EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHCV 214 of 2012

BETWEEN:

DIGICEL (BVI) LIMITED ("DIGICEL BVI")

Claimant

And

THE TELECOMMUNICATIONS REGULATORY COMMISSION ("TRC")

Respondent

Appearances:
Mr. Nigel Pleming Q.C. and Mr. Paul Webster Q.C. with Ms. Akilah Anderson for the Claimant
Mr. Jonathan Crowe Q.C. with Mr. Brian Kennelly for the Respondent

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2013: October 22 – 23
2014: May 6th

JUDGMENT

[1] BYER J.:- This claim was commenced by way of fixed date claim form filed the 11th day of September 2012 for Judicial Review against the decision of the Respondent dated the 1st June 2012.

[2] The fixed date claim form sought the following relief:

(i) An Order of certiorari quashing the decision of the TRC issued and communicated to the Claimant on June 1, 2012 ("the Decision"), whereby it:

(a) found that the Claimant was in breach of section 75(1)(a)(iii) of the Telecommunications Act 2006, of the laws of the Virgin Islands ('the Act') in that (according to that finding) the Claimant's Caribbean Calling Plans

imposed a margin squeeze on Caribbean Cellular Telephone Limited ("CCT") which was likely to result in an anti-competitive effect, contrary to the public interest;

(b) by way of enforcement action pursuant to Section 75(2)(g) of the Act, ordered the Claimant to cease from offering in the BVI, the Caribbean Calling Plans, to the extent that (according to its finding referred to above) they contributed to the margin squeeze; and

(c) imposed a fine on the Claimant pursuant to Section 75(2) (b) of the Act, in the sum of $314, 250.00.

(ii) An Order requiring the repayment to the Claimant of the sum of $314,250.00 paid by it to the Respondent on a "without prejudice" basis on the 28th of June, 2012 in compliance with the fine mentioned above; and

(iii) An Order awarding the Claimant its costs of the proceedings, interest on the aforementioned sum of $314,250.00 from the date of payment, and such further or other relief as the Court deems just.

[3] Trial of the matter proceeded from the 22nd day of October 2013 to the 23rd day of October 2013 which adopted the unusual procedure of cross examining the respective expert witnesses of the parties.

[4] By order of this court on the 4th day of November 2013, subsequent to the hearing and with the consent of the Respondent, the Claimant filed an amended fixed date claim form which now included the ground 6.13.6 which placed before the Court the issue of whether there had been a separation of the investigative and adjudicative functions of the Board of the Respondent in breach of the Protocol that had been adopted by the Respondent.

[5] The parties provided copious and detailed submissions to the Court by way of their pre trial submissions, oral opening submissions and closing submissions which all repeated the central theme for the respective parties.

[6] A chronology of how the events unfolded leading to the Decision in 2012 was also helpfully provided by the Claimant and is set out in précis form as follows:

(a) 2007 – at the beginning of the year, CCT was the sole provider of mobile telecommunications services. It was the incumbent provider with 100% of the

market. In July 2007, Cable & Wireless (then bMobile, now LIME BVI) entered the market.

(b) 2008 – after successful litigation in 2007 challenging the refusal to grant a third telecommunications license (see *Digicel Limited v The Telecommunications Regulatory Commission* 25th May 2007), the Claimant (Digicel BVI) entered the market in November (or December) 2008. At that time, LIME BVI "*offered an All Talk package of 6000 minutes to the other LIME Caribbean destinations for $50 a month."*

(c) 2009 – in the first half of 2009, the Claimant, CCT, and LIME, engaged in vigorous competition.

(d) 14 July 2009 – CCT complains to the Respondent.

(e) 14 October 2010 – The Respondent issues its *"Consultation on the Virgin Islands Telecommunications Market Review"* ('the Market Review'), proposing *ex ante* regulation, and imposing a deadline for responses of 1 November 2010 "given the need to expedite the market review process."

(f) 21 October 2010 – The Respondent gazettes its Investigation Notice, making it clear that it was investigating *"the practices of Digicel [defined as both Digicel BVI and Digicel Group (i.e. various affiliates of Digicel BVI] in relation to wholesale and retail tariffs for calling certain Caribbean destinations – i.e. networks operated by Digicel's affiliates."*

(g) 23 December 2010 – Preliminary Submission by the Claimant. In that document, the Claimant took issue with many aspects of the Respondent's investigation.

(h) 22 February 2011 – The Respondent adopts a Protocol ("the Protocol") which expressly and clearly separates out "the investigative and adjudicative functions of the investigation." By the terms of the Protocol, contact is expressly and clearly limited between the Staff and the Board.

(i) 31 May 2011 – the Investigation team of the Respondent produces its Sanction Notice for the Board making it clear that its investigation and decision focused on, or at least included, the activities of the non-BVI affiliates. It is to be noted that the Sanction Notice, sets out the TRC investigation team's finding and its recommendation to the Board to proceed with enforcement action.

(j) 13 July 2011 – The Claimant responded to the Sanction Notice with a detailed Legal and Economic Appraisal of the Sanction Notice ("the Appraisal"). The

Appraisal, as developed before the Board, expressly asserts that there is *"no actual evidence of anti-competitive harm*". In the Appraisal the Claimant noted that it had not had sight of the CCT documentation, concerning the alleged effects of the Claimant's three plans.

(k) 18 July 2011 – in the morning, there was a meeting between the Board and representatives of CCT, in the absence of the Claimant. A slide presentation of some sort was made by or on behalf of CCT and Notes were taken of that hearing by the Respondent.

(l) 18 July 2011 – in the afternoon, the Oral Hearing with the Claimant referred to in the Protocol took place before the Respondent's Board. As with the morning meeting, the Board members were attended by a legal and economics adviser – Josh Holmes (counsel), and Professor Robin Mason (economist).

(m) July/August 2011 – Professor Mason, accepting significant aspects of the criticism in the Appraisal recommended that a Supplement to the Sanction Notice be produced to demonstrate that the alleged margin squeeze attributed to the Claimant, and its affiliates, had caused harm to CCT, such that if the squeeze continued, by reason of that conduct, CCT would be forced to leave the market, with a consequential detriment to the public interest.

(n) August 2011/October 2011 – Sarah Hayes, Brian Kennelly (as a member of the investigation team *qua* adviser), Professor Mason and Josh Holmes (as advisers to the Board), prepared and produced a draft Supplement to the Sanction Notice. At least one draft of the Supplement was shown to the Board for its comments.

(o) 4 October 2011 – the Supplement (undated) was supplied to the Claimant, and, it is assumed, re-supplied now in is finalized form to the Board. The Supplement supplied to the Claimant is redacted (there is no complaint about this), and does not show the financial position of CCT but asserts: *"What is relevant here is not that CCT is a loss-making entity per se but the magnitude of CCT's losses has increased since Digicel's entry into the market and the launch of the Caribbean plans."*

(p) 10/14 October 2011 – the Claimant objected to the Supplement and sought "access to all of the financial information submitted by CCT" proposing "that our review of any commercially sensitive information concerning CCT is carried out by our external financial advisers (in conjunction with in-house and external counsel) under appropriate conditions of confidentiality". This is refused, and the Claimant

was required to respond to the Sanction Notice Supplement in 2 days time. The Claimant's request was repeated. The financial information, available to and considered by the Respondent, was not produced to the Claimant's advisers before the decision.

(q) 1 June 2012 – the Decision (and Supplement as Annex 1), was issued. (which shall be referred to as "the Decision" in these proceedings).

The Claimant's Submissions

[7] The Claimant in their submissions filed on the 11th October 2013 bolstered by the opening oral submissions of Mr. Pleming QC and their closing submissions filed on the 8th November 2013 sought to structure their arguments around the claims as stated in the filed Fixed Date Claim Form.

[8] The Claimants though recognizing that there was no specific requirement as to how to structure the grounds of complaint under fixed separate heads of argument essentially sought to itemize their arguments around the general grounds of ultra vires, abuse of power, unreasonablness, procedural unfairness and the disporportionality of the fine.

Ultra Vires

[9] The Claimant agrees that the legal basis of the authority of the Respondent to act is grounded in the provisions of the Telecommunications Act 2006 ("the Act").

[10] The Claimant however submits and has argued before this Court that the Respondent having relied on Section 75(1)(a)(iii) of the Act ("the Section") has misinterpreted what was required of them under the Act to trigger the enforcement provisions of this Section.

[11] The Claimant in interpreting the enforcement provisions has submitted that the language of the section was vague in that it made provision for the Respondent to take action against a licensee but they submit that the Respondent first had to determine that that licensee was acting in a manner "***detrimental to the public interest including in an anti competitive manner."*** [1]

[12] The Claimant argued that this Section gave no definition of what amounted to "anti competitive" and as such the Respondent could not act without that being established either through subsidiary legislation or a code. They further argued that if this had in fact been done, then there may not

[1] Section 75(1)9a)(iii) the Act

have even been any need for enforcement proceedings of the nature that had been undertaken nor would it have been necessary to proceed to penal action against the Claimant.

[13] The Claimant further submitted that their position as presented was supported by the reading of the Act and Section 26(3) in particular. A finding of dominance was therefore required as a first action before the actions of a licensee could have been found to be anti competitive under the Section. It was only where anti competitive behaviour found by way of dominance that enforcement proceedings could possibly be undertaken. They argue that this was the only sensible interpretation that could be given to the wording of the Act in light of the opening words of Section 26(3): "*for the purposes of this Act."*[2] The Claimant argued that without undertaking the exercise provided for by Section 26(3), any other purported actions undertaken by the Respondent could only have resulted in their acts being *ultra vires.*

[14] The Claimant also sought to submit to this Court that the Act only authorized the Respondent to take enforcement against the licensee not any existing affiliates. They argue that it was however apparent from the Decision rendered that the Respondents, outside of their express authority, assessed the Claimant's "anti competitive" plans in relation to their dependency and interrelatedness with their affiliates in other jurisdictions. Thus a finding of the Respondent that there operated a price squeeze imposed by the Claimant alleging that there was price fixing of both the retail and wholesale markets by the Claimant was incorrect. By this finding it was apparent as argued by the Claimant, that the Respondent took into consideration actions of persons/entities over which the Claimant had no control and in particular the entity that controlled the setting of the wholesale market.

[15] Having therefore made the wrong assumption, the definition of a price squeeze upon which the Respondent relied to make a finding of anti competitive action as against the Claimant was flawed and as argued by the Claimant could not stand.

[16] This action of the Respondent, the Claimant argued resulted in the actions of the Respondent being ultra vires the Act. Such considerations were indefensible and without excuse and certainly without merit and as such could only mean that the Decision was impeachable.

[17] The Claimants argue that given all of these complained of actions the acts of the Respondent are unlawful and must not be allowed to stand.

Abuse of Power

[18] However the Claimant's arguments were not based on the ground of ultra vires alone.

[2] Section 26(3) of the Act

[19] They also sought to advance the wide ranging ground of abuse of power, which they recognized covers a multitude of matters as it is considered as the "*root concept in [a] public law challenge..."* [3]

[20] The issue which the Claimant has sought to argue under this head is whether it was open to the Respondents as regulators to commence proceedings with ex ante regulations and then change mid stream to ex post facto regulations which carried with it, more severe and cumbersome penalties or whether it was in fact abusive of the Respondents to do so.

[21] This argument was grounded in what the Claimant submitted was the equally efficacious consideration of using ex ante regulations as opposed to ex post regulations, which additionally would have given them advance notice of their precise obligations.

[22] The Claimant did not seek to advance to this Court that a regulator was not entitled to utilize any properly based available methodology to address offending licensees. They however do argue that in this instant case, that the choice of the ex post regulatory action was *"grounded in unfairness and unreasonableness"*[4] it being based on a "*contentious theory of harm"*[5] which effectively condemned the Claimant when there was another more palatable avenue open and not having chosen that, ultimately resulted in the actions being abusive and unfair and on that basis must not be allowed to stand.

Unreasonableness

[23] Under this limb of the Claimant's arguments, the Claimants sought to submit that the Decision rendered in 2012 was unreasonable in that the Respondent had relied on:

(i) An erroneous and incomplete Market Definition
(ii) An unreasonable finding of Market Power
(iii) *An unreasonable finding of appreciable anti-competitive effects*

[24] In looking at these grounds the Claimant placed heavy reliance on the economic theories relied upon by the Respondent that appeared to have informed their Decision.

[25] The argument of the Claimant was that the Respondent relied on a definition of market which took into consideration economic theories that were artificial and inappropriate in the circumstances of the case. The Claimant argued that the Respondent's failure to adopt the expected methodologies adhered to in the industry, ultimately resulted in the unreasonableness of the approach utilized and as such the Decision was by its very nature flawed.

[3] Claimants written closing submissions filed 8th November 2013
[4] Claimant's submissions filed 11th October 2013
[5] Op Cit

[26] The Claimant argued that the Respondent in defining the market in the manner that they did first in the Sanction Notice with one definition and then in the Supplement with another, resulted in more than one market being relied upon for the purposes of the economic analysis being undertaken by the Respondent which in all the circumstances resulted in the Decision being unreasonable.

[27] The Claimant further argued that the Decision was also unreasonable in that the Respondent's definition of market power was "***obtuse***" [6] in that they sought to rely on an assumption that had no merit in the circumstances. There should have been no wholesale importation or reliance on a definition of market which has no relevance to real world realities identifiably operative in this jurisdiction. The definition of market which was therefore adopted was one that ought to be disregarded in that it defied common sense and every day realities. The Claimant argued that how market power is found in one part of the world does not mean that it would be of relevance, and cannot be of relevance in another part, unless there exists, the requisite evidentiary basis. Having not undertaken the exercise to determine the relevance if any, the Claimant submitted, that it was unreasonable for the Respondent to take a whole sale adoption of the same.

[28] Having failed to adequately, if at all properly, define the essence of the case as against the Claimant with regard to the appropriate market, the Claimant maintains that the Respondent could not properly find that there was any anti competitive behaviour on the part of the Claimant that merited sanction.

[29] The Claimant's submitted that the number in real terms of the persons who availed themselves of the complained of plans at 1600 could not merit the Respondent making a proper rational finding of anti competitive behavior which could not be combated by the aggressive actions of competitors in a free market economy. As such the finding that the complained of plans were anti competitive as claimed by the Respondent was also unreasonable in all the circumstances.

Procedural Unfairness

[30] By this argument the Claimant sought to argue before the Court that there was an "***undercurrent of unfairness"*** [7] as to how the Respondent dealt with this matter which resulted in the Claimant being severely prejudiced in their ability to answer and make representations to the charges made against them. These failures the Claimant submits are sufficiently serious and fundamental to warrant the setting aside of the decision.

[31] The Claimant complained firstly that the Respondent failed to allow the Claimants to examine and comment on the assertion being made that the Claimant's plans would have caused the local

[6] Claimants submissions filed on the 11th October 2013
[7] Claimants submissions filed 8th November 2013

incumbent CCT to exit the market in the BVI by failing to allow the Claimant access to the financial information that formed the basis of this opinion or determination.

[32] The Claimant submitted that the Respondent had no reason to refuse access to the Claimant of this financial information for which there were procedures that could have been implemented to allow the same, which included a confidentiality ring with stringent contractual arrangements establishing the necessary limitations on access and utilization. It was not enough to have given the Claimants the "gist" of the case where the allegation made sweeping findings which the Claimant was entitled to investigate and make a response.

[33] Secondly, the Claimant argues that the Respondent having heard and received further submissions from the incumbent before their oral hearing before the Board which were never revealed to the Claimant made an already manifestly unfair situation worse.

[34] Thirdly, the Claimant argued that the Respondent during the course of the process had established a Protocol whereby among other things, no member of the Board who had participated in the investigative process could participate in the final decision, the investigation would be carried out without the involvement of the Board and there was to be an oral hearing before the Board.

[35] The Claimant argues that the fact that the Respondent's advisor Professor Mason having been the one who suggested the "Theory of Harm" upon which the Supplement to the Decision was based and having assisted in finalizing the same as was revealed upon cross examination before issuance to the Claimant, resulted, they say, in the very Protocols that were established by the Respondent being breached. This lack of separation between the investigative and adjudicative process, they argue, has resulted in a cumulative result of manifest unfairness.

[36] Fourthly, the Claimant argued that their legitimate expectation that the Respondent would adhere to the tenets of the of the Office of Fair Trading guide ("the Guide") as stated in correspondence, was breached.

[37] The Respondents failed to do so and ad hoc-ly applied the terms of the Guide when it suited them and did not when it did not. Thus they issued the Supplement to the Sanction Notice in circumstances where there was no additional or new ground of reliance as provided for by the Guide and they failed to appoint an independent adjudicator to determine the procedural issues that had arisen in the manner in which the proceedings were being carried out despite being provided for by the Guide.

[38] Fifthly, the Claimant argued that the Respondent failed to produce reasons for their choice of approach, in preferring the penal method of the EU approach over the non penal approach of the US approach to sanction anti competitive behaviour.

[39] It was argued that the failure to give reasons produced an unfair result and prejudicially skewed the proceedings in relation to the Claimant to understand and appreciate the actions taken by the Respondent in coming to the finding of anti competitive behaviour.

[40] The Claimant therefore argued that these actions of the Respondent created a "*pattern of selective compliance with procedures and protocols unilaterally adopted by the Respondent"* [8] which resulted in the proceedings being conducted procedurally unfair.

Unreasonableness and Disproportionality of the fine

[41] The Claimant's final point of argument was that the fine imposed by the Respondent in any event was unreasonable and disproportionate based on the length of time that the plans were in existence and compared to the fine that had been imposed on their competitor LIME BVI who had been disciplined in similar proceedings.

[42] The Claimant therefore argued that in the setting of the fine the Respondent took into consideration irrelevant material mainly being the territorial extent of the Caribbean Plans offered by the Claimant.

[43] The Claimant argued that this was irrelevant as that in and of itself had no bearing on the assessment of the effect of the so called anti competitive nature of the plans which the Respondent was seeking to censure within the BVI. The Claimant argued that the Respondent was entitled to consider only the extent of the calls from the BVI to the Caribbean and the revenue and, if any, of those operations.

[44] They further argued that when the actual offending plans are examined closely, it is apparent that they really accounted for a very small part of the total market, and that the number was insignificant in the market as a whole. As such it did not warrant the aggravation of the fine by the utilization of the 6.5% figure.

[45] By this unsubstantiated increase, the fine against the Claimant was so manifestly larger than the one that was set as against LIME BVI when in real terms it was apparent the period of infringement by the Claimant was shorter than that of the period that had existed for LIME BVI. It therefore meant the Claimant was treated "*more severely*" [9] and without reason.

[46] Finally, the Claimant argued that since matters of this nature had been new to this jurisdiction it may have been the better route to have not imposed the penal aspect of a fine in recognition of the

[8] Claimants submissions filed 11 October 2013
[9] Claimants submissions filed 11th October 2013

fact that that this was a novel area under the Act or if a fine was to be imposed that it amounted to a nominal sum in all the circumstances of the case.

[47] The Claimant therefore submitted to this Court that the Decision issued by the Respondents was "...*unsound, its internal reasoning contrary to informed common sense, the manner of its adoption unfair, and the legal basis for the underlying liability flawed*"[10] and should therefore be set aside with the consequential orders.

The Respondent's Submissions

[48] The Respondent by their Skeleton Arguments filed on the 17th October 2013 and arguments at the opening of the trial and their comprehensive closing Submissions filed on the 22nd November 2013 sought to answer each and every point of argument raised by the Claimant in defence of the relief sought.

[49] I have therefore adopted the same general headings advanced by the Claimant in their submissions to summarize the vigorous arguments propounded by the Respondent in their defence.

Ultra Vires

[50] The Respondent submitted to this Court that the argument of the Claimant with regard to the operation and interpretation of the Act and the operative Section should be completely rejected based on the following:

(i) that the interpretation advanced by the Claimant is inconsistent with the language of the Act;

(ii) that the interpretation being relied on by the Claimant was inconsistent with the Act generally;

(iii) that the interpretation suggested would frustrate the purpose of the legislation and

(iv) there was no basis to say that the wording of the section was vague.

[51] The Respondent argues that nowhere in the wording of the Section does the Legislature make the power of the Respondent to act under the Section dependent on the satisfaction of any other requirements. Therefore there was no need to either have the words "anti competitive" in the section defined before they could take action nor was there any need to have a code established

[10] Claimants submissions filed 29th November 2013

by the Respondent nor was there any need to have subsidiary legislation in the form of regulations to be set by the Minister before action could be taken. If this was required as submitted by the Claimant, the Respondent submitted that the intent of the Act would be rendered a nullity. It would be, they argue to interpret the Act to either have the section be read to be dependent on other action by themselves or upon the action or another public body. The Respondent's purpose as established by the Act, they argue was to act independently of any other body or person and to assume that there was a requirement to link their actions on another would make nonsense of their "*independence and ability to act effectively in the public interest."* [11]

[52] Further the Respondent made it clear, that if this was in fact required, the purpose of the Act would be effectively frustrated. The Respondent argues that if they are required to stringently define the terms "anti competitive" it would limit the generality with which the Legislators intended to afford to the utilization of the Act to be able to dissuade circumvention of its provisions by licensees who are given the "heads up".

[53] The Respondent additionally argued that if the licensees were unaware of what business conduct was captured by the phrase "anti competitive" that they were entitled to seek the guidance of their own legal counsel or address queries to the Respondent themselves before undertaking any commercial enterprise. Having failed to do so the Claimant cannot now argue that it was incumbent upon the Respondent themselves to set those limitations before they took action under the terms of the Section.

[54] The Respondent therefore concludes that they were lawfully entitled to take action against the Claimants under the Act as they did in the filing and serving of the Sanction Notice.

[55] The Respondent also responded to the argument of the Claimant that even if the section gave them authority to act without the definition of "anti competitive", that it certainly did not allow them to act without taking into account the operation of Section 26(3) of the Act. This section provides for the finding of dominance of a public supplier in relation to the telecommunications network or a telecommunications service. The Claimant argued that it was necessary for the Respondent, before they took action on the basis of anti competitive behaviour, to find that that entity was also dominant. Having failed to do so the Claimant argued that the Respondent was not in a position to take action. The Respondent has rejected this argument wholesale and has stated that there is nothing in the reading of the Act or the relevant sections which can import that meaning and it is in fact inconsistent with the reading of the Act in its totality.

[56] Further the Respondent argued that if this was a correct reading ascribed to the interpretation of the Section that in cases of urgent action being required, that it would be well nigh impossible for

[11] Respondents submissions filed 22nd November 2013

the process of dominance being completed first to afford urgent and necessary action and as such would defeat the entire purpose of the Act.

[57] The final issue under the heading of ultra vires raised by the Claimant was that the Respondent had taken into consideration the conduct of Digicel affiliates across the region in assessing the complained of behaviour of Digicel BVI.

[58] The Respondent submitted that in looking at the extent of the complained of behaviour, that they were entitled to look at how Digicel BVI worked with its affiliates and their ability to fix the rates under the offered Caribbean plans because of their connection to their affiliates compared to the wholesale cost that was available to CCT, and thus their ability to compete with those offered plans. The Respondent argued that this assessment was required in order to obtain the whole picture as to how the plans offered by the Claimant affected CCT.

[59] The Respondent has also responded to the Claimant's argument surrounding their contention that in order for a price squeeze to be established there has to be established that the fixing of the wholesale market and the fixing of the retail market had to be in the hands of the same company. The Claimant argued that Digicel BVI did not fix the whole sale markets only the retail market and as such the Respondent was precluded from taking regulatory action in that there was no operational price squeeze based on the ascribed definition. The Respondent has however argued that the concept of a price squeeze was not a rigid formulation, it was merely an analytical tool and operated regardless of whether the retail and wholesale setting of prices were reposed in the same entity. What they sought to rely on was the overall effect on CCT. In other words the substance of the effect of the actions of the Claimant and not the form to which could be ascribed to their behaviour. Having failed to discredit the definition relied upon by the Respondent; the Respondent argued that they were therefore entitled to act. Any attempt to limit their powers as ascribed to them to protect the public interest was therefore absurd and by necessary implication lacked merit.

Abuse of Power

[60] The Respondent acknowledged that when it is alleged that a public authority has acted under an abuse of power, that term is used to encompass a wide range of perceived ills by the party complaining. Once it is established that the public authority abused their power then the nub of the argument goes to the irrationality of the decision which was reached by the public authority. The Respondent states categorically that they have however not so acted and there is certainly no "*conspicuous unfairness*" on their part.

[61] The Respondent identified the arguments of the Claimant under this head as being a failure to prioritize particular matters to facilitate ex ante regulations and choosing to pursue ex post enforcement action as opposed to ex ante regulation.

[62] The Respondents submit in short that it is for the Regulatory body itself to decide which matters are for prioritization and unless their choice of matters are so "*capricious, irrational or unlawful"* [12] then it is not for the Court to interfere in the findings of the decision making tribunal. The Respondent therefore argued that the Claimant had not met this threshold to warrant the interference of the Court.

[63] In addition, the Respondent submitted to this Court that whether one method of censuring a licensee is more preferable than another, cannot mean that a regulator is not free to choose between equally available methodologies. If the Regulator has used a method that may be controversial but not legally impossible, the Respondent argues then that the action of the Regulator cannot amount to an abuse of power. The Respondent having relied on ex post regulations had not acted in any manner that was not legally open to them and as such there could not be any argument that there was an abuse of power by the Respondent.

Unreasonableness

[64] In the submissions of the Respondent, they submitted to this Court that the Claimant had not met the high threshold that was required by a complainant to impugn the actions taken by a decision maker. The reliance in their arguments in questioning definitions and findings regarding market, dominance and anti competitive behavior was a futile attempt to establish that the decision rendered was unreasonable.

[65] The Respondent argued under this head that the only way that the Claimant could succeed under this claim was to show the Court that the decision made could not have been arrived at by a reasonable tribunal. The Respondent submitted that the Claimant's arguments are woefully inadequate to enable a properly seized Court from so finding.

[66] The Respondent argues that the Court is not entitled to interfere or even inquire into the action of the decision maker if it cannot be shown that the decision was one that could have been reached even if it is based on a controversial theory. It is only if when faced with a range of possibilities to choose from upon which the decision can be based, that the decision maker still chooses an option that is beyond those possibilities that the Court will be entitled to make an inquiry into the decision.

[67] The Respondent further submitted that this is especially so in the case of decision makers and tribunals who are tasked with specific statutory functions. They submitted to this Court that in this case, the Respondent has been given the power to protect the public interest with regard to the Telecommunications industry in the BVI and as such any interference in their role should be slow and measured, if at all, to ensure that they are able to act and function without fear or favour. The Respondent argued that it is for the regulator to decide what facts they find, if there was some

[12] R(City Hook Ltd) v Office of Fair Trading [2009] EWHC 57

evidence or not upon which they could rely, if there was a need for further inquiries, if they make any predictions about the future of affected business entities or trends, whether in interfering with fundamental rights it was based on some viable information and for the decisions thus issued to be read in a generous and not restricted way.

[68] As such the Respondent argued that it is for the Claimant to show this court that the decision fell outside of the parameters of what would constitute a reasonable decision. It therefore cannot be open to the Claimant or this Court they submit, to second guess the principles or the theories upon which the decision is based once there was some evidence of them being arguable or viable. The definition and analysis of market and the finding of anti competitive effects were matters based on sound economic theories and the mere fact that competing experts come to different conclusions, could not mean that the theories were so flawed that the Respondent was not entitled to rely on them.

[69] The Respondent therefore submits to this Court that the nub of the arguments proferred by the Claimant are all essentially about the competing economic theories all of which are viable alternatives and which should not engage the attention of the Court as that is not their role of function in proceedings of this nature.

[70] The Respondent therefore in answer to the submissions made by the Claimant that they erred in coming to their decision, is that once their decision was consistent with available evidence and the conclusions were reasonable then the findings must also be considered reasonable.

[71] Inevitably once there was some evidence or some basis for their findings or determination, the Respondent argued that the Claimant was not entitled to have the decision disturbed on this ground.

Procedural Unfairness

[72] This gravamen of this argument on behalf of the Respondent in answer to the Claimant was that there was no unfairness in the procedure and without a doubt the Claimant knew at all times what case they had to answer and how the same was going to be advanced.

[73] The Respondent recognized that the main complaints were the denial to essential financial information related to CCT, that the submissions of the Claimant were not considered in that no reasons were ascribed as to the adoption of the EU methodology, that the terms of the Office of Fair trading guide was not adhered to and that there was a failure to separate the investigative and the adjudicative processes of the Respondent's board.

[74] The Respondent firstly argued that the only obligation that existed on their part was that they had to give the Claimant sufficient information to get the "gist" of the case that they were being asked to

answer in relation to CCT's financial state. There was no concomitant need to divulge the confidential nature of the information in its entirety. The Claimant, they argue, was well aware from the information that they were given to know the extent of the financial crisis of CCT without the need to know the background to that crisis.

[75] They further submit that there was no need to divulge the entirety of the information being that it was of a competitor, divulgence of which could have been more detrimental to CCT than beneficial to the Claimant. The Respondent sought to argue that there were no safeguards that the parties could have established to protect the confidential nature of the information and there was therefore no need to allow full access in any event once they had been given the "gist" of the case to the affected entity, which they had in this case.

[76] The Respondent completely rejected the complaint about the failure to consider the Claimants' argument with the provision of reasons as to why the EU approach was adopted as opposed to the US approach in terms of the enforcement procedure. The Respondent argued that unless the Claimant was able to show, that the EU approach has completely prejudiced them, then it was indeed open to the Respondent to rely on the chosen methodology without the requirement to give reasons.

[77] The Respondent has also argued that there could have been no legitimate expectation in the Claimant that the procedure governing the hearings would be in every aspect governed by the provisions of the OFT guide (Office of Fair Trading of UK).

[78] The Respondent in submissions, states that it was made clear to the Claimant in correspondence that the hearings would be governed by the provisions of the Guide only where it was relevant. Having made this clear, the Respondent says that there could not have been created any promise express or implied which amounted to or created a legitimate expectation in the Claimant.

[79] In any event the Respondent argues, that whether or not they had used the tenets of the OFT guide there was nothing preventing the Respondents from issuing the Supplement to the Sanction Notice or on their refusal to appoint an independent adjudicator as requested by the Claimant.

[80] The Respondent therefore argues that having taken entirely rational decisions with regard to the procedure it was not now open to the Claimants to complain or invite the Court to investigate the same.

[81] The final subhead under this general ground was that the Respondent had failed to maintain a separation of the investigation and adjudicatory functions of the Commission. The Respondent argues that this was manifestly incorrect and submits that there was no overlap. They argued that it was at their own instance that they implemented the Protocol which stated that any board member who participated in the investigatory process was not to be involved in the decision making

process. Further that all investigations would be conducted without the involvement of the Board except where recommendations were submitted to the Board by the investigative team and that finally there would be an oral hearing. The Respondent says these guidelines were not breached.

[82] The Respondent maintains that no member of the Board or its advisors participated in the investigative process and the mere assistance rendered in the finalization of a document, specifically the Supplement to the Sanction Notice, which was to emanate from the investigative arm of the Respondent, by an advisor to the Board, the adjudicative arm of the Respondent, did not amount to a breach of the published protocol which could lead to a finding of procedural unfairness.

The Penalty/Unproportionality of the fine

[83] In response to the allegation of the Claimant, the Respondent reiterated that they were entitled to look at several different aspects of the business of the Claimant (in order to get a global view of the actions of the Claimant) and in determining the quantum of the fine were empowered to assess the following:

i) That the Claimants had offered the plans, they chose them and "instigated" them by their business decisions.

ii) The geographical reach of the plans as it impacted on the gravity and the extent of the anti competitive conduct.

iii) The size of the Digicel group. The larger the party or the player, then, the larger the deterrent effect would have had to be.

iv) The seriousness of the conduct together with the future and cumulative effects of what they saw with the plans on the incumbent CCT.

v) That the fine was a means to act as a deterrent.

[84] Having assessed all of these factors the fine imposed was fair and properly reflective of the message which was to be set to offending licensees.

Court's Analysis and Finding

[85] On assessing the arguments of the Claimant in these proceedings there are therefore five main subgroups that this Court is being asked to consider in coming to a determination as to whether the decision of the Respondent should be set aside. However, before this Court undertakes the specific exercise to examine the arguments of the Claimant, the Court is of the opinion that it would

be useful to revisit and note with clarity what is the role and function of this Court in judicial review proceedings.

[86] Judicial review proceedings are the process by which an aggrieved party seeks to ask the Court to inquire into the functions and/or decisions of public authorities, to ensure that the "***functions of public authorities are carried out in accordance with the law and also that these bodies are held accountable for any abuse of power or unlawful or ultra vires acts ..... In a constitutional democracy, one of the roles of judicial review is the vindication of the rights of an individual against abuse of power carried out by public officials."*** [13]

[87] The filing of judicial review proceedings therefore does not engage the Court to stand in the stead of the decision maker or even as a tribunal in the appellate jurisdiction. The Court simply operates to examine the premise upon which the decision maker has based their decision and to ultimately determine whether that tribunal could have come to the decision that they did. In other words whether the decision made could have been reached by any reasonable tribunal in all the circumstances.

[88] Judicial review is therefore "*not an appeal from a decision but a **review** of the manner in which the decision was made."* (my emphasis) per Lord Bingham in Chief Constable of the North Wales Police v Evans [14].

[89] However in doing that review it is very clear it is not the job of this Court or any Court to determine the right or wrong of the decision itself or even to examine the theories upon which the decision was made but simply to ensure the process followed was lawful, reasonable and fair.

[90] The arguments of the Claimant in the case at bar against the Decision of the Respondent were therefore as follows:

i) That the Defendant acted ultra vires the Telecommunications Act 2006 (the Act);

ii) That the Respondents abused their power in carrying out the tenets of the Act;

iii) That the decision was unreasonable in all the circumstances;

iv) That the Defendant acted with procedural unfairness;

v) That the fine that was imposed on the Claimant was disproportionally high

[13] Digicel (Jamaica) Limited v The office of Utilities Regulation HCV 2012/03318 (Jamaica) unrep.
[14] [1982] 3ALL ER 141 at 155

[91] It is these issues as raised through the arguments led before this Court that this Court will now address its mind in coming to its decision.

Ultra vires

[92] There is no doubt that the Respondent in this case at bar is a creature of statute created by the promulgation of the Act. The preamble of the Act states:

> "*An Act 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."*

[93] Thus there came into creation the Respondent body embued with the responsibility to oversee the working of the telecommunications industry within the British Virgin Islands.

[94] By its creation, the Respondent as the regulatory body was therefore also empowered to ensure compliance by licensees with the Act. Enforcement and regulation of the licensees is therefore contained within the terms of the Act itself and in particular Section 75. Section 75(1) provides as follows:

> *"The Commission may take enforcement action against a licensee or authorization holder if …*
> *(a) in the opinion of the Commissioner the licensee or authorization holder…*
>
> *(iv) is carrying on or is likely to carry on business in a manner that is detrimental to the public interest, including an anticompetitive manner or detrimental to the interests of clients, creditors or investors…"*

[95] It is under this section that the Respondent upon a complaint being made took the steps which led to the launch of the inquiry complained of and ultimately the Decision that emanated from that inquiry.

[96] The Claimant has sought to argue and advance to this Court that the Respondent did not have the legal authority to undertake this enforcement action without first defining the parameters of "*anti competitive*" so that persons regulated by the Act are able to identify and address offending conduct, and if possible prevent them. Having failed to do so, according to the Claimant, ultimately has resulted in the Respondent acting inter alia ultra vires the Act.

[97] It is important to note that the definition of ***ultra vires*** is any action taken "beyond the scope or in excess of a legal power or authority"[15]. Either an act complained of is authorized by statute or it is

[15] Merriam – Webster Dictionary

ultra vires that statute. In order to so determine whether an act complained of is authorized or *ultra vires* the interpretation of the statute is therefore necessary.

[98] The Claimant relies for their proposition that there was a mandatory requirement on the Respondent to define the meaning of "anti competitive" as it was vague and nebulous and could therefore not have afforded the Respondent any parameters within which they could have purported to act.

[99] The Claimant further argued that even if the words were not vague that at the very least any definition of anti competitive would have had to have been dependent on firstly making a finding of dominance as provided for by Section 26 of the Act which states as follows:

> *"26(3) For purposes of this Act, the Commission may determine that a public supplier is dominant with respect to a telecommunications network or a telecommunications service where, individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors and users and, for such determination, the Commission shall take into account the following factors:*
>
> *(a) The relevant market;*
>
> *(b) Technology and market trends;*
>
> *(c) The market share of the public supplier;*
>
> *(d) The power of the public supplier to introduce and sustain a material price increase independently of competitors;*
>
> *(e) The degree of differentiation among networks and services in the market; and*
>
> *(f) Any other matters that the commission deems relevant.*
>
> *(4) Where the Commission determines that a public supplier is dominant in any market, the Commission shall include in the license of the public supplier, upon issuing or by amending the licence, such additional terms and conditions to the licence for the purposes of regulating tariffs, protecting the interest of users and other licensees including the provision of adequate facilities and interconnection and access services, and of ensuring fair competition among licensees as it considers appropriate.*
>
> *(5) Where a public supplier that was determined to be dominant considers that it has lost its dominance with respect to a telecommunications network or a*

telecommunications service, it may apply to the Commission to be classified as non-dominant in a particular market and, where the Commission approves the application, the Commission shall amend the public supplier's license by removing the additional terms and conditions included under subsection (4).

(6) Before determining that a public supplier is dominant, or has lost its dominance, with respect to a telecommunications network or a telecommunications service, the Commission shall hold a public consultation and shall, at least fourteen days before the commencement of the consultation, publish details in relation to the same and the matter under consideration in the Gazette, on the Commission's website and in a newspaper published and circulated in the Virgin Islands."

[100] The argument therefore ran that the anti competitive finding could only be linked to a mandatory undertaking of a finding of dominance first. The argument proffered was that the preamble of section 26 which stated it was "*for the purposes of this Act*" could only logically mean that the Section had to be subject to establishing the findings under section 26. Therefore it was argued that there was a requirement that the Respondent before taking any enforcement action (with the finding of anticompetitive conduct) had to make a finding of dominance of the licensee and then and only then could the Respondent have taken any action to sanction anti competitive conduct. Having failed to do so, the Claimant sought to advance before me, that the Respondent was barred from proceeding to take enforcement action.

[101] It is apparent to this Court that this question in issue does indeed turn on the rules of statutory interpretation. In that regard I am heartened by the words of Byron CJ as he then was as he adopted the words of Sir Vincent Flossaic from the case of Charles Savarin v John William[16] in the later case of The Attorney General v Barbuda Council [17] "… *start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which the word or phrase should bear, That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that as may be necessary to make it concordant with the statutory context. In this regard the statutory context comprises every other word or phrase used in the statute, all implications there from and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention."*

[16] [1995]51 WIR 75 at 79
[17] Civ App NO 7/2001 at para 10

[102] Thus statutory interpretation in almost all cases must give pay to the words in their "…***grammatical and ordinary sense [read] harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.***[18]"

[103] This Court therefore when looking at the scheme of this Act does not see any need to look beyond the words of Section 75 to decipher the "***manifest and expressed intention***[19]" of the section or the Act. The words of Section 75 are in the opinion of this Court clear. Section 75 says that the Commission may take enforcement action against a licensee. It does not say, subject to the terms of this Act or even specifically subject to the terms of Section 26. There cannot be read into this section, any provision which limits its applicability.

[104] Section 26 when it is read must also stand alone and be referable to a specific action where the Respondent determines that a finding of dominance is required. This Court is therefore not convinced that Section 75 must be read referable to Section 26.There is no inherent vagueness and the parameters for the acts of the Respondent are clear.

[105] The only determination that the Respondent had to undertake was therefore whether they had formed the opinion or belief that the actions complained of as against the Claimant were captured by the provisions of Section 75. That is anti competitive in their ordinary meaning given the nature of the industry. Having so satisfied themselves, in the interest of the public good they were then entitled to take action and this Court is of the opinion that the action taken by the Respondent could not be considered "***ultra vires.***"

[106] In relation to the argument relied upon by the Claimant that the Respondent purportedly looked at the behaviour of its affiliates in considering whether there was anti competitive conduct on the part of the Claimant, the Court is of the view that the entirety of what and how the Claimant operated within the jurisdiction of the British Virgin Islands would have been relevant to give the back drop. Specifically with regard to the cost to the Claimant for call termination on their own network as opposed to the cost for their competitors for the same service.

[107] The fact that the Claimant was not responsible for the setting of the retail and whole sale prices cannot be an answer to the criticism when it is in reality the factual matrix as to what occurred. That is, that they benefitted from the whole sale prices being set by their affiliates while their competitors did not.

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[18] Driedger's The Construction of Statutes Butterworths 1983 p 87

[19] Bennion on Statutory Interpretation 5th ed. p 469 referring to A.G. for Canada v Hallet & Carey Ltd [1952] AC 427 at 449

[108] It was however not open to the Respondents to use that fact to make a finding or assist in coming to a finding of anti competitiveness as required by the Act. The Respondent under the Act was only entitled to look at the actual acts of the licensees and how their business was or was not anti competitive.

[109] What is however clear to the Court is that unfortunately the Respondent seemed to have relied on the actions of the affiliates to bolster their finding of anti competitiveness to ground the taking of enforcement action. This was not open to them to do and took their action outside of the purview of the powers conferred on them by the Act. If the finding of anti competitiveness was based soley on the complained of plans and their affect on the incumbent CCT, the Claimant would have been bound by the finding however the mere fact that they brought into play the theory of a price squeeze which spoke to the setting of retail and whole sale market prices it is apparent to the Court that consideration was given to the circumstances which they considered existed which by implication would have resulted in them addressing their minds as to who was responsible for that squeeze- including the affiliates of the Claimant.

[110] This Court therefore finds that in this narrow regard that I agree with the Claimant that the Respondent appeared to have acted ultra vires but at this stage, I am not prepared to find that this transgression was sufficient to warrant the setting aside of the Decision.

[111] It is apparent that regardless of whether the Respondent acted outside of their mandate in taking into account and apparently penalizing the Claimant for acts outside of their control, the Court is satisfied that the use of the plans themselves and the effect that they had on the incumbent without the need to show that the concomitant setting of the whole sale market necessarily needed to reside in the same person or even that the Claimant had an input, was sufficient to allow the decision maker Respondent to make a finding of anti competitive conduct sufficient to warrant the commencement of the investigation.

[112] The Court therefore finds under this head that the arguments regarding the Act itself and the criticisms lobbed at it are unfounded and finds on the narrow issue of the use of the sanctioned power that the Respondent took into consideration irrelevancies but that these I find do not go to the heart of the decision and do not warrant the setting aside of this Decision at this juncture.

Abuse of Power

[113] On the ground of abuse of power, the Court is guided by the statement of Lord Scarman in the case of R v Secretary of State for the Environment, ex p Nottinghamshire County Council[20] "*the ground upon which the courts will review the exercise of an administrative discretion by a*

[20] [1986]AC 240

public officer is abuse of power. Power can be abused in a number of ways: by mistake of law in misconstruing the limits imposed by statute(or by common law in case of a common law power) upon the scope of the power; by procedural irregularity; by unreasonableness in the ***Wednesbury*** *sense; or by bad faith or an improper motive in its exercise.*"

[114] In this case, the Claimant has alleged that the Respondent abused their power by misconstruing the power given to them by the Statute and the scope of the power that was given to them.

[115] The Claimants under this head seemed to rest on what they say was a failure by the Respondent to take into consideration certain matters during the investigative process and by using the terms of the section to utilize ex post regulations as opposed to ex ante regulations.

[116] In looking at this, this Court must consider whether the decision maker misconstrued the limits of their abilities and that they must have acted with "***conspicuous unfairness."*** [21]

[117] In assessing whether the acts complained of by the Claimant can amount to this, the Court has to assess whether the act of the Respondent was just "***unfair***" or whether it is was so "***outrageously unfair***"[22] that it requires the decision to be completely disregarded.

[118] This Court in looking at the complained of acts is not convinced that the failure to prioritize matters for investigation or making a choice of enforcement procedures, both of which were not prohibited expressly or impliedly by the empowering Statute could constitute an abuse of power which must be disapproved by the Courts. I therefore do not find that this ground has been made out by the Claimant.

Unreasonableness

[119] One of the most investigated aspects of a decision maker's decision making process is whether the decision can withstand scrutiny from the Courts as to its reasonableness.

[120] There is no doubt that the role and function of the Court is to make an assessment of the complained of decision and to investigate its reasonableness. In the case of ***Associated Provincial Picture House Limited***[23] Lord Green MR had this to say "*The court is entitled to investigate the action of the local authority with a view to seeing whether they ought not to take into account or conversely have refused to take into account any matter. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority kept within the four corners of the matter which they ought to*

[21] R v Inland Revenue Commissioners ex parte Unilever [1996]ST 681
[22] Ibid 697
[23] [1947]2ALL ER 680

consider they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever come to it."

[121] This Court is therefore mandated to investigate whether the decision made by the Defendant was one any reasonable tribunal with the evidence before it could have come to or whether they failed to take into consideration certain matters or took into consideration irrelevant matters and therefore came to a wholly unreasonable decision.

[122] The investigation therefore goes to the heart of the decision and the question is therefore whether a reasonable regulator could have come to or taken the decision arrived at in the present proceedings. This is the test.

[123] In looking at whether the Respondent has failed this test the Claimant has sought to rely on expert evidence, which in the unusual procedure was tested on cross examination before this Court. The reasoning behind this reliance seemed to lie in the argument of the Claimant that the economic theories upon which the Respondent relied to come to their decision were so manifestly wrong that it was apparent that the Respondent could not have properly based their decision on the same and thus the Decision published was unreasonable.

[124] The Court was therefore subjected to an in-depth and esoteric exercise examining the economic and accounting underpinning of the Decision. Whether there was sufficient definition of market share, sufficient exposition of the theory of harm and whether the basis of the economic theory was sound.

[125] While it is recognized by this Court that some assessment or inquiry into the basis of the Decision published by the Respondent is required to be satisfied that the decision fell within ***"…the range of reasonable views open to the decision maker…."***[24] this Court is of the considered opinion that it is not required to make a determination as to the correctness of an underlying theory. That is simply not its role.

[126] This Court's charge when undertaking judicial review is to examine what the decision maker had before them and whether it was sufficient to come to the decision that it did. This court cannot take the place of the decision maker and even more so a specialized decision maker as a regulator. It is not for "…*the Court [to] compel the public authority to exercise its power in a particular way nor can it compel it to make a decision which it believes is the correct one. The court is not concerned with whether a decision is wrong or right on its merits."* [25]

[24] Secretary of State for Education and Science v Tameside Metropolitan Borough Council cited with approval by Small-Davis J in Jared Adams v Commissioner of Police AXAHCV 2009/89 unreported

[25] Adams v Commissioner of Police op cit at paragraph 20

[127] It is therefore not the Court's role to now investigate whether the economic theory used by the Respondent was flawed or lacking in substance. That is not this Court's function. It would be quite alarming that this Court could be asked to decipher and determine whether the theory utilized by the Claimant was preferable to the one utilized by the Respondent. That cannot be what is being asked of it. But in any event, none of the detailed expert reports or evidence elicited under cross examination could make that unequivocal statement of fact.

[128] It must be accepted that economic theories differ widely and theorists will also differ as to which theory should be applied in what situation. It was therefore clear from the evidence and reports and the answers to the Court, that the Claimant was unable to definitively point this Court to any learning or authority that the economic theory relied upon by the Respondent was manifestly incorrect. There is nothing to suggest that the Respondent "got it completely wrong."

[129] This Court appreciates the point raised by the Claimant and their experts that there was possibly a different way of looking at the matter but that is the most that can be done. The Claimant can merely make a suggestion that there may perhaps be a different or better approach that could have been adopted but this Court is not convinced that they have been able to justifiably dismantle or discredit the entire theory relied upon by the Respondent to the point that the Court is convinced that it was wholly unreasonable for the Respondents to rely upon it. This Court is therefore unable to accede to this argument as proffered by the Claimant and is unable to find that this decision was "*unreasonable and therefore unlawful…"* [26]

Procedural Unfairness and Breach of Rules of Natural Justice

[130] In order for a decision maker's decision to stand the scrutiny of the court, the procedure by which that decision maker carried out their function must be fair to all parties. There is no doubt in this Court's mind that within the circumstances of this case, it was required that the principles of natural justice were to be applied.

[131] This observation was as stated in the words of Lord Denning in Kanda v Government of Malaya [27]

> "*If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statement have been made affecting him; and then he must be given a fair opportunity to correct or contradict them."(my emphasis)*

[26] Digicel (Jamaica) Ltd v The office of Utilities Regulation op cit para 67
[27] [1962]AC 322

[132] In the case at Bar the Claimant sought to itemize several breaches that they contend resulted in the procedural unfairness of which they complain. These included failure to access confidential financial information relating to CCT; failure to adhere to the terms of the Guide issued by the Office of Fair trading; that there was insufficient separation as between the investigative and adjudicative functions of the Board and that there was a failure to give reasons as to why the Respondent chose one approach as opposed to another with regard to the nature of the enforcement proceedings they adopted.

[133] The Respondent started the enforcement proceedings against the Claimant by the issuance of the Sanction Notice. The Claimant sought to equate this Sanction Notice to the notice of intended prosecution in a criminal trial and as such they sought to ascribe the requirements of criminal justice to the proceedings.

[134] This Court is however not prepared to ascribe those stringent rules to this case at hand. Be that as it may, this Court does recognize unreservedly that the engagement of the Claimant in this process by the filing of the Sanction Notice brought to bear the implicit rules of natural justice and a requirement that they must be heard in their own defence.

[135] Thus subsequent to the filing of the Sanction Notice the Claimant was entitled to file their response to the same and did so in the form of the document titled Legal and Economic Appraisal. This document set out the answers of the Claimant to the allegations in the Sanction Notice and was the basis of their defence to the same.

[136] The Claimant was thereafter afforded an oral hearing before the Respondent and it was well within the realm of the expectations of the Claimant that their arguments would have been considered by the Respondent.

[137] From the record as presented to the Court it appears that after this hearing the Claimant's right to be heard was compromised. What seems to have transpired is that after the oral hearing and the presentation of the Legal and Economic appraisal the Respondent then created and served a document that they referred to as the Supplement to the Sanction Notice. (the Supplement) This Supplement purported to set out in more detail the theory relied upon by the Respondent and specifically a Theory of Harm and in so doing relied in large measure on confidential financial information provided by the original complainant, CCT.

[138] Upon request by the Claimant for the entirety of the financial information upon which the Respondent relied, in order to make an informed response to the Supplement, the Claimant was instead provided a redacted form of the financial records and was given 14 days to respond to the Supplement. At this point, the Claimant, rightfully in this Court's opinion, again requested the full records from the Respondent which was again refused on the basis of the need to preserve

confidentiality. The Claimant, without the requested information then refused to answer the Supplement on the basis that the information and time given was insufficient.

[139] The Respondent by its Counsel, in its opening submissions and closing submissions have sought to justify their actions on the basis that the information that was divulged was sufficient to afford the Claimant their right to respond and that the breach of the confidential nature of the documents was not warranted as the "gist" of the case to answer had been provided to the Claimant.

[140] The Respondent further sought to argue that there had been no violation of any principles of natural justice and although the Act made provision for the implementation of a procedure to disclose information, they considered that these gave insufficient safeguards in matters where the matters were not yet filed in this Honourable Court or a matter of court record.

[141] What is very apparent to this Court in assessing the determination of the Respondent not to provide the information, is that this Respondent in the Decision published sought to rely almost exclusively, though they argue otherwise, on these very same financial records provided to them by CCT.

[142] It was the chief economist of the Respondent in the person of Sarah Hayes who stated on cross examination that upon the figures presented it was clear to them that "*even if CCT was as efficient as Digicel, it would not have been able to compete with Digicel in the BVI. CCT would still have been in danger in the long term*" and further "*the financial information was not irrelevant I used it to see the confirmation of CCT's losses."* (my emphasis) She even went on further to say "*Financial information showed losses –took losses into account – the effect of the plan was to make losses worse. They were relevant in that it exacerbated the losses that were already occurring."*[28]

[143] There can therefore be no doubt in this Court's mind that these financial statements were of paramount importance to the investigative and ultimately decision making process of the Respondent. There can therefore also be no doubt that the Claimant was entitled to the said financial information in their entirety.

[144] This case as lodged by the Respondent went to the very business decisions of the Claimant as a newcomer on the BVI telecommunication phone market scene. The Claimant had introduced a plan in the usual scheme of competiveness; this Court is of the view that if they were to be in a position to answer the allegations made against them that the business decision was flawed or that they were satisfied that they should not have launched the plans and be given the option to

[28] Transcript of Proceedings – evidence of Sarah Hayes

withdraw the plan without enforcement action, then it was required that they have all the information that was at hand and available with the appropriate safeguards.

[145] It has long been recognized by the courts that "*substantial fairness may in some circumstances be satisfied by disclosing the substance of the case without disclosing the precise evidence or the sources of the information* "per Ellis J in Siobhan Nicola Gillespie & Citco BVI Ltd. v The Ministry of Natural Resources and Labour [29].

[146] It is therefore a "*balancing exercise between the interests which non disclosure seeks to protect and the need to be procedurally fair*" Ellis J in Siobhan Nicola Gillespie[30].

[147] In the instant case there is no dispute as between the parties that the financial information was confidential. The concern for the Court however is that the Claimant did not see the underlying information upon which the figures from CCT were based and therefore fell to be at a severe disadvantage to present a response to the same.

[148] It must be accepted that a party being presented with bald figures without the background to the same can make little comment on them. "*Fairness requires that objectors should be given adequate information to enable them to challenge the accuracy of any facts and the validity of any argument which can be seen by the decision making body as truly likely to influence it in its decision making process."* [31]

[149] The allegations the Claimant faced went to the root of their business decisions as a new entrant on the telecommunications market. This Court is of the opinion that in order for the Claimant to properly address the allegations and to seek to dissuade the Respondent from their proposed action, they required all the information to ensure a level playing field.

[150] The Court is also of the opinion that the failure to provide the information to the Claimant was compounded by the procedural irregularities indulged in by the Respondents which only came to light during the cross examination of Ms. Hayes, namely the fact that there was a hearing held with CCT to which the Claimant was not privy and to which the Claimant had no opportunity to make representations in response to the information then placed before the Tribunal.

[151] What alarms this Court is that at no point was this further information disclosed and at no point were the contents of what transpired at that hearing conveyed to the Claimant. Up to today's date those proceedings have still not been disclosed with the inevitable result being that information

[29] BVI HCV 2013/0003
[30] Op cit
[31] Hariprashad-Charles J in Virgin Islands Environmental Council v The Attorney general and anr BVIHCV 2007/0185 at paragraph 32

was given to the Respondent to which the Claimant has not been afforded an opportunity to refute.

[152] A Court must recognize that *"It is incumbent upon a decision maker to consider whether the individual against whom an allegation is being made, has sufficient information and material as to the case against him so that he is able to make informed submissions. Otherwise an individual would not be able to properly defend himself and could not effectively persuade the decision maker that his information is inaccurate or exaggerated or at any rate does not justify an adverse decision."* Per Ellis J in Siobhan Nicola Gillipsie.[32] (my emphasis)

[153] It is in this Court's considered opinion that these Claimants did not in fact have the necessary information to allow them to address and answer all the allegations that were canvassed before the Respondent.

[154] It is even of more concern to note that these very parties, subsequent to the filing of these proceedings were able to create a confidentiality ring to allow the disclosure of the information to the Claimant. This Court therefore concludes that full disclosure was not only possible with the appropriate measures in place but certainly required in all the circumstances. As in the case of BMI Health care Limited and ors v Competition Commission and The London Clinic[33] a Disclosure room could have been created with the necessary contractual obligations to ensure that the sensitive material was protected.

[155] The Court is therefore persuaded by Counsel for the Claimant that this failure prevented them from making adequate representations in circumstances in which the disclosure would have been neither cumbersome nor inappropriate.

[156] In assessing the other limbs argued under this heading by the Claimants, the Court was not persuaded that there was any legitimate expectation on the part of the Claimants as to the usage of the OFT guide as they sought to argue.

[157] Indeed it is recognized that the terms of the OFT Guide were mentioned by the Respondents in correspondence[34] to the Claimants indicating that there would be adherence to the same as a starting point where relevant to the context of the BVI.

[158] This Court has not been directed to any evidence which amounted to an express or implied representation to that effect having been given by the Respondent. I therefore do not find that any

[32] Op cit.
[33] [2013]CAT 24
[34] Letters from the Respondents to the Claimants of 10th June 2011, 12th October 2011 and 15th March 2012.

legitimate expectation was created and thus there was none upon which the Claimants could properly rely.

[159] Another aspect upon which the Claimants sought to argue was that there was no separation of the investigative and adjudicative aspects of the Board of the Respondents and they sought to rely essentially on what appeared to have been the input into the Supplement by Professor Mason who was an advisor to the Board and NOT the investigative team as crossing that boundary and essentially causing what may be colloquially referred to as "cross contamination" of the roles and functions of the investigatory and adjudicatory segments.

[160] This Court is aware that the Respondents created and published a Protocol which spoke to the intent to keep the investigative and adjudicative roles ascribed to the Respondent separate.

[161] The argument of the Claimant is therefore that the creation of the Supplement to the original sanction notice which sought to bring into being the "new" Theory of harm (which this Court does not accept was conceptually new at all given the nature of the contents of the Sanction Notice) caused there to be participation in the investigative process (the Supplement being issued by them) by members of the Adjudicative portion of the Board or its advisors. The complained of participation was in the person of Professor Mason. However this Court is not convinced from the evidence that was elicited from Sarah Hayes and Professor Mason himself that this "crossing over" was anything more than cursory.

[162] I am therefore not prepared to accept that the limited assistance given by Professor Mason in the preparation of the Supplement amounted to any such "cross contamination" in breach of the Respondents own published Protocol and as such I do not find favour with this argument.

[163] The final point that the Claimant argued with regard to procedural unfairness was the failure of the Respondent to give reasons for preferring to use the EU approach to enforcement as opposed to the US approach which they had sought to impress on the Respondent.

[164] This argument as submitted to this Court seems to be premised on the expectation of public authorities to give reasons for the decisions that they make in an attempt to ensure that the person or persons affected by the decision can satisfy themselves that irrelevant considerations have not been taken into account.

[165] In the case of R v Secretary of State for Education ex parte G[35] Latham J said this among other things "…*the general approach has been to require there to be sufficient reasons to be given to determine whether or not the decision maker has asked the right question and approached it in an apparently rational way …the duty to give reasons was in truth an aspect of*

[35] [1995]ELR 58 at 67 E-F

the duty to act fairly, in other words it was not a freestanding duty ...in any given case, what might appear to the uniformed observer to be a statement of a conclusion, will be to the person concerned with the way in which a dispute has developed, a full and sufficient explanation of the reason for the decision."

[166] This Court however does not interpret this to mean as the Respondents so eloquently called it that "*an essay*"[36] must be produced enunciating the reasons as to why they had chosen one approach over the other, however the Claimants having made the argument which was obviously rejected by the decision maker, must be entitled to know why it was rejected and why the alternate way was preferred. Whether they agree with whatever the reasoning might be is another matter entirely.

[167] The absence of reasons altogether, allows the Court to make the almost inevitable finding, that there really was no rational reason for making that decision. It is not, we find, for the Respondent to glibly answer as to why there are no reasons, to say to this Court, the Decision they made was one open to them to give and as such they didn't have to give a reason. Like a parent saying "because I say so". That is by far unacceptable by any standards.

[168] The Court therefore is of the opinion, that the Respondent having failed to give reasons for the approach chosen which led to the harsher enforcement penalties as against the Claimant, coupled with the failure of the Respondent to properly and fully disclose the nature of the case to the Claimants inclusive of the confidential financial information, that these proceedings were conducted in a procedurally unfair manner which warrants the Decision being set aside.

Disproportionality of the Fine

[169] The Claimant has argued before this Court that the fine that was imposed by the Respondent was disproportionate to the circumstances that existed and did not warrant the significant disparity as seen between the fine that was imposed on them and the one that was imposed on LIME BVI under similar circumstances. The Respondent argued conversely as expected. However, in the circumstances that now exist in that this Court has found that the Decision issued by the Respondent should be set aside which would include the fine imposed, this Court is not prepared to enter into what will essentially amount to an academic exercise.

[170] However in the event that I am wrong regarding the findings to set aside the Decision for procedural irregularity, this Court determines that it is unconvinced by the arguments proferred by the Respondent regarding the justification for the larger fine.

[36] Respondents closing submissions paragraph 185

[171] This Court is not convinced that there was any basis for the Respondent to consider imposing a fine in excess of the fine imposed for the other offending licensee LIME BVI. The consideration upon which the Respondent purported to rely upon was lacking in substance or conviction and gave no valid reason for the disparate amounts. There was no supported mathematical calculation that accompanied the decision to impose the 6.5% figure of the Claimant's retail figures.

[172] In a reconsideration of the Decision if there is a finding contrary to the Claimant, this Court determines that there will now be required a proper assessment of the business of the Claimants during the shorter offending period and a mathematical determination as to the percent to be imposed if the Claimant is to be penalized.

Costs

[173] The issue of costs has been fully ventilated before me by both parties in their respective submissions. Having read and digested them all, this Court does not find merit in the arguments of the Respondent against the disallowance of costs in favour of the Claimant on the basis that they are, "*a substantial trading entity which is part of a large international group of companies and ...[the] claim [was] being brought not in order to test the legality of some provision of general application ...but rather to challenge a targeted regulatory decision which is directed specifically and only at that corporate entity."* [37]

[174] This Court finds this to be a most alarming proposition in light of the very clear provisions contained in CPR 56.13(6). Part 56.13(6) which speaks to an unsuccessful Claimant allows for a costs order to be made against an unsuccessful applicant for an administrative order only if the court considers that the applicant has acted *unreasonably* in making the application or his conduct was in some way worthy of censure for having filed the application. The provision cannot, without more, carry over to successful litigant.

[175] There being no specific provision which relates to a successful applicant in administrative matters this Court is therefore prepared to accept that the general rule that costs follow the event is applicable here.

[176] I am therefore of the opinion that the normal rules under CPR 2000 part 65 are operative. I am fortified in this view by both the ruling of Hariprashad-Charles J in the case of Virgin Islands Environmental Council[38] and Wilkinson J in the case of Marital v Public Service Board of Appeal[39] where they both awarded costs to the successful applicants.

[37] Respondents closing submissions paragraph 228
[38] Op cit
[39] SLUHCV2010/450

[177] The Claimant has sought to claim costs on the sum of $314,250.00 being the quantum of the fine that was imposed by the Respondent. However this Court does not feel that without the appropriate application having been made by the parties to value the claim as provided for by Part 65.6 (as amended) that an arbitrary figure which is not the claim but rather a corollary to the claim can be considered the value of the claim without more for the purposes of the calculation of costs.

[178] I therefore find that the regime applicable to prescribed costs where there is no valued claim will apply and I make a costs order in favour of the Claimant in the sum of $14,000.00.

Conclusion

[179] The Court therefore makes the following orders:

(i) The Decision of the Respondent dated the 1st June 2012 is quashed and it is remitted to the Respondent to be dealt with in accordance with the findings of this judgment;

(ii) That the Respondent is to repay the sum of $314,250.00 being the sum paid by the Claimant as the imposed fine within six (6) weeks of this judgment;

(iii) Costs to the Claimants in the sum of $14,000.00.

Nicola Byer
High Court Judge