v Elcombe[12] as follows:

i. The duty of the ex – parte applicant is to make a full and fair disclosure of all material facts. R v Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac [1917] 1 KB 486, 514 per Scrutton LJ.

ii. The material facts are those which it is material for the judge to know in dealing with the application as made; and materiality is to be decided by the court and not

[11] (1993) 5 Admin LR 698

[12] [1988] 1 WLR 1350 at 1356, followed by the Eastern Caribbean Court of Appeal in Sonya Young v Vynette Frederick Consolidated Appeals HCVAP 2011/022, 023,024, 026

by assessment of the applicant or his legal advisors. R v Kensington Income Tax Commissioners per Lord Cozens –Hardy MR at page 504.

iii. The applicant must make proper enquiries before making the application. Bank Mellat v Nikpour [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the ex – parte applicant but also to any additional facts which he would have known if he had made such enquiries.

iv. The extent of the enquiries which will be held to be proper and therefore necessary must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the Defendant and (c) the degree of the legitimate urgency and the time available for the making of inquiries. Bank Mellat v Nikpour at page 92-93.

v. If material non – disclosure is established the court will be astute to ensure that he plaintiff who obtains [an ex parte injunction] without full disclosure… is deprived of any advantage he may have derived by the breach of duty." Bank Mellat v Nikpour per Warrington LJ at page 91.

vi. Whether the fact not disclosed is of sufficient materiality to justify or to require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which are to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that it relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquires and to give careful consideration to the case being presented. *Behbehani v Salem* [1989] 1 WLR 723 at 726 – 72

[77] Not every omission will result in the automatic discharge of an ex parte order. The court has discretion notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms. Lloyds Bowmaker Ltd v Britannia Arrow Holdings PLC[13] Each case must depend upon its own facts and the determining factor is the interests of justice. In Fitzgerald v Williams[14] Sir Thomas Bingham M.R set out the general position thusly;

> "In seeking ex parte relief an applicant must disclose to the judge any fact known to him which might affect the judge's decision whether to grant the relief or what relief to grant. It is no answer

[13] [1988] 1 WLR 133
[14] [1996] 2 WLR 447 at 454 F - H

> for an applicant who falls down on his duty to show that the relief would have been granted even had he complied with his duty. The courts have traditionally insisted on strict compliance with this rule as affording essential protection to an absent defendant and as applications for ex parte relief have multiplied so the importance of complying with this duty has grown...the judge has then to exercise his own judgement whether in all circumstances the interest of justice are best served by discharging or maintaining or varying the order. In making this judgement he will have regard to the importance of securing compliance with the fundamental principle but he must have regard also to the significance in the context of the particular case of the facts which had not been disclosed when they should have been". (emphasis mine)

[78] In the Court's view the rationale for requiring an ex parte applicant for leave to make a full and frank disclosure was most fittingly set out in Re OJSC Ank Yugraneft[15]in which the Court explained as follows:

> "... the Court is being asked to grant relief in the absence of the defendant and is wholly reliant on the information provided by the claimant. Moreover, it is not only the duty of the claimant to disclose material facts: he must also present fairly the facts which he does disclose...The principles are well established and well known on applications without notice for injunctions and other interim relief, but they are fundamental to the proper functioning of the Court's process on any application without notice to other interested parties which makes these principles so important. Other parties do not have the opportunity to correct or supplement the evidence which has been put before the Court"

[79] It is now clear that the duty also extends to disclosure of adverse legal principles and authorities. In R v Secretary of State for the Home Department ex parte Li Bin Shi[16] leave was set aside for failure to disclose legal authorities and principles. Latham J, in that case commented that counsel should not expect even experienced judges to be seized of all relevant legal principles and authorities and should cite cases relied upon and adverse to the application.

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[15] [2008] EWHC 2614

[16] [1995] COD 135; See also R v Crown Prosecution Service ex – p Hogg [1994] COD 237 where Auld J commented that it would be wiser in paper applications for leave to draw the judge's attention to any body of authority against the applicant and explain how it is to be distinguished.

[80] It therefore follows that in considering such applications it is necessary for the Court to first identify the alleged non-disclosure and then to determine whether it was a matter material to the decision and, if so, whether it would have made any difference to the outcome.

[81] Turning to the case at bar, it is apparent that the Applicant maintains or alleges more than a few breaches on the part of the Respondent LIME BVI. The allegations mainly focus the failure or LIME BVI or its counsel to identify the weaknesses in its application for relief and/or the relevant principles and authorities which in the particular circumstances of this case would have militated against the grant of leave.

[82] Counsel for the TRC took pains to identify the several omissions in LIME BVI's ex parte application which he contends were deliberate and glaring. As regards LIME BVI's argument that the TRC had no power under section 75 of the Act to take enforcement action in respect of past anti-competitive conduct, Counsel for the TRC argued that such a literal interpretation is inconsistent with the purpose of the section and cannot have been intended by the Legislature. Moreover, she submitted that such a literal interpretation runs counter to the long-established interpretation of regulatory statutes in other common-law jurisdictions.

[83] Counsel for the TRC argued that it is common for prohibitions in regulatory statutes to be drafted in the present or future tenses notwithstanding the fact that they encompass past behaviour and he cited the example of section 18 of the UK Competition Act 1998 which provides that *"... any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom. Counsel submitted that this statutory provision does not expressly encompass past conduct (e.g. by using the terms "may affect or have affected trade within the United Kingdom*") yet it has never been suggested that the UK regulatory authority lack jurisdiction under section 18 to sanction past anti-competitive conduct which has ceased by the time of the final decision. Indeed in almost all competition or regulatory decisions where a sanction is imposed, the impugned conduct will have ceased by the time of the final decision.

[84] In any event, Counsel submitted that section 75(1) (a) (iii) of the Act expressly targets the situation in which a licensee is "likely to carry on" its business in an anti-competitive manner. The Decision orders LIME BVI to desist from pricing in such a way as to cause the anti-competitive margin squeeze to be revived. These propositions do not appear in the Decision because this argument had not previously been made by LIME BVI. They could, however, have been identified if any reasonable enquiries had been made by LIME BVI or thought given to the TRC's case.

[85] The TRC's contended that LIME BVI's failure to inform the Court that there was an argument that the Act in fact allowed the TRC to penalise past anti-competitive conduct went to the core of LIME BVI'S case. The TRC submitted that reference by LIME BVI's Counsel to the TRC's exercise of a "retrospective power" [17] was misleading as the conduct penalised in the Decision all occurred after the coming into force of the prohibition in section 75(i) (a) (iii) of the Act.

[86] In relation to LIME BVI's contention that the TRC took into account irrelevant and/or failed to take into account relevant considerations, Counsel for the TRC contended that that decision like all decisions made by statutory regulators should be read in a generous and not a restrictive way[18] and should be read as a whole and be analysed as if it were a statute.[19] He submitted that in any event each of the concerns raised by Mr Auguste and Counsel for LIME BVI are conclusively addressed in the Decision. The following specific examples are identified:

i. " As regards LIME BVI's the alleged error in market definition, 27-28 of the Decision explains that (1) formal market definitions were not required under section 75(1)(a)(iii) of the Act; and (2) proper market definitions were in any event set out;

ii. As regards the alleged lack of causality between LIME BVI's conduct and CCT's losses, 40-47, 49-59 of the Decision explains how LIME BVI'S conduct was likely to drive CCT out of the market;

iii. As regards the appropriateness of the definition of "margin squeeze" adopted in the Decision, 31-34 of the Decision explains that a margin or price squeeze such as that operated by LIME BVI is simply a well-recognised type of anti-competitive behaviour (as by the broad prohibition in section 75(1)(a)(iii) of the Act;

[17] See: transcript, p. 7, 11. 7-11
[18] R v Monopolies and Mergers Commission, ex p. National House Building Council [1993 ECC 388'
[19] Tesco v Competition Commission [2009] CAT 6 at [79]

iv. As regards the lack of jurisdiction to penalise LIME BVI because the wholesale charges are applied by LIME affiliates and not LIME BVI itself, 24-25 of the Decision explains that:

(a) LIME BVI sold to CCT wholesale services on its affiliates' networks on behalf of those networks and therefore stood in the shoes of the upstream operators. Further, the relevant behaviour is the retail pricing in the BVI where the plan has material effect. LIME BVI set the retail price of its plan in the BVI and in doing so set a price level which threatened to exclude CCT.

(b) There was strong evidence that, for the relevant period, LIME BVI participated in a form of anti-competitive margin squeeze. It is wholly artificial to contend that LIME BVI'S conduct as the agent in the BVI for its affiliated LIME upstream operators should be disregarded. In ascertaining whether in substance (and as a matter of economic reality) a margin squeeze occurred in the BVI, it was relevant that LIME BVI sold the LIME upstream termination input to CCT while at the same time competing with CCT through the All Talk Plans."

[87] Counsel for the TRC submitted that the facts and matters which LIME BVI failed to bring to the Court's attention are highly material since the contentions of LIME BVI if made out, would vitiate the Decision. As no contrary facts or arguments were put to the Court, the TRC submitted that there is no evidence that LIME BVI made any proper inquiries of its likely defence before making the application, as required by the case law.

[88] The weight of judicial authority clearly prescribes that an ex parte litigant has a duty to disclose potential defences as well as relevant principles and authorities which in the circumstances of a particular case would have militated against the grant of leave. In Siporex Trade S.A. v Condel Commodities Ltd.[20] the court summarized the duty of an ex parte litigant as follows:

> "Such an applicant must show the utmost good faith and disclose his case fully and fairly…he must identify the crucial points for and against his application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identifying any likely defences. He must disclose all acts which reasonably could or would

[20] [1986] 2 Lloyd's Rep 428 The dictum in Siporex has been adopted in several Eastern Caribbean Supreme Court judgements so that it is now clear that it reflects the law in this jurisdiction.

be taken into account by the judge in deciding whether to grant the application. It is no excuse for the applicant to say that he was not aware of the importance of matters he has omitted to state."

[89] Having reviewed the evidence filed in support of the application for leave as well of the transcript of the ex parte proceedings before my learned brother Redhead J on 28 June 2012, this Court is satisfied that although the entire text of the Decision would have formed part of the materials laid before him, the specific adverse issues which have been identified by the TRC were either not advanced or addressed with any depth. The matters essentially constitute legal defences which would underpin the TRC's response to the legal challenge levied against it. They indicate to the Court that there are considerably weighty matters which will trouble the reviewing court and which should as a consequence have been brought to the attention of the judge hearing the application for leave.

[90] This statement of principle must however be considered in light of the relevant context. Where the applicant seeks to set aside leave to apply for judicial review on the basis on material non-disclosure, the Court accepts the dictum of Bignham J in R v Home Secretary ex parte Chinoy which was considered by Smellie C J in Cable & Wireless (Cayman Islands) Ltd v Information and Communications Technology Authority. At pages 294 -295 of the judgment he noted the following:

> ""In R v Home Secy ex p Chinoy, Bingham J stated the principles as follows (4 Admin L.R. at 462)
>
> > "I would however, wish to emphasize that the procedure to set aside is one that should be invoked very sparingly. It would be an entirely unfortunate development if the grant of leave ex parte were to be followed [by applications to set aside inter partes which would then followed] if leave were not set aside by a full hearing. The only purpose of such a procedure would be to increase costs and lengthen delays, both of which would be regrettable results. I stress therefore that the procedure is one to be invoked very sparingly and it is an order which the court will only grant in a very plain case."
>
> That is a statement that recognizes two further distinct considerations. The first is that fact that the ex parte application for leave in the nature of an administrative procedure intended imply as a filter against frivolous vexatious or hopeless applications for judicial review… As

such leave will often necessarily be granted without going into the material in depth provided that there appears prima facie an arguable case for the grant of the relief claimed by the applicant.

Secondly it follows that leave will often have been granted on the court's expectation that the true merits or otherwise of the applicant's case will be tested upon the full inter partes hearing of the application. Unlike in the case of the grant of other kinds of ex parte orders such as Mareva injunctions where the grant of leave substantially affects the parties interest – in these kinds of cases, that is unlikely to happen. Further it would follow that applications to set aside the ex parte leave in a proceeding sort of a full inter partes hearing will often be counterproductive. It is likely that some examination of the merits will still be undertaken and often only conclude that the full hearing should proceed."

[91] In the Court's judgment this means that for every case where leave initially given is to be set aside, a judge must consider the matter deliberatively. In clear cases either way, namely, where leave should be clearly granted or refused, little or no difficulty arises. In unclear cases, the court must, incline towards sustaining the leave given unless there are compelling reasons otherwise.

[92] In the case at bar the Court has no reservations in concluding that there was an unfortunate failure to disclose material factors militating against the application for leave which included obvious aspects of the TRC's potential defence to the Claim. These factors include matters of law and matters of mixed fact and law which will no doubt be fully ventilated at the substantive hearing but which all judicial authorities prescribe should have been candidly traversed by LIME BVI at the ex parte hearing before Redhead J. so that he would be fully assisted in determining whether an arguable case for judicial review could be made out.

[93] Neither Counsel's note nor the transcript of the proceedings demsonstare that any effort was made to bring such matters to the attention of the learned Judge (no contrary or adverse arguments were advanced by LIME BVI) and it is clear that simply putting the Act and the full text of the Decision before the court would not be have been enough.

[94] Given the indisputable scope of its duty, as a well represented and experienced litigant (LIME BVI) the Court cannot conclude that its lack of candour was inadvertent. In the premises the Court must in accordance with the binding authority of the Court of Appeal decision of Sonya Young v Vynette Frederick et al Consolidated Appeals HCVAP 2011/022 – 026[21] set aside the ex parte order granting leave to apply for judicial review.

[95] The Court is however empowered to consider the application for leave in light of the whole of the facts presented on this Application. Having reviewed the application for leave, the supporting affidavit and the oral submissions made by Counsel, the Court is satisfied that there arguable grounds were advanced which meet the threshold test for the grant of leave prescribed in Sharma v Browne-Antoine[22]. Having reviewed the Act, the Court is satisfied that there is a case to be argued as to the scope of the TRC's jurisdiction under section 75 of the Act. While the Court accepts the TRC's contention that ultimately this is a matter of statutory interpretation, having reviewed the current state of the relevant judicial authorities, the Court has determined that LIME BVI's submissions raise compelling legal issues which require a full hearing on their merits.

[96] In the Court's opinion this case raises issues of public importance. Of prime importance is the approach to be taken by the courts and public authorities to the interpretation and application of the enforcement provisions of the TRC's regulatory regime. The Court is cognizant that the Act establishes a fairly new statutory regime in the Territory which is yet untested. The Court is satisfied on the basis of the submissions of Counsel for the TRC that there is a significant public interest in ensuring the intention of the Legislature is properly construed.

[97] Further, the Court is not satisfied that the TRC's submissions sufficiently disgorges LIME BVI's contention that the TRC took into account irrelevant and/or failed to take into account relevant considerations. The matters highlighted in the application for leave were not decisively routed by Counsel for the TRC and in the Court's view warrants a thorough hearing on the merits. Both sides have raised compelling legal arguments and again the Court is mindful that this case raises issues of general public importance – including the factors which are to define anti-competitive behaviour

[21] Paragraph 28 of the Judgment
[22] [2007] 1 WLR 780 at page 787 D-H recently applied in Michelle Andrews v DPP et al. High Court Civil Claim 41 of 2008 (St. Vincent & the Grenadines)

under the Act; the definition and application of the term margin squeeze; and theory of harm applied by the regulator. These constitute arguable matters which will potentially have significant regulatory implications for the Territory.

Stay of Proceedings

[98] Under CPR Part 56 once leave to apply for judicial review has been granted, the court may also grant interim relief. Part 56.4 (8) provides that if the remedy sought is certiorari or prohibition, the court must direct whether the grant of leave is to operate as a stay on the proceedings to which the application relates. More generally, CPR Part 56.4 (9) provides that the court may grant such interim relief as it deems just.

[99] These procedural rules have generally been the source of significant debate and litigation. The debate centres on whether a stay of proceedings constitutes interim relief and analyses the remit of a grant of a stay as opposed to an interim injunction.

[100] The English Court of Appeal has held that the Courts may suspend the operation of an administrative decision pending an expedited process for the hearing of the judicial review claim by granting a stay. In R v Secretary of State for Education, ex p. Avon County Council[23] the Court of Appeal held that "proceedings" should be construed broadly so as to include any process or procedure by which a public law decision is reached.

[101] Noted legal scholars have theorised that this conclusion is best explained by the fact that at the time (prior to the decision in M v Home Office [1994] 1 A.C. 377) it was not thought to be possible to obtain an interim injunction against Ministers of the Crown. So the Court of Appeal would be compelled to grant a stay in order to achieve the same purpose as an injunction. The Court therefore held that the term is apt to include executive decisions and the process by which the decision was reached and may be granted to prevent a minister from implementing a decision.

[23] [1991] 1 Q.B. 558

[102] However for the British Virgin Islands, the Court is of the opinion that the legal position as regards a stay of proceedings was definitively prescribed by the Privy Council in Ministry of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd[24]. In that case the Privy Council held, that a stay of proceedings is merely an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place; and that it could have no possible application to an executive decision which has already been made. At page 556 of the judgment Lord Oliver stated;

> "A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place. It is not an order enforceable by proceedings for contempt because it is not, in its nature capable of being "breached" by a party to the proceedings or anyone else. It simply means that the relevant court or tribunal cannot, whilst the stay endures, effectively entertain any further proceedings except for the purpose of lifting the stay and that in general, anything done prior to the lifting of the stay will be ineffective, although such an order would not, if imposed in order to enforce the performance of a condition by a plaintiff (e.g. to provide security for costs), prevent a defendant from applying to dismiss the action if the condition is not fulfilled."

[103] After referencing the relevant part of the Jamaican Civil Procedure Code, he went further to say that,

> " This makes perfectly good sense in the context of proceedings before an inferior court of tribunal but it can have no possible application to an executive decision which has already been made…If it was desired to inhibit JCTC from implementing the allocation which has been made and communicated to it or to compel the minister assuming this were possible to revoke the allocation or to issue counter instructions that was something which could be achieved only by an injunction with mandatory or prohibitory for which an appropriate application would have to be made."

[104] It should be noted that the Board in this case was considering s.564B (4) of the Jamaican Judicature (Civil Procedure Code) Law which was in similar terms to CPR Part 56.4 (8).[25] More particularly it should also be noted that ex p. Avon was neither referred to nor cited in argument.

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[24] [1991] 1 W.L.R. 550

[25] s.564B (4) of the Jamaican Judicature (Civil Procedure Code) Law provided that "the grant of leave under this section to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operates as a stay of the proceedings in question until the determination of the application or until the court of judge otherwise orders."

[105] Counsel for the TRC argued that ‘‘proceedings’’ in this context ought to be given a narrow meaning and there certainly seems to be some significant support for this contention. In England the United Kingdom Law Commission has also recommended a narrow reading of the term.[26] This is in light of the fact that injunctions are now available against ministers on a claim for judicial review.

[106] It is this Court’s view that the narrow construction of the term “stay of proceedings” which is the correct and applicable construction to be applied in this jurisdiction.[27] There being no proceedings upon which stay could take effect, the Court is of the view that the grant of the relief was inappropriate and inapplicable in the circumstances. Now that interim injunctions are readily available, the Court is of the view is that an interim relief in the form or a mandatory or prohibitory injunction should be sought rather than a stay, unless the decision actually involves proceedings narrowly construed.

[107] Notwithstanding this (and in the event that the Court’s conclusion is wrong) it cannot be disputed that ultimately both remedies (a stay and an injunction) depend on the exercise of the court’s discretion and have the same objective of preventing the operation of the impugned measure pending the substantive hearing. Until recently the principles governing the exercise of the grant of a stay have remained in a state of flux although it was generally thought that principles governing the grant of interim injunctions could be similarly applied to the grant of stay. This has been increasingly confirmed in recent cases where the courts have effectively applied the same approach to awarding a stay as they would have done on an application for an interim injunction (at least in relation to public bodies other than Ministers). This is evident in Cala Homes (South) Limited v Secretary of State for Communities and Local Government [2010] EWHC 3278 (Admin), and Walshaw Moor Estate Ltd v Natural England [2012] EWHC 331 (Admin).

[26] Law Commission Report, Administrative Law: Judicial Review and Statutory Appeals (Law Com No. 226, 1994) at para. 6.26.

[27] R v Secretary of State for the Home Department, ex p. Muboyayi [1992] 1 Q.B. 244

[108] In Cala Homes after concluding that the court had jurisdiction to grant a stay in the circumstances of that case, Lindblom J observed the following at paragraph 27

> "As with any application of this kind, the court must do its best to establish the procedural justice of the matter, having regard to the balance of convenience. In striking the balance of convenience the court will consider the substance and apparent strength of the claim, without predetermining its merits. Here, in my judgment, the court has to go about this task with a sense of the wider importance of the issues raised as well as the particular circumstances of Cala Homes as claimant. On behalf of the Secretary of State it has been conceded, though only for the purposes of the present application, that the court should adopt a benevolent attitude to the merits, and assume that the claim is arguable. I have done so. Without attempting to prejudge the claim, but conscious of the history lying behind it in the original proceedings, I consider that it must be regarded as having some prospect of success. Equally clear, however, from the summary grounds presented to the court by the Secretary of State and from those of the City Council, is that this new challenge, like the last, is going to be vigorously opposed…But, in any event, the existence of what may turn out to be a compelling argument for the Secretary of State on so fundamental a question in the claim is, of itself, a factor which goes to the balance of convenience." (Emphasis mine)

[109] In Walshaw Moor Singh J continued a stay of the impugned decision and granted permission for an expedited hearing of the judicial review claim. The claimant had obtained urgent interim relief on the papers pending an inter partes hearing and it then succeeded in continuing that protection until the substantive hearing on the basis of undertakings. Singh J accepted that on closer scrutiny of the facts the balance of convenience favoured the claimant, rather than a precautionary approach. In particular, he noted that the defendant had allowed a long time to pass (during which time it had full knowledge of the claimant's activities and their effects) before taking any regulatory action at all thereby undermining its claimed urgency.

[110] The principles governing interim relief in ordinary private law disputes are set out in the well know case of American Cyanamid Co. These private law principles (is there a serious issue to be tried, where does the balance of convenience lie, would damages be an adequate remedy for the claimant) must however been modified to take into account the peculiar context of judicial review litigation. This was recognised by the House of Lords in R v Secretary of State for Transport ex

pa Factortame Ltd. (No.2)[28]. This position has since been confirmed in BACONGO v Department of the Environment of Belize (Practice Note) [2003] UKPC 63, [2003] 1 W.L.R. 2839 where per Lord Walker, in delivering the advice, stated at paragraph 35

> "Counsel were agreed (in the most general terms) that when the court is asked to grant an interim injunction in a public law case, it should approach the matter on the lines indicated by the House of Lords in American Cyanamid […], but with modifications appropriate to the public law element of the case. The public law element is one of the possible "special factors" referred to by Lord Diplock in that case, at p409. Another special factor might be if the grant of refusal of interim relief were likely to be, in practical terms, decisive of the whole case; but neither side suggested that the present case is in that category."

[111] Further, at paragraph 39, he held that:

> "Both sides rightly submitted that (because the range of public law cases is so wide) the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimise the risk of an unjust result.

[112] The decision in Ex parte Factortame was considered by the Court of Appeal in R v Secretary of State for Trade and Industry, ex parte Trades Union Congress[29] where Buxton LJ at paragraph 27 summarised the court's approach thusly:

> "I draw from Lord Goff's speech the following propositions:
>
> (A) The decision whether to grant an interim injunction, and thus in the case before us whether to grant a declaration on an interim basis, is a matter of discretion on the part of the trial court. The Court of Appeal in this instance, as in all others, will not interfere with the decision made by the trial court unless that decision reveals either an error of law or a plain error of fact or assessment.
> (B) In approaching the question of whether an injunction should be granted in such cases, the court should have regard to what I describe as the threshold condition that Lord Goff identified, as a particular requirement that ought to be fulfilled in all but the most exceptional cases before an otherwise apparently valid law is struck down or disapplied.

[28] [1990] 3 WLR 818
[29] [2001] 1 C.M.L.R. 8,

> (C) In thereafter considering, as the court is obliged to in an interim application, the balance of convenience, the concurrent elements that the court has to take into account in a case such as the present are firstly, the strength of the case asserted by the Claimants in the sense of its prospect of success in the European Court of Justice; and, secondly, the respective loss to the parties should the declaration sought either be granted or not be granted, and in due time either one or other of them is successful in the European Court of Justice. Having said that, though, I revert to the point that, as with any other issue of the balance of convenience, that balance is to be struck in the first instance by the court of trial."

[113] Case law generally reveals that there is a strong presumption against interim relief in public law matters because it is in the public interest that decisions of public bodies are respected unless, and until, they are set aside. In relation to whether there is a serious issue to be tried, while the grant of permission is pegged as a starting point it is by no means the case that interim relief will be appropriate merely because permission has been granted. The courts have demonstrated that the more appropriate approach is to take account of the strength of the applicant's case when weighing the balance of convenience.

[114] It is also clear that the balance of convenience in public law cases cannot be measured simply in terms of the financial consequences to the parties. An applicant will normally have to demonstrate actual misfeasance before damages would be awarded against a public body. It follows therefore that the adequacy of damages in unlikely to be a key issue in public law cases because breach of public law does not of itself give rise to a claim in damages.

[115] Given these factors, the balance of convenience is likely to be the key factor for the court when deciding whether or not to grant interim injunctive relief. The case law demonstrates that there is an incontrovertible nexus between the balance of convenience and the public interest because a public body will have taken its decision in the exercise of powers intended for the public good. This was described by Lord Goff at 673A-674D of Ex parte Factortame

> "Turning to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that "one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed:" […] I incline to the opinion that this can

> be treated as one of the special factors referred to by Lord Diplock in the passage from this speech which I have quoted. In this context, particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put in to the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being from enforcing the law. […]"

[116] This dictum aptly describes the undertaking which must trouble any court in considering an application for interim injunctive relief or indeed an application for the stay of a final decision. In the case of the latter, the grant of such an order would prevent implementation of the decision, suspending it for the time being so that it would be treated as temporarily being of no effect.

[117] Having reviewed the transcript of the proceedings, the Court concurs with Counsel for the TRC that none of the common law requirements for the grant of interim relief in judicial review were brought to the attention of the Court. LIME BVI made no attempt at the ex parte leave hearing to satisfy any of the requirements. The Court is also satisfied that the learned Judge was not properly informed of how the relevant principles of American Cyanamid were to be applied.

[118] Apart from the potential financial impact of the fine against the company, LIME BVI's Notice of Application does not attempt to assess the balance of convenience and there is no indication that Counsel for LIME BVI otherwise assisted the learned Judge in carrying out that assessment. The Court is of the view that such an assessment would have been critical to the outcome of the application.

[119] Moreover as there is no written judgment, it is not clear (the transcript or from the order) how the Court in fact assessed the balance of convenience or whether the balance of convenience was simply assumed to weigh in favour of LIME BVI. It is certainly not clear whether any consideration was paid to the public interest.

[120] In its current terms the order granting the stay of the Decision restrains the TRC from properly performing its statutory function under the Act. There can be no doubt that the result of this order is that LIME BVI is ostensibly free to offer the impugned Plan. The fact that the Plan has been discontinued by LIME BVI in circumstances where it indicated that it has no plans to reintroduce the same would, in the absence of an enforceable undertaking or court order provide no real comfort to the TRC or to LIME competitors.

[121] Further, in light of the overall context of the Decision, the Court cannot agree that the only operative aspect of the Decision which would have been affected by the order was that which was detrimental to LIME BVI – to wit the fine which was due to be paid by 30th June 2012. Even if LIME BVI contention were to be accepted, in the Court's view a partial stay of the decision relative to the payment of the fine may have provided LIME BVI with adequate protection without the need to stay the entire scope of the Decision.

[122] It is also noted that LIME BVI offered no cross-undertaking in damages as the *quid pro quo* for the grant of the interlocutory stay. The TRC alleges that no regard was paid to the fact that third parties might suffer loss as a result of the suspension of the Decision. The Authority noted the potential impact, possibly Digicel BVI and consumers in the BVI telecommunications market generally but was unable to provide any actual or substantiated evidence of the likely detrimental impact on the operations on these third parties who are not before the Court. What is clear is that the genus of the investigation and the consequent Decision was in fact a complaint made by CCT. It stands to reason that it would be a third party who would have had more than a mere interest in the application which would warrant the approach adopted by the Court in R v Inspectorate of Pollution and Anor.[30] The stay would clearly have the potential to deprive CCT of the benefit of the Decision which was rendered ostensibly in its favour.

[30] [1994] 1 WLR 570 at page 573

[123] Again in the absence of an enforceable undertaking or court order, the intimation that LIME BVI does not intend to reintroduce the Plan in circumstances where the TRC has required it to "*desist from reoffering the All Talk Plus Plan to the extent that it constitutes an anti-competitive margin squeeze on CCT*" can provide no real comfort in the wake of the interim stay.

[124] The Court is satisfied that ex parte procedure employed by LIME BVI contributed in no small part to the wide scope of the order which was granted by the Court. This procedure goes against the now commonly accepted practice whereby applicants who wish to ask for interim relief in the form of a stay would give notice of the application to a respondent so that he may attend the hearing and if necessary make representations.[31] Where no notice has been given to the respondent, the case law has suggested that a court adjourn the application to enable the respondent to be represented. In the British Virgin Islands this is further underpinned by CPR part 56.4 (3) (b) which requires that where an application for judicial review includes a claim for interim relief, the judge must direct that a hearing be fixed in open court.

[125] LIME BVI has advanced no legitimate reason why notice of the application could not have been provided to the TRC and it does not appear from the transcript that this was raised before the learned Judge so that he could consider adjourning the application for an inter partes hearing.

[126] This Court has no doubt that if the recommended practice had been followed that LIME BVI would not have obtained the order which it did. Given that purported concern for LIME BVI was its financial obligation (fine) and given its intimation that it was not prepared to reintroduce the impugned Plan, the Court can see no basis for the broad scope of the order made by the learned Judge. Surely a simple undertaking by the TRC not to commence enforcement action in respect of the fine would have made a stay wholly unnecessary.

[31] R v London Borough Transport Committee ex. p Freight Transport Association [1989] COD 572; R v Kensington and Chelsea Royal London Borough Council ex pa Hammell [1989] QB 518 at 539. In Re Metropolitan Police force Disciplinary Tribunal ex parte Lawrence The Times 13th July 1999 the court concluded that where a stay is sought it is essential that defendant have notice of the application.

[127] In the Court's view the balance of convenience clearly would have lain in favour of the TRC and for that reason the Court will set aside the order granting a stay of the decision. The Court will grant a stay only in respect of that part of the Decision which relates to the payment of the fine prescribed under section 75 (2) (b).

Other Procedural Failures

[128] The TRC also raised a number of alleged procedural breaches on the part of LIME BVI which it contends run contrary to the protections mandated for ex parte applications. Apart from the failure to give notice of the application for the interim stay, the TRC contends that LIME BVI breached common law obligation which requires that an applicant promptly serve a note of the ex parte hearing. This scope of this obligation was reiterated by Lightman J in the Intertoute Telecommunications (UK) Ltd. v Fashion Gossip Ltd. and Others [32] where he stated:

> "I should add a reminder to practitioners. It is the duty of counsel and solicitors when they make ex parte application for relief (an most particularly freezing injunctions) to make in the course of the hearing a full note of the hearing…and to provide a copy of that note with all expedition to all parties affected by the grant of relief on the ex parte application. This is essential so that the parties affected may know exactly what occurred and the basis and material on which the order was made and so that in this way they may be provided with the material to make an informed application for discharge. The sooner that obligations is widely understood and complied with, the sooner the risk of injustice on ex parte applications will be alleviated."

[129] The Court is persuaded notwithstanding the later court ordered compliance, that LIME BVI did not fully appreciate and therefore fulfil its common law procedural obligation to *promptly* serve a note of the ex parte proceedings. However, the Court is also persuaded that this would not without more be a basis upon which the grant of leave could be revoked.

[130] The Court is however not persuaded that the TRC's contention that LIME BVI failed to comply with CPR Part 56.7 4 (b) (i) (which requires that the affidavit filed in support of the application for an administrative order did not identify the interim relief sought) has any real traction in the context of the application which is before this Court. The Court is satisfied that this is matter which should

[32] The Times 10 November 1999

properly engage the reviewing court once the first hearing in the substantive matter is convened. The Court is also not persuaded that the purported failure of LIME BVI to include as part of the draft order the prescribed notification mandated by CPR Part 11.16 would in any event be fatal to the grant of leave. The irony that this contention is raised in the context of this particular application to set aside the Court order has not escaped the Court's notice.

CONCLUSION

[131] For the reasons which are set above, the Court finds that the Order of 28 June 2012 should be set aside. The Court however finds that the LIME BVI is entitled to proceed with the substantive application for judicial review and will exercise its discretion so as to grant leave to file an application for judicial review. The Court will grant a stay only in respect of that part of the Decision which relates to the payment of the fine prescribed under section 75 (2) (b).

[132] IT IS HEREBY ORDERED AS FOLLOWS:

i. The Order of 28th June 2012 be set aside.

ii. Leave be granted to Respondent herein to file a claim for judicial review against the Decision of the TRC dated 1st June 2012 on the grounds of illegality and irrationality – taking into account irrelevant considerations and failure to take into account relevant considerations.

iii. The leave granted herein will operate as a stay only of that part of the Decision which directed LIME BVI to pay to the TRC a fine of US$493,665 within 30 days. This stay will remain in effect pending the hearing and determination of the substantive action.

iv. Costs of this application are reserved to the substantive hearing.

[133] In an effort to expedite the matter the following directions are made:

1. To the extent that the Respondent intends to rely on the Fixed Date Claim Form filed on 13th July 2012 and on the evidence which has already been served in support thereof and in support of the applications for leave to apply for judicial review, any requirement at CPR 56.7(3) and CPR 56.10 to re-serve that evidence is dispensed with.

2. The Defendant will file its Affidavit in Answer within 21 days of the date of this Order.

3. The Claimant will if necessary, file an Affidavit in Reply within 7 days thereafter.

4. First Hearing is to be held in Chambers at 9.00am on 30 November 2013.

5. Directions will be given for the final determination of the claim at the first hearing of the Fixed Date Claim Form.

[134] The Court gratefully acknowledges the assistance of both Counsel.

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Vicki Ann Ellis
High Court Judge