EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO BVIHCV2015/237

IN THE MATTER OF THE TELECOMMUNICATIONS ACT 2006

BETWEEN:

CARIBBEAN CELLULAR TELEPHONE LIMITED

Claimant

And

THE TELECOMMUNICATIONS REGULATORY COMMISSION ("TRC")

Respondent

Appearances:
Mrs. Tana'ania Small Davis and with her Ms. Monique Peters for the Claimant
Mr. Brian Kennelly and with him Ms. Sinead Harris for the Respondent

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2015: December 16-17
2016: April 11

JUDGEMENT

[1] **BYER J.:-** This claim was commenced by way of Fixed Date Claim Form filed the 22nd October 2015 for Judicial Review against several decisions and actions of the Respondent namely with regard to the conduct of the Spectrum Award 2015.

[2] The Fixed Date Claim form sought the following relief:

(i) A declaration that the Special Directive ("TheDirective") dated 5 May 2014 requiring the Claimant to take such action as is necessary to vacate the 2x4 MHz band (834-838 MHz Uplink, 879-883 MHz Downlink) and ensure that this

frequency range is not being used by its network and is vacant and free from any unwanted emissions that may occur as a result of its activity in other parts of the 850 MHz band is null, void and of no legal effect.

(ii) An order of certiorari quashing the decision of the Telecommunications Regulatory Commission ("the Respondent") whereby it has deemed the Claimant to be materially non-compliant with its instruction by way of the Directive requiring the Claimant to take such action as is necessary to vacate the 2x4 MHz band (834-838 MHz Uplink, 879-883 MHz Downlink) and ensure that this frequency range is not being used by its network and is vacant and free from any unwanted emissions that may occur as a result of its activity in other parts of the 850 MHz band.

(iii) An order of certiorari quashing the decision of the Respondent restricting the Claimant from qualifying for registration and participation in the Spectrum Award 2015 unless it shall vacate the spectrum described above by 14 September 2015.

(iv) An order of certiorari quashing the decision of the Respondent that it shall not grant a Frequency Authorisation for spectrum in the 850 MHz band or in the Spectrum Award 2015 to the Claimant until such time as the Claimant shall comply with the instruction to vacate the spectrum described in (1) above.

(v) An order of certiorari quashing the decision of the Respondent to reject the Claimant's application to register for the Spectrum Award 2015.

(vi) An order of certiorari quashing the decision of the Respondent stipulating the frequency for which the Claimant must apply for frequency authorisation, which amounts to less spectrum than it has been assigned and has used with the authority of the Respondent in operation of its telecommunications network since 2003 and continuing.

(vii) A declaration that for the purposes of calculating annual royalty fees paid by the Claimant to the Respondent pursuant to Article 5.1 of the Telecommunications Licence dated 25 May 2007 issued to the Claimant, the revenue derived from sales of non-telecommunications services such as sale of telephone handsets and accessories, rental income and interest do not fall within "services provided under the Licence".

(viii) Further or other relief as the Court deems just.

(ix) Costs

[3] The trial of this matter was held on 16th and 17thDecember 2015. An oral decision was handed down on 13thJanuary 2016. This judgment therefore serves only as a fuller development of the oral decision previously given.

Factual Background

[4] Caribbean Cellular Telephone Ltd ("CCT") is the Claimant herein and is a limited company incorporated under the laws of the Virgin Islands. It holds a License issued on 25 May 2007 under the Telecommunications Act, 2006 ("the Act") for the operation of a telecommunications network providing telecommunications services in the Virgin Islands.

[5] The Respondent is a body corporate established under section 5 of the Act. The Respondent is mandated to regulate the telecommunications sector and its functions are set out in section 6 of the said Act. In this judgment the Respondent may also be referred to as the TRC and will therefore be the same entity as identified as the Respondent.

[6] The Claimant and parties who are considered licensees are governed by the Act, the Telecommunications Code, the Regulations, the terms of their Licenses and any instructions issued by the Respondent.

[7] By letter dated 4 March 2004 (prior to the commencement of the Act) the Minister of Communications and Works (the "Minister"), who was then responsible for overseeing the telecommunications industry, gave the Claimant permission to operate within certain blocks of spectrum. This allocation included the 2x25 MHz in the 850 MHz range- i.e. 824-849 MHz Uplink paired with 869-894 Downlink. The reallocation of this specific spectrum range is at the heart of these proceedings.

[8] A summary of the pertinent events leading up to the Claimant's application for judicial review is outlined below.

[9] On the 14thJanuary 2013, the Respondent first wrote to the Claimant requiring it to, *inter alia*, relocate its usage of spectrum in the 850 MHz band, which letter was copied to General Manager of LIME (BVI) Limited. In this correspondence the Respondent notedthelack of frequency authorisation under section 19 of the Claimant and stated that section 23 of the Act did not apply and further proposed to make a directive under section 77(2) of the Act.

[10] A series of written communications between the Claimant and the Respondent with regard to the spectrum re-allocation followed the January 2013 letter. In these correspondences the Claimant purported to raise several objections/protests in respect to giving up their assigned spectrum while the Respondent remainedadamant and reiterated its request for the Claimant to take the necessary steps to vacate the spectrum.

[11] The Respondent reiterated its position throughout 2013 to no avail on the part of the Claimant.

[12] By mid-June of 2013, the Claimant had made it clear that it was not in agreement with the proposed re-farming initiative and set before the Respondent its development plans including a 4G LTE network for the use of the specified spectrum.

[13] The entire year of 2013 passed and the Respondent made no response to the Claimant. However by letter of 26 March 2014they sought the Claimant's consent to the re-farming of the 850 MHz spectrum. The Respondent in that correspondence sought to remind the Claimant of its lack of frequency authorisation under section 19 of the Act, and informed the Claimant that their use of the spectrum had in fact only been on an "ad hoc" basis.

[14] The Claimant rejected this approach and thus on the5th May 2014the Respondent issued its controversial"Special Directive" ("theDirective"). Pursuant to the terms of the Directive, the Claimant was expected anddirected to vacate 2x4 MHz of 850 Spectrum (834 t0 838 MHz paired with 879 to 883 MHz). The Claimant was invited to submit a written statement of objections to the amendment of the frequency within 60 days of the date of the Directive.At this juncture, the rationale relied on by the Respondent was that it was in the public interest to undertake this re assignment. The Claimant responded to the Directive in August 2014 and then never heard about the Directive again.

[15] In May 2015, the Respondent announced its intention to engage external consultants to prepare the best way forward for the offering of spectrum to all the licensees.

[16] During the first half of 2015 the Respondent therefore met with, held discussions with and finalised the procedures for the proposed procedures for the Spectrum award. As a result, a Notice of Consultation dated 11 June 2015, Consultation Document and Draft Invitetion to Apply for spectrum ("ITA") were issued.

[17] After some further feedback these documents were finalised by August 2015 and individual meetings were held between the stakeholders to establish the parameters for the participation of the licensees in the proposed Spectrum Award.

[18] These stakeholders by necessity included the Claimant who was told in no uncertain terms that there were several areas of noncompliance including the non-compliance with the Directive and the failure to pay the requisite license fees. The Respondent in fact by correspondence on the 9th September 2015, informed the Claimant that these were areas that needed immediate address and that the Claimant was able to deal with these matters

in the undertakings being sought to be completed, despite the Claimant's clear indication that they were not prepared to do so.

[19] Within two days of the Claimant being informed of the Respondent's position,this application for judicial review was filed. Subsequent to such filing the dead line for the submission of applications to register for the Spectrum was extended. Upon the Claimants purporting to submit the application to the Respondent, to the person of Mr. Guy Malone the Chief Executive Officer, the application was rejected ousting the Claimants from participation in the Spectrum Award process.

The Special Directive (prayers 1 to 4 of the Fixed Date Claim Form)

Claimant's Submissions

[20] The Claimant's main submission was that the Directive dated 5th May 2014 in and of itself was null, void and of no legal effect. The Claimant therefore challenged the Respondent's purported reliance on the failure of the Claimant to comply with this Directive upon which they based their determination that the Claimant was materially non-compliant sufficientto disqualify them from registering in the Spectrum Award 2015.

[21] The Claimant's submissions on this issue, both written and orally, challenged the validity of the Directive on several bases:

[1] Failure to follow proper procedures

[2] Legitimate Expectation

[3] Irrationality

[4] Inconsistency

[5] Similar Pattern

[6] Abuse of Power

[22] For the sake of brevity, the Court will summarise the extensive arguments made by Counsel for the Claimant on these points.

[23] The Claimant as with all claimants in judicial review applications recognisedthat the Court's role in these matters is purely a supervisory one and that having recognised that the Respondent was the entity with the legislated power as regulator, deference must always exist to its decisions.

[24] However Counsel for the Claimant, equally posited to this Court, that it was this very power given to the Respondent, which imposed an obligation on them to ensure that they wield that power with faimess and transparency. This was especially important in the Spectrum Award process in which her clients sought to participate.

[25] It was clear to this Court that the Claimant's main contention was the fairness of the process. The Respondent having determined the manner and method in which participation would be afforded, was required to adhere to those mechanisms and therefore Counsel for the Claimant requested of the Court to bear in mind all that occurred with those mechanisms in mind, in particular the document entitled the Invitation to Apply (the ITA).[1]

[26] Counsel for the Claimant recognised that it was the ITA that set out the strict qualification criteria which limited participation in the Spectrum Award to existing operators who were considered to be materially compliant with the Legislation, the Telecommunications Act, the Telecommunications Code, the Regulations thereunder and any instructions duly issued by the Respondent. It is in this context and this context only , that the Claimant became aware for the very first time that the Directive issued to the Claimant in 2014 which was not complied with, was a source of non- compliance to bar the Claimant from due participation.

[27] The Claimant submitted to this Court that this having been drawn to their attention just prior to the registration/ application process being undertaken, together with the requirement to ensure full payment of all due licence fees, immediately placed the Claimant in a disadvantageous position that obviously worked against them. The reliance on the areas of non-compliance, was therefore in the argument of the Counsel for the Claimant, unreasonable.

[1]Trial bundle page 198.

[28] The Claimant submitted to this Court that what in fact the Directive amounted to, despite any argument to the contrarywas an amendment to the spectrum holding of the Claimant without the procedure provided for by the provisions of the Act.

[29] Counsel for the Claimant, submitted to this Court that this was clearly so when the very terms of the Directive made reference to and relied on the terms of Section 23 in particular, of the Act as the applicable provisions. This they say is clear from the caption of the Directive and its contents all of which were referable to the same section 23.

[30] Section 23 they argued clearly set out the applicable procedure for the amendment of frequency authorisations. They relied on the fact that Section 23 contemplates that frequency authorisations may beamended by way of very certain procedures. These included by way of written agreement of the authorised holder or as a secondary measure, by the Respondent acting by necessity of force majeure, national security considerations, changes in the law or implementation of international obligations or where they deem it necessary to achieve the purposes of the Act taking into account the public interest. [2]

[31] The Claimant further contended that the Respondent therefore having failed to comply with the very clear provisions of this section 23 (1) of the Act, rendered the Directive null, void and of no legal effect. The Claimant submitted vigorously to the Court that this section was breached when the Claimant was not given the opportunity to present its views in addition to submitting its written statement of objections to the suggested amendment which the Respondent was duty to take into account before reaching a decision on the amendment and which in the final analysis had to be issued by the Respondent in any event.[3]

[32] The Claimant's further argued that the purported Directive amounted to only the notification of the Commission's intention to amend the Claimant's frequency authorisation, but it did not and could not be amount to anything more than that.

[33] The Claimant further posited to this Court that the failure of the Respondent to therefore follow the procedure provided for by the Act and indeed the Respondent having failed to

[2] Telecommunications Act 2006 section 23
[3] Op Cit Section 23 (3)

make any further mention of this Directive, even after the purported deadline contained in that document, led the Claimant quite legitimately, they argued, to believe that the Respondent was in fact no longer pursuing the provisions of this Directive.

[34] Learned Counsel for the Claimants therefore submitted that this failure, even without more, to follow the procedure rendered the Directive a nullity. Having failed to actfairly, reasonably and lawfully where there was a procedural imposition to do so by statute,meant that the Respondents had breached their obligations to act fairly towards the Claimant.

[35] Counsel for the Claimant therefore as a corollary submitted that since the very essence of the Directive would have resulted in the interference of substantive existing rights of the Claimant, it was imperative that principles of fairness were to be essential in the process employed by the Respondent.

[36] Counsel posited that there was therefore a legitimate expectation that the Respondent would act with procedural fairness and that their rights fell within three of the four categories recognised and itemised by Simon Brown LJ in the case of***R v Devon County Council ex parte Baker***[4]where a legitimate expectation would arise and having failed to observe such procedural fairness the decision which emanated from that faulty process must fall.

[37] Counsel for the Claimant also sought, although less forcefully, to submit to this Court that they were also entitled to consider the Directive of having no legally binding power to render them materially non-compliant, when one considered the general way in which the Respondent failed to follow up on similar issued edicts.

[38] Thus the Claimants relied on one previous occasion in 2013, when the Respondents had issued a purported directive of similar ilk which was not enforced after the Claimant had made representations against it. Having done so once again with the Directive of 2014 and there being no decision issued or any further follow up for close to a year the Claimant contended that they were entitled to consider that Directive no longer extant.

[4](1995) 1 All ER 73 at 88E.

[39] Therefore when taken in the round, for all of these reasons the Claimant therefore asked this Court to find the same null and void.

The Respondent's Submissions

[40] The Respondent in their submissions resoundingly rejected all the criticisms of the Claimant with regard to the conduct of the Spectrum Award process and specifically submitted that the Claimant had failed to identify any issues of law on which they could be successful.

[41] Learned Counsel arguedthat the Respondents as the regulatory body for telecommunications industry within the Territory of the British Virgin Islands could not be faulted for requiring applicants in the Spectrum Award process to demonstrate regulatory compliance as criteria for entrance into the Spectrum Award.

[42] The Respondent submitted that the Claimant's challenge to the Directive is ten months too late and in any event it is misplaced. The Claimant's complaint, the Respondent argued, has not changed since 2011, that is that it is not prepared to give up their spectrum as it would be damaging commercially.

[43] The Respondent stressed that despite all indications to the contrary the spectrum does not belong to any of the operators including LIME. It in fact, belongs to the Territory of the British Virgin Islands and as such it should be deployed in a manner benefitting to the citizens of the British Virgin Islands. They reiterated that the Act mandated the Respondent to manage the spectrum for the purpose of effective usage and promotion of fair competition between operetors.

[44] The Respondent clearly stated that they agree that as a principleany benefit advantage like Spectrum should not be removed from the Claimants without rational grounds and without giving them an opportunity to comment on such grounds. However, Counsel submitted that the Respondent had followed proper procedure in making the Directive with all grounds for proposing the withdrawalfrom the 850 MHz Spectrum being conveyed to the Claimant, giving them ample opportunity to comment on the same.

[45] The Respondent's however argued that in doing so, sections 19 and 23 of the Act did not apply to this process despite any views held by the Claimant to the contrary. Learned Counsel, Mr. Kennelly clearly stated thatsections19 and 23 clearly did not apply in that these were only applicable where there were actual frequency authorizations. In any event there was no evidence he submitted, that the Claimants in fact believed or sought to rely on these sections until these proceedings where they were raised for the first time.

[46] Counsel submitted to this Court that the Directive was clearly issued pursuant to section 77 (2) of the Act which made specific provision for the issuance of Directives of a specific or general nature.

[47] All that was required under the tenets of natural justice, the Respondent argued, was that the Claimant was entitled to a notice of the proposal for amendment, which it got by the Directive and to comment, which it had been given.

[48] Once having done so and having been procedurally fair, there was then no obligation on the Respondent to then thereafter to publish or confirm that validity of a document that was clear. Any such failure could not affect its fundamental validity.

[49] The Respondent therefore argued that the Claimant's argument that the Directive was totally ineffective due to the lack of response to the objections or a confirmation that the Directive stood was nonsensical.

[50] On that basis, the Respondent therefore submitted that it was significant that in the entire complaint of procedural unfaimess, the Claimantcould not point to any fact or event that confirmed that the Respondent had either failed to provide an opportunity for the Claimant to be heard or to respond to the Directive. This was extremely instructive and therefore could only mean that this ground of challenge must fail.

[51] The Respondent further argued that the Claimant having admitted that they could not rely on any substantive legitimate expectation that they would refain the Spectrum allocated, they sought to impress on this Court that by extension there could be no procedural

legitimate expectation because there was no evidence of a promise having been made that the Respondent would afford them a specific procedural right.

[52] The Respondent had not provided any "*clear and unambiguous representation*"[5] that the Directive was no longer valid or that the Claimants were entitled to rely on any procedure regarding the alleged lack of validity, and as such they submitted that this ground must also fail.

[53] In response to the argument that the Respondent failed to adhere to the procedure provided for under the Act and section 23 in particular, Counsel for the Respondent argued strenuously that this was not a proper case for the application of section 23. The Claimant having never applied to the Commission under section. 19 of the Act for any frequency authorisation could not now benefit from the provisions of section 23 which dealt with the amendment of formal frequency authorisation.

[54] Therefore due to the Claimant's failure to apply for a frequency authorisation under the Act, the Respondenthad allowed them to use their spectrum on an "ad hoc" basis, and the Respondent never purported to grant the Claimant a frequency authorisation under section 19 of the Act (nor would such a grant have been lawful, absent an application under section 19).

[55] Thus they argued any reliance on a reference to Section 23 in the Directive was a clear mistake.

[56] The Respondents further submitted that as an expert regulatory body, they enjoy a broadrange of discretion.[6] Indeed it was the Respondent who was best placed to weigh the competing interests of the stakeholders. It is simply not the role of the Court to do so unless irrationality can be made out. It is in this regard that it is clear, it was submitted, that the Claimant could not *"demonstrate that the [decision]' [was] so outrageous in its defiance of*

[5] *R v Devon County Council ex p Baker*[1995] 1 All ER 73 at 88E.
[6] *R v Hillingdon London Borough Council ex p Puhlhofer* [1986] 1 AC at 518B-F.

logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"[7]

[57] The Respondent therefore argued that the Directive must be read in a generous and not a restrictive way and that the Respondent must be seen as having a broad discretion for the issuance of the same.

[58] It is the Respondent who is best placed to weigh the competing interests which was achieved by the very issuance of the Directive. Therefore any irrationality claim must therefore fail in this regard.

[59] The Respondent completely disregarded any claims to any purported inconsistency in the Directive that led to the misleading of the Claimants but rather stated that it was always clear that the Claimants knew what they were answering and they did not rely on any such misrepresentation. As such this this ground must fail as well.

[60] The Respondent further argued that whatever the reason for the lack of action of the Directive that had been issued in 2013, such inaction could not have possibly give any credence to the supposition that there was a legitimate pattern of non-enforcement upon which the Claimant could rely.

[61] Finally with in regard to the requirement of compliance with the Directive, the Respondentsurged upon the Court that there was no "conspicuous unfaimess "that attached to this prerequisite for participation in the Spectrum Award.[8]

[62] The Directive was a lawful decision, which the Claimant had chosen not to challenge and there was nothing irrational to insist applications has to be compliant with all lawful directives.

[63] All of this they argued was part and parcel of the Respondent's purview and could not be considered irrational. This limb must therefore also fail.

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[7] ***Earl Hodge v Governor of the Territory of the Virgin Islands***(Claim No. BVIHCV 2012/297)(5 July 2013) per Ellis J para 58.
[8] ***R v Inland Revenue Commissioner ex parte Unilever***[1996] WL 1090 368.

The Rejection of the Application to Register (prayer 5 of the Fixed Dated Claim Form)

The Claimant's Submissions

[64] The Claimant contends that the Respondent erred in law and its power when its Application to Register for the Spectrum Award was rejected by Mr. Guy Malone on the 18th September 2015.

[65] The Claimant submitted that in this regard there are in fact two issues for the Court to decide. One being the factual issue of what transpired on the 18thSeptember 2016 and the other being the authority of Mr. Guy Malone to reject the application out right.

[66] The Claimant's main criticism is that their application package was rejected without any due consideration.

[67] By the Claimant's evidence, on the 18th September 2015the Claimant's representatives, Mr. Averad Penn (CEO) and Dr. Heskith Vanterpool attended the Respondent's office before the application deadline of 3:30 pm. They met with the Respondent's CEO Mr. Guy Malone, who appeared to have been awaiting their arrival. Mr. Malone took the application package, made what appeared to be a cursory survey of the documents and enquired as to whether the undertakings were agreed beforehand and in the format of the draft undertakings prepared by the Respondent and presented to the Claimant. Having been informed that they were not, Mr. Malone rejected the Claimant's application on the basis that it had not agreed the undertakings beforehand and according to his watch the application was late and past the stipulated deadline.

[68] The crux of the Claimant's submissions is that what occurred was an unauthorised and absolute rejection of the application without proper consideration. In the words of Learned Counsel for the Claimant, such action was "*completely out of order*". Having done so was therefore a breach of the procedure set out by the Respondent in the ITA itself.

[69] Learned Counsel argued that the rejection of the application out right, based on an allegation that there was a failure to agree undertakings beforehand, resulted in a rigid and

mechanistic approach to the powers and discretion reposed in the Respondent which amounted to an abuse of process.

[70] The Claimant further argued that given the role of the Respondent as the regulator established as a public authority and given the nature and importance of the Spectrum Award process to the Territory, together with the intense competition among the operators for thelimited available Spectrum, meant that the Respondent ought to have considered its powers and exercised them responsibly, fairly and with due regard to the interests of all.

[71] The Claimant argued that the purpose of the registration process was to commence the process for applications for the Spectrum Award. The Respondent in all reasonableness had the opportunity during the multistep process to accept the registration package, review and make a determination as to whether the applicant's application was satisfactory or not and then act accordingly, not to reject the same out of hand.

[72] Additionally the Claimant made it clear that Mr. Malone did not have the authority to reject the application upon its presentation. The application should have rightfully been considered by the Commission as an entire body, who had been given the responsibility of overseeing the Spectrum Award process and not Mr. Malone. They further argued that section 12 of the Act setting out the duties of the office of the CEO did not assist the Respondent's case at all.

[73] Therefore it was submitted by the Claimant's Counsel, that the proper course of events should have been that, at the presentation of the application that it should have been accepted then considered in the fullness of time and a decision ultimately rendered whether it was eligible to participate.

[74] By acting otherwise, the Claimants submitted, that the Respondent fettered their inherent discretion making the process manifestly unfair. The Respondent having predetermined the outcome of the application process took an unreasonably rigid approach to the application of the rules set out in the ITA.

[75] Learned Counsel in this regard directed the Court's attention to the terms of the ITA and in particular sections 2 and 8[9] which set out the eligibility criteria and the manner and form of the applications for the Award itself. They sought to impress upon the Court that despite there being admittedly some areas of non compliance on their part, any provision for the creation of undertakings to address those areas of non compliance did not have attached to them the requirement that they be agreed before the registration process as done by the Respondent.

[76] Learned Counsel submitted therefore that refusing to accept the application, defeated the purpose of submitting an application for registration. This was something they submitted that the Respondent could only have done upon due consideration of the application itself.

[77] Counsel therefore argued that between the 18th September 2015 (date of registration) and the date of the announcement of who qualified to register for the Spectrum Award there was sufficient time for the TRC to consider all the application packages including the Claimants and could have made the appropriate determination at that stage.

[78] Counsel for the Claimant therefore argued that if the due consideration had been given that it would have in any event met the requirements, having however failed to do so, the decision to reject the application required review and must therefore also be set aside.

The Respondent's Submissions

[79] The Respondent submitted to this Court that the evidence before the Court showed that the parties had engaged in correspondence with regard to the Claimant's vacation of the 850 MHz for over a period of many years.

[80] The Respondent therefore argued that this was not something new to the Claimant and that it was clearly stipulated to them that this was an area of material non-compliance that had to be remedied in order to be eligible for application to the Spectrum Award. This stood as a requirementand a prerequisite across the board for all applicants that it was clearly

[9]Trial bundle 198.

stipulated to them that any areas of material non-compliance had to be remedied in order to be eligible for application to the Spectrum Award.

[81] The Respondents submitted to this Court, that having raised the same with the Claimant and the Claimants having responded, that they sought to find an effective way in which to still allow them to participate in the process. This therefore led to the creation of the undertakings to provide an avenue for eventual, if not immediate compliance.

[82] In making these concessions, the Respondents submitted that a reading of the ITA and in particular Rule 2.2(ii) had to be read sensibly and that any undertakings that were to form part of the registration process would have had to have been agreed before delivery of the applications.

[83] The Respondent therefore argued that when the application was taken and examined by Mr. Malone, he did so pursuant to his powers conferred on him by the Act. He was entitled to adhere to a generous reading of the ITA and reject the application where there had been no previous agreement.

[84] This decision on the part of Mr. Malone was not illogical or irrational or unreasonable.

Frequency Authorisations and Spectrum Cap (prayer 6 in the Fixed Date Claim form)

The Claimant's Submissions

[85] By their argument, the Claimants submitted that it was incorrect for the Respondent to determine that they were not in possession of a frequency authorisation. What they do admit is that they, like all other operators since the promulgation of the Act were required to *formalize* their spectrum holdings by obtaining a frequency authorisation under section 19 of the Act.

[86] The Claimant's submitted that that not having been done, along with the continued usage of spectrum allocated by the Minister together with the continued ratification by the Respondent, all amounted to an authorised use of spectrum by the Claimant within the

parameters that had been initially assigned. If this was not so, then it was indeed an incongruity where the Respondent still collected licence fees for those very services offered by the use of the spectrum which was now categorised as an "ad hoc" usage.

[87] The Claimant's argued that the failure of the Respondent to ensure the regularization of the frequency authorisation, could not be a failing of the Claimant. Therefore they have been quite rightly been in occupation of spectrum, which, without proper process the Respondent seeks to now relieve them.

[88] It was therefore argued that any move to reduce the Claimant's spectrum holding would in effect disadvantage the Claimant who had made it abundantly clear their intentions to utilise the same in their business development.

[89] It was therefore vigorously argued that any attempt by the Respondent to impose a spectrum cap as a precursor for participation in the Spectrum Award processwas wholly irrational and must not be allowed.

[90] This prerequisite therefore exhibited an act of the Respondent as capricious, highhanded, arbitrary and unreasonable amounting to an abuse of its power granted by the Act and must be quashed.

The Respondent's Submissions

[91] The Respondent submitted to this Court that the Claimant's argument on this point amounted to a dispute not only of the Respondent's right under the Act to manage the spectrum but additionally to tout the argument that they had an almost absolute right, to the spectrum which it had used (and was permitted to use) in the past.

[92] The Respondent argued that the wording of sections 33-36 of the Act are clear; no licensee under the Act has absolute ownership of the spectrum they utilise, a fact they say is plainly ignored by the Claimant.

[93] Having been given the responsibility for the management of the spectrum as a scarce and valuable commodity, it must be open to them they submitted, to take the view that this essential asset must not be underutilised or used ineffectively.

[94] The Respondent's bolstered their argument by relying on the reports that emanated from the Spectrum Management Framework since 2011 which recognised that a spectrum cap was necessary to effect a properly managed structure.

[95] The Respondents therefore posited, that it was therefore no surprise that Spectrum caps were the subject of consultation and made a pre-condition for participation in the Spectrum Award 2015.

[96] The Respondent submitted that it was just these types of decisions that expert regulatory bodies are responsible for and for which Courts are slow to disturb.

Calculation of Royalty Fees (prayer 7 in the Fixed Date Claim form)

The Claimant's Submissions

[97] Under this head, the Claimant's submission was simply that the Respondent's calculation of royalty fees payable was manifestly incorrect as it was based on a clear misinterpretation of Section 60 of the Act.

[98] The Claimant made it clear that there was indeed an obligation to make payments but they clearly argued that there were many areas of revenue earned that did not fall within the services monitored by the Respondent.

[99] It is was agreed by Counsel that section 60 of the Act empowered the Respondent to collect royalties from the licensee for services covered by the terms of their licence, however the Claimants strenuously argued that this cannot by extension purport to include revenue streams that are not regulated or licensed activities.

[100] The Claimant relying on article 5.1 of their licence submitted to the Court the clear parameters of what is to be paid. Once the revenue fell outside of those parameters it was made clear by the Claimant that they had no authority to insist on any other payments.

[101] The Claimants therefore submitted that it was solely on the basis of the Respondents seeking to include such unrelated sums that they refused to agree tothe draft undertakings as drafted and presented by the Respondent. It was therefore open, they state, to put forwardin the registration package they submitted for consideration, amended draft undertakings, which took these matters into hand. They therefore asked this Court for a declaration as to the parameters of monies due.

The Respondent's Submissions

[102] The Respondent relied in large measure on the interpretation of section 60 of the Act to ground their argument with regard to the declaration sought on royalty fees. The Respondent's position therefore was that "the exclusion of other sales" was untenable in light of the clear language of the Act and the broad definition of License Services in the Claimant's Licence.[10]

[103] Further the Respondent asserted that a critical aspect of the Respondent's enforcement role is the review of management accounts from which it can be assessed what gross revenue is earned under the licence.

[104] The Respondent maintained that under section 60 of the Act, every licensee is required to pay the Commission a royalty of three percent of gross revenue or such other prescribed rate. The Respondent added that the Claimant has been in substantial breach of this requirement for a considerable period of time. Therefore any other calculations were based on estimates.

[105] The Respondent thereforesubmitted, that the real issue is that in the absence of audited accounts, it is not possible for the Respondent to satisfy itself as to the status of "bad debts" (and whether they have been appropriately written off) or any other revenue earners which the Claimant proposes should be deducted from its gross revenue for the purposes of calculation of royalty fees.

[10] Respondent's skeleton arguments para 152 filed on the 10th December 2015.

[106] The Respondent accepted that adjustments to the royalty fees can be made but emphasizes that the audited accounts have to be provided by the Claimant in order to make such adjustments. The Respondent also submitted in their skeleton argument that the draft Undertakings proposed by them, on that basis included provision for royalty fees to be adjusted to take account of other revenue streams once audited accounts had been provided and allowed the Claimant significant time to deliver those audited accounts.[11]

Delay

The Claimant's Submissions

[107] The Respondent's raised the issue of delay on the supposition that the Public Authorities Act Cap 62 applied to these proceedings and as such the limitation period to bring judicial review proceedings against a decision of the Respondent was 6 months from the date of the decision, being at the latest November 2014.

[108] The Claimant in response to this point arguedprimarily that since theDirective was not a valid decision it followed that time couldnot have run from that date. There was therefore no action required as there was no effective decision.

[109] In any event, if they were not successful on that point the Claimant went on to further argue that since they were not aware of the intention of the Respondent to rely on their "non compliance" with the Directive until July 2015, the filing of the action in September 2015 did not raise any issues of delay.

[110] Learned Counsel invited the Court to consider the instances that arose in the cases of ***Newbury District Council***[12]and ***Boddington v British Transport Police***[13]in which, in both instances, significant time had passed before the application for judicial review was filed.

[111] The Claimant therefore argued, that it was clear from these authorities that the Court must consider the circumstances of each case and exercise their discretion but that on any interpretation, commencing proceedings outside the statutory limitation period did not

[11] Respondent's skeleton arguments para 152 filed the 10th December 2015
[12][1989] 1 AC 1155.
[13][1991] 2 AC 439.

amount to an automatic bar to relief nor did the facts of the instant case raise considerations of delay.

The Respondent's Submissions

[112] The Respondent having raised the issue of delay of the Claimant in commencing proceedings for judicial review, they maintained that the time period for commencement of these judicial review proceedings had long passed. The proceedings they submitted were encapsulated by the provisions of section 2 of the Public Authorities Protection Ordinance ("PAPO") which specified that there was asix month limitation period applicable for the bringing of actions.They argued that since the Claimant was directly challenging the Directive,the six months limitation period expired in November 2014. The Respondent argued that the Claimant had brought their claim for judicial review too late and therefore it should not be allowed.

[113] The Directive having been issued in mandatory terms under an express power conferred by section 77(2) of the Act had not been withdrawn. It was clearly a decision amenable to judicial review for which the Claimant was well aware and could have challenged it within the statutory time limit.

[114] Further, the Respondent argued that there had to be powerful public interest in challenges to decisions of public authorities being brought expeditiously. Having failed to do so, they were entitled to rely on the clear provisions of the PAPO.

[115] The Respondent also argued that in any event the dilatory manner in which the Claimants prosecuted their claim generally also had to be considered and whether delay would now bar their substantive relief.

Court's Analysis and Findings

[116] It is clear to this Court that in this matter, like with any other judicial review application it is always useful to remind the parties and the Court itself what is the role of the Court in such applications.

[117] Judicial review is not an appeal against the merits of the decision being impugned having been made by the decision maker. Such decision makers are usually clothed with statutory authority to make decisions and in the case at bar they have the ultimate responsibility to regulate the highly competitive world of telecommunications within the territory of the British Virgin Islands. The Court therefore seeks to simply "*review the decision of the [decision maker] and to consider whether there has been 'illegality', 'irrationality' or procedural impropriety'.*[14]

[118] This Court is therefore in agreement with the proposition made by Counsel for the Respondent that the question that must pervade this exercise is not whether any other decisions were open to the Respondent, but whether these decisions which are being questioned were not open to the Respondent at all.[15]

[119] Thus the test is very clearly one of "*whether the decision is such that it falls within the range of reasonable views open to the decision maker*".[16]

[120] That being said, the Court has therefore been given a limited purview and it is within such purview that this Court will undertake the review of the decisions impugned by the Claimant here.

[121] However, before I proceed to examine the matters before the Court in more minute detail, there was a preliminary point raised in the submissions of the Respondent that although not vehemently pursued still requires the determination of this Court.

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[14] *R v Panel on Take-overs and Mergers ex p. Datafin Plc* [1987] QB 815 at 842 F-H.
[15] Respondent's submissions para 71 filed 10th December 2015.
[16] *Adams v Commissioner of Police* AXAHCV 2009/89 at para 44 per Small-Davis J(Ag) .

[122] This was the preliminary issue as to whether the delay on the part of the Claimant to bring these proceedings has caused them to run afoul of the statutory provisions as set out in the Public Authorities Protection Ordinance Cap 62. (The "PAPO") and Part 56 of the Civil Procedure Rules 2000 itself.

[123] By the provisions of the PAPO and in particular section 2, it provides as follows "***where any action, prosecution or other proceedings is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance or of any public duty or authority... (a) the action, prosecution, or proceedings shall not be or be instituted unless it is commenced within six months next after the act, neglect or default complained of.***"

[124] In this regard the Respondent's argument therefore is this:- the Directive which was issued on the 5 May 2014 was a valid decision given by the Respondent under the power conferred by the Act. TheClaimant, having not taken any action on the same, until some 17 months later are barred from doing so and there can be no consideration of the claim by virtue of the provisions of PAPO.The Respondents also argued the corollary point, which although was not specifically developed by the parties in oral argument, but which was found in the skeleton arguments, asked the Court to also consider the question of delay on the part of the Claimant generally, to have this Court deal with the matters before it.

[125] In response to this submission, this Court finds and agrees applications for judicial review fall within the parameters of Section 2(a) of the PAPO as noted by our own Court of Appeal in the case of ***Quorum Island (BVI) Ltd and Virgin Islands Environmental Council.***[17]

[126] Having however said that, and for the reasons that will be clear shortly below, I find that the Directive was not a valid decision upon which the Respondent could have relied and therefore no considerations of the tenets of PAPO would apply in the present circumstances.

[17]HCVAP 2005/04 per Barrow JA.

[127] That being said, it was still open to this Court, even after leave having been granted, to consider whether there was any delay on the part of the Claimant that would have barred them from their substantive relief.

[128] Having determined that there was in 2014 no valid decision from which the Claimant could have sought review and the Court accepting that it only became clear to the Claimant that reliance was being placed on the said Directive in July 2015 during the Spectrum Award process, I do not find that the filing of the application for judicial review in September of 2015 to be within the parameters of delay that would be sufficient to bar the Claimant. In order for this to have been made out on the evidence , I would have had to have been satisfied that it would be detrimental to good administration or cause substantial hardship to the rights of any person or substantially prejudice the rights of any person.[18]

[129] It is clear from the authorities that the Court considered, that any suchfinding must be clearly based in the factual matrixfrom which the claim emanates. I therefore adopt the words of Her Ladyship Madam Justice Ola Mae Edwards in the case of ***Ronald Browne v The Public Service Commission*** who in considering the argument of delay barring that litigant in those proceedings had this to say which I adapt to the Territory of the British Virgin Islands, "***... the absence of any rigid time limit for invoking the supervisory jurisdiction in [Tortola] is sslutary subject of course to the Court's insistence on reasonable promptness in all the circumstances of each particular case and rejection of stale claims***".[19]

[130] Thus it is clear to this Court that, there was sufficient promptness on the part of the Claimant to bring these proceedings and no question of delay will bar the Claimant from its substantive relief. The claim will now be examined in further detail.

The Special Directive

[131] In the correspondence that accompanied the Directive, there were at least three references within the text itself to the effect of the Directive being an amendment of a frequency

[18] Part 56.5(2) Civil Procedure Rules 2000
[19] St Lucia HCVP 2010/023 at para 21; relied on in the case of ***Germison Griffith v Senior Magistrate Donald Browne***SVGHCV 2011/320.

authorisation under section 23. These were specifically in its heading/caption and in the body of the accompanying letter to the Claimant. Despite Counsel for the Respondent's valiant effort to convince the Court that these references were clearly errors, based on the fact that no formal frequency authorisation had been issued to the Claimantunder section 19 making any reference to section 23 inapplicable, this Court remains unconvinced of this argument.

[132] From the factual matrix it was made clear to this Court, that in 2003 a frequency authorisationwas allocated to the Claimant, which had been used by the Claimant relatively undisturbed (minus the allocation subsequently given to LIME) even subsequent to the liberalisation of the market and the industry in 2006 with the advent of the Act. After the promulgation of the Act, itwas also made clear and generally accepted by both parties, that there was a requirement on the part of the Respondent to ensure that there was compliance with the Act ensuring that the existing operetors apply for formal frequency authorisations for the spectrum held or desiring to be held. What the parties agree is that this was never done. By this failure, this Court is of the opinion that it could not be a correct characterisation by the Respondent now, that any such usage of the spectrum by the Claimant or as a matter of fact any of the other operators was on an "ad hoc" basis. By the mere use of that term, in this Court's mind, there would be an uncertain or inconsistent state of affairs regarding the usage of the spectrum by the Claimant. This could not be further from the truth.

[133] The Claimant, like its competitors from all indications, has operated within the allocated spectrum generally undisturbed with constant and sometimes costly monitoring by the Respondent. This is, in this Court's opinion, cannotamount to an "ad hoc" use. I therefore find that the Claimant operated by a de facto frequency authorisation and allocation. That being said, it was also pellucid to this Court that any changes to those operations would have required the Respondent to make a proper and lawful amendment to the same.

[134] Therefore the Directive issued by the Respondents, by its very operation would have amounted to an amendment of the allocation and authorisation which was required to be

carried out pursuant to basic tenets of fairness and natural justice as the same would have equated to an interference of an enjoyed right by the Claimant.

[135] This Court having not only found that there was a de facto frequency authorisation on the part of the Respondent to the Claimant, also is fortified in accepting that this was the correct state of affairs, when the course of conduct between the parties is examined. In the evidence of Mr. Malone laid before this Court by his second affidavit filed the 23 November 2015, he specifically mentioned [20] that in February 2014, the Respondent had treated the unauthorised use by the Claimant of the 770 MHz band for testing purposes as a breach of section 19 (the provision related to frequency authorisation) and had fined the Claimant for such breach in the sum of $50,000.00. This without more, in this Court's mind solidifies the determination that the Respondent, by the issuance of the Directive was bound by the procedures that governed the amendment process.

[136] It would therefore be instructive to consider the provisions of Section 23 of the Act and it is therefore reproduced here in its entirety:

> ***"23 (a) Subject to sections 17(b) and 21(b), a licence or a frequency authorisation may be amended by the written agreement of the licensee or the authorisation holder or by the Commission where***
>
> ***Force majeure, national security considerations, changes in national legislation or the implementation of international obligations require amendment or***
>
> *(a)* ***the Commission taking into account the public interest, otherwise deems amendment necessary to achieve the purposes of this Act .***
>
> ***(2) Where a licence or a frequency authorisation is amended pursuant to subsection (1) on grounds of national security, the rights of the licensee or the authorisation holder to compensation shall not be prejudiced***
>
> ***(3) Before amending a licence or a frequency authorisation, the Commission shall give the licensee or authorisation holder adequate advance notice in writing, which, absent exigent circumstances, shall not be less than ninety***

[20] at paragraphs 59 et seq.

days, giving reasons for the amendment and the date by which the amendment shall take effect, and shall give the licensee or the authorisation holder the opportunity

(a) To present its views, and

(b) To submit to the Commission within such time as the Commission may specify a written statement of objections to the amendment of the licence or the frequency authorisation, which may include proposed alternatives to the amendment,

which the Commission shall take into account before reaching a decision on amendment.

(4) Nothing in this section precludes the Commission from immediatety amending a licence or a frequency authorisation where there is, or is likely to be, a risk of national security or where immediate amendment is essential to the public interest."(my emphasis)

[137] There it is clear that any amendment or change to a frequency authorisation required the Respondent to follow the very precise procedure laid down by the Act. Doing so would have amounted to the respondent acting fairly towards the Claimant. In fact any failure to adhere to the procedural rules that are set out in the governing legislative framework may amount to 'procedural impropriety" as defined by Lord Diplock in the now seminal case of ***CCSU v Minister tor the Civil Service***[21], even though such failure in and of itself may not amount to a denial of natural justice.

[138] Section 23(3) therefore provided specific guidelines for the carrying into force of an amendment of licence or frequency authorisation. Firstly, there must be advance notice in writing not be less than 90 days with an indication as to when the amendment is intended to take effect, secondly, the authorisation holder is given an opportunity to present their views and present written submissions and thirdlyand finally the Commission must issue/reach a decision.

[21][1983] UKHL 6.

[139] In answer to this clear process the Respondent has sought to advanceto this Court in the event that section 23 did apply, (a fact they steadfastly deny) compliance with the Act had occurred in any event. They rely on the fact that there was notice as required,by the prior correspondence and the very letter that accompanied the Directive, that the Claimants were given an opportunity to respond, which they did not do during the period specified and that finally there was a decision which had an effective date and was therefore binding. The Respondents further stated that since the Claimant never raised an issue of the incorrectness of the procedure in the response they did give, that they in any event waived any right or entitlement, without more to rely on that fact now.

[140] This Court in making its determination as to whether those responses by the Respondent could have satisfied the clear process set by the Act , was greatly assisted by the dicta of Lord Woolf in the case of ***R v Immigration Appeal Tribunal ex parte Jeyeanthan***[22]. In that case, His Lordship carefully set out a series of questions that any Court would have to address their minds to in making a determination whether the act complained of could amount to procedural impropriety warranting the setting aside of the complained of decision.

[141] These questions were identified as, 1. Was the statutory requirement fulfilled in that there was substantial compliance with the requirement as opposed to strict compliance, 2. Is the non-compliance capable of being waived and if so was it done in the particular case, 3. If it is capable of being waived or was not waived, what was the consequence of non-compliance. I will consider each of these questions in relation to the case at bar.

[142] In the case at bar Section 23 clearly stated that the requirements of the process were all mandatory. There can be no mistake as to the use of the word "shall" in that context.

[143] When this Court considers all that transpired between these parties from the issuance of the Directive to the reliance on the Directive as a valid document I cannot agree with Counsel for the Respondents attempt to suggest that there was in fact substantial compliance with the provisions of the Act though even he would have had to agree there was not strict

[22](2000) 1 WLR 354.

compliance. The Directive itself may have stood as the requisite notice under section 23(3), the Claimant was told to that it could present a written statement but they were given no opportunity to present its views nor did the Respondent , most importantly in this Court 's mind, reach a decision on the amendment which was presented to the Claimant.

[144] With regard to the second question, despite the argument made by the Respondent that the Claimant had in fact waived any purported non compliance with the Act, I have to agree with Counsel for the Claimant and from an assessment of the evidence that the mere fact that the Claimant did not rely on a particular right that they are entitled to at the particular time does not, without more, amount to a waiver of that right to prohibit any reliance at any later stage. The law of waiver is clear, there had to have been clear and unequivocal words or actions that could amount to such, which are all absent in the case at bar.

[145] Thirdly having failed to answer the first and second question in favour of the Respondent, I therefore find that the ultimate consequence of the Respondent's failure to adhere to the statutory procedurescould only be that the Directive is of no effect and therefore must be considered null and void.

[146] There having been no legal document upon which the Respondent could rely, the decision by the Respondent to bar the Claimant from participation in the Spectrum Award due to its purported non compliance with this Directive must also be set aside. Thus all actions taken by the Respondent which flowed from their reliance on the validity of this Directive must be set aside and prayers 1 to 4 in the Fixed Date claim form are granted.

The rejection of CCT's application

[147] This prayer essentially centered around the powers of Mr. Malone as the CEO of the Respondent and whether he was entitled and empowered by the Act to reject the application submitted by the Claimant for participation in the Spectrum Award without due consideration.

[148] It was clear to this Court, that the Respondent in an attempt to make the process for application for Spectrum, a transparent and consultative process they had done all they

could to ensure that there was a clear and precise process for the submission of applications by interested and qualified applicants. One facet of that process was the delivery of all applications to the Respondent at a specified time on a specified date.

[149] In determining this aspect of the complained of behavior, this Court is required to consider several matters. Firstly was the resolution of an evidential conflict of what occurred on the 18th September 2015 at the Respondent's office, secondly whether Mr Malone had the statutory power to act in the manner he did and reject the application and thirdly whether the prerequisites for the application were required at the time of submission or whether they were to be duly considered upon the application being submitted.

[150] With regard to the first issue the factualmatrix that was presented to this Court that was undisputed, was that the deadline of applications were conveyed to the prospective applicants, of 3:30 pm of the 18th September 2015. It has been argued by the Respondent that that this was a fixed date and time and that no discretion reposed in the Respondent to waive the same without there having been raised questions of the fairness of the process to all participants. Thus it was clear to this Court that this was therefore material to the entireprocess. This being so, it was also clear to this Court that a process would and should have been implemented at the point of entry, the Respondent's office, that showed clearly the time of acceptance of any applications which would have clearly set the stage for further participation.

[151] What instead appears to have happened is that the Respondent purportedly closed its doors, with the instruction that no one was to enter past 3:30 pm.That therefore meant or should have meant that no one was to enter past that time but somehow, courtesy applied and the Claimant was allowed to enter purportedly after 3:30.[23]I however find that this would have been an entirely bizarre version of events given the obvious importance that this deadline featured in the scheme of things. Therefore on the balance of probabilities (the parties having not applied to specifically cross examine the deponents on their affidavits although it could have been raised at case management whether it was required) I find more credible the version of events presented by Mr. Penn and Dr. Vanterpool as to what

[23]Affidavit of Guy Malone filed the 23rd day of November 2015 at para 117.

transpired on the afternoon of the 18th September. That is, that they arrived at 3:30 but were only attended to some few minutes later.[24]

[152] What transpires after the initial entry varies very little as between parties. Indeed it is agreed that Mr. Malone did meet with the Claimant's representatives who attended the office and he by his evidence at paragraph 123 of his second affidavit of the 23 November 2015 stated that "*I confirmed to them that I would not accept their application to register for the Spectrum Award 2015*".

[153] So having resolved the factual issue in favour of the Claimant, the Court will now consider whether Mr. Malone had any such authority to "accept" or "reject" the application at all.

[154] It is clear that this decision was made by Mr. Malone in his sole capacity. The Respondents have argued that under section 12 of the Act and in particular 12 (2) the CEO is responsible, among other things, for the day to day management, administration and operation of the Respondent. However this Court is not convinced that section 12 clothed Mr. Malone with any such authority. There is nothing in that section that speaks to or can be construed to allow him to prohibit parties from participating in any regulatory exercise. In fact section 12 clearly states:

> (1) "*The Minister shall, with the approval of the Council and on the recommendation of the Board if constituted, appoint a fit and proper person to be the Chief Executive Officer of the Commission on such terms and conditions as are considered appropriate.*
> (2) *The Chief Executive Officer shall be a Commissioner and an employee of the Commission and shall*
> (3) *Be responsible for the day-to-day management, administration and operation of the Commission and the supervision of the staff of the Commission;*
> (4) *Implement the decisions of the Board and, subject to any general or special direction of the Board execute the functions of the Commission outlined in section 6;*

[24] Affidavit of Averad Penn filed 23rd October 2015paras 35- 39 and Affidavit of Dr Heskith Vanterpool filed the 23rd day of September 2015.

(5) *Coordinate and execute as required by an enactment all requests for legal and regulatory assistance from foreign regulatory authorities; and*

(6) *Perform such other duties as may be assigned or delegated to him by the Board."*

[155] The Court is therefore satisfied that without Mr Malone having been given any power by the Board to specifically act on their behalf to consider the appropriateness or qualification of applications, Mr Malone exceeded his authority. Further what is even more telling in this regard is that there was no subsequent ratification by the Board presented to this Court to clothe Mr Malone with that authority.

[156] That having been said this Court still undertook an assessment of the very ITA that the Respondent by Mr. Malone sought to rely on to dismiss the application of the Claimant out of hand.

[157] By the ITA under section 1.2, applications were to be submitted in accordance with the rulesas contained in the ITA, which made it clear that the applications were to be submitted for a quantity of spectrum within each frequency band of the offered Spectrum.[25] By paragraph 2.2 it went on further to state that all applicants either had to be in compliance with the Act or had delivered undertakings which had been agreed by the Respondent which made provision for such compliance. Then at 2.3 that all persons who did not comply with inter alia those requirements would not be allowed to register or participate in any aspect of the Spectrum award.

[158] It was therefore quite clear that a comprehensive and succinct document had been prepared to guide the applicants through the heady process of applying in the Spectrum Award. There was noevidence before this Court that even suggested or indicated that the same had been amended subsequent to its publication on the 19th September2015 to confer any such power on the CEO, which in this Court's mind would have had to have

[25] ITA Section 1.2

been a specific and published power given the nature and extent of that power being wielded.

[159] Therefore based on this finding, the issue of whether the undertakings and guarantees were to be agreed before hand or at the time of submission now becomes moot as I find that the CEO, Mr Malone was not in a position to reject the application out of hand, there being no consideration by the ***Commission*** itself.[26]

[160] If however I am wrong on that point, the Court finds that there having been no amendment of the ITA and there being no evidence that there was any requirement for *prior* approval or agreement of the undertakings before the presentation of the application itself, save and except through correspondence sent from the Respondent itself, which could not have amounted to an amendment of the approved process, its further finds that there was no requirement to have the undertakings and guarantees agreed before registration in any event. That was in fact an artificial self-imposed requirement which did not have the force of the underlying policy. The Respondent therefore could not impose such conditions on the Claimant to the detriment of the Claimant without more.

[161] Having said so the decision to reject the application of the Claimant is set aside and prayer 5 of the Fixed Date Claim form is granted.

Frequency Authorisation/ spectrum caps

[162] By the Spectrum Management Framework published in March of 2011 it was clear that Spectrum was a valuable national asset and that a comprehensive policy was required to fully and effectively have this Spectrum utilized. From that report it was also manifestly clear that in order to achieve these objectives, there was a need for Spectrum caps as part of a more equitable distribution or allocation of the Spectrum in the BVI.

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[26] *Lloyd v McMahon* [1987] AC 625 and *R v Licensing Authority ex parte Suntours* (1975) 23 WIR 387 considered.

[163] In fact whenthe ITA was finally settled it was stated there at 2.5 that applicantswho already had frequencyassignments across all spectrum below 1 GHz in bands identified by the Internationalassignments across all spectrum below 1 GHz in bands identified by the InternationalTelecommunications Union (ITU) for IMT Telecommunications Services and the quantity of Spectrum each bid for lots P1, P2 or P3 exceeded 60 MHz were not to be awarded any space inthe 700MHz band unless they agreed to the release of spectrum to the Commission. Thus even atthe application stage, not just the policy stage the Claimant was aware that they would have toconsider the relinquishmentof some of theirholdingsto qualifytoparticipata in the Spectrum Award.

[164] The Claimant'sargument to this Courtwas couched in the argumentthat this requirement was unreasonable and/ or irrational on the part of the Respondent in that the reality was that such requirement would in real terms only affect the Claimant.

[165] This Court was not convinced that even though the practical effect of this requirement may have affected the Claimant only, given the extent of theirspectrum holdings, that this made it either an unreasonable or irrationaldetermination by the Respondent in all the circumstances. The Courttherefore agreed with Counsel for the Respondent in their submission thatthere could never be inferred an intention that an operator in thetelecommunications sector would have an absolute right to the spectrum theygiven the power to determine and "***allocate the uses of the spectrum inorder to promote the economic, orderly and efficientutilisation offrequencies for the operation of all the telecommunications networks and provisions of all telecommunications services...***"

[166] Further the Court also notes that section 35 of the Act additionally gives theRespondent clear authority to allocate and reallocate any of the frequency bands for any particular use in accordance with the decided Spectrum plan.

[167] It was therefore manifestly clear to this Court, that the Claimant's purportedobjection to this requirement for spectrum caps to participate in the said Spectrum Award is unable to withstand any serious scrutiny.

[168] In order for the Claimant's argument to succeed they needed to demonstrate to this Courtthat the decision by the Respondent in this regard was so outrageous or in defiance of logic to be considered irrational.[27]

[169] This Court is however not so convinced. The Claimant has sought to dislodge this heavyburden by relying on tenuous and unsubstantiated argument that such a determination bythe Respondent could not be based on public interest but rather on considerations of their competitor's bidding.

[170] In fact there is no compelling evidence before this Court that suggests that the Respondent could not have come to this decision.

[171] It is decisions of this nature made by specialized regulators or experts that the Courts have been slow to interfere.

[172] The Court cannot take the place of the decision maker and even more so a specialized decision maker such 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.***"[28]

[173] The Court therefore finds that this decision to impose spectrum caps was not an irrational or unreasonable decision in within the meaning of the settled law. It was in fact conceded by Counsel for the Claimant that the Respondent was entitled to create criteria for the participation in the Spectrum Award, they just did not agree that this should be one of them.

[174] Having made that finding the Court refuses to quash the decision of the Respondent making the imposition of a spectrum cap a prerequisite for participation in the Spectrum Award. Prayer 6 therefore fails.

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[27] ***Earl Hodge v Governor of the Territory of the Virgin Islands*** BViHCV 2012/297 at para 50 per Ellis J.
[28] ***Adams v Commissioner of Police*** AXA HCV 2009/89 per Smell Davis J(Ag) quoted in ***Digicel (BVI) Limited v Telecommunications Regulatory Commission*** BVIHCV 214/2010.

[175] What I do however state as a means of observation only is that the Respondent seeking to include this fundamental requirement in an undertaking was questionable but that is as far as I would say in that regard.

Payment of Royalty Fees

[176] By the terms of the licence granted to the Claimant, the Claimant was licensed to carry out certain services as stated under section 2.1 of its licence. These included but were not limited to, basic telephony services including local, national and international telephony, cellular telecommunications services, and the one of contention, the sale and maintenance of subscriber premise wiring and terminal apparatus. Under section 5.1 the Claimant was also required to pay 3% of gross revenues for those services carried out under section 2.1.

[177] It was therefore imperative that not only did the parties know what services are licensed but just as importantly whether the licensee in fact provides those services.

[178] Under section 2.1 there is a comprehensive list of services that are included for the provision of telecommunication services in the BVI. From what this Court observed, although it was not argued, it appeared that this document may have been drafted as a template for all businesses who apply for such a licence and not specifically tailored to the specific business enterprise, in this regard the Claimant.

[179] Thus as the evidence is before the court, the Claimant not only supplies cellular telecommunications services but also phone sets/handsets of mobile phones, rents premises and operates a system of post-paid plans.

[180] The issue that has now arisen is that the Respondent has sought to levy a sum on the Claimant to which they objected on the basis that the sum includes services that are not in fact licensed.

[181] What is unfortunate however andwhat is clear to the Court, is that this Claimant has found itself in this particular unenviable situation,due to its own recalcitrance in providing the

required documentationin order for the Respondent to determine the appropriate sum and thereafter for the same to bedeemed due and payable.

[182] It is of some concern to this Court that the Claimants have instead sought to place the blame on the Respondent for what could only be considered their obvious failings.

[183] However that being said, on a strict interpretation of the license which the Respondents are mandated to undertake, the Court does not agree that the sale of mobile handsets, a trade that is quite clearly conducted by unlicensed operators in the territory can property fall under the purview of the Respondent. It was also conceded that the rent that is collected on leased premises is not under the purview of the Respondent and any substantiation of bad debts resulting from the poor management of the post paid plans would and could not be taken into consideration by the Respondents in the calculation of monies due and owing.

[184] Therefore the Court declares that for the purpose of calculating annual Royalty fees payable to the Respondent pursuant to Article 5.1 of the Telecommunications licence dated 25 May 2007 all revenue derived from sales of non telecommunications services such as sales of telephones, handsets and accessories, retail income and interest do not fall within the services provided under the licence.

[185] Therefore any further undertaking with regard to outstanding sums must therefore be appropriately worded to make provision for the payment of all sums that are found due and owing. Time frames for the provision of the accounting records must be given and time frames for the payment of all such sums due and owing must also be provided for by the Respondent.

[186] As it relates to costs the parties had asked for the opportunity to be heard on the same and in order to include an order to that effect in the written decision the Court invited the parties to make written submissions on the issue of costs within two weeks of the delivery of the oral decision. Neither party took advantage of the same and to date no such submissions were made. I therefore make no order as to costs.

Conclusion

The Court therefore makes the following orders:

1. It is hereby declared that the Special Directive dated the 5May 2014 is null and void and of no legal effect.

2. The decision of the Respondent deeming the Claimant to be non-compliant with the said Special Directive quashed.

3. The Decision of the Respondent restricting the Claimant from qualifying for the Spectrum Award based on the Special Directive is quashed.

4. The decision of the Respondent that is shall not grant the Claimant Frequency Authorisation based on the non-compliance with the Special Directive is quashed.

5. The Decision of the Respondent rejecting the application of the Claimant to register for Spectrum Award is quashed.

6. The Decision of the Respondent to stipulate to the Claimant to apply for Frequency Authorisation is to stand and the application by the Claimant in that regard is dismissed.

7. It is declared that the Respondent for the purposes of calculating Royalty Fees paid by the Claimant shall not take into regard non-telecommunications services. Any further undertakings that may be required by the Applicant for outstanding sums as owed to the Respondent by the Claimant shall therefore take cognisance of that declaration.

8. No order as to costs.

The Court wishes to go on record to apologise to the parties for the lengthy period that I took for the presentation of this written judgment and to thank both Counsels in this matter for their invaluable assistance to the Court in this matter.

Nicola Byer

High Court Judge