EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2016/0013

BETWEEN:

TELECOMMUNICATIONS REGULATORY COMMISSION

Appellant

and

CABLE & WIRELESS (BVI) LIMITED

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. John Carrington, QC	Justice of Appeal [Ag.]
The Hon. Mr. Eamon Courtenay, SC	Justice of Appeal [Ag.]

Appearances:

Mrs. Arabella di Iorio with her Mr. Simon Hall for the Appellant
Ms Kassie Smith, QC with her Mr. Callum McNeil for the Respondent

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2017: July 11;
2018: May 30.

Civil appeal – Judicial review – Telecommunications Act of the Territory of the Virgin Islands – Interpretation of section 75 of Telecommunications Act – Application of the rule of informed interpretation of legislation – Whether section 75(1)(a)(iii) permits TRC to take enforcement action with respect to conduct that is past or only conduct that is present or future – The relevant point in time in relation to TRC's exercise of its enforcement powers – Whether TRC is empowered under the Telecommunications Act to do ex post regulation or is limited to ex ante regulation – Whether TRC is able to take enforcement action under section 75(1)(a)(iii) without having made a finding of dominance in the market under section 26(3) – Whether TRC acted ultra vires by proceeding with enforcement action

under section 75(1)(a)(iii) of the Act rather than by proceeding with regulatory action under sections 26 or 29 of the Act – The effect of taking into account irrelevant factors in coming to a decision

Cable & Wireless (BVI) Limited ("LIME BVI"), the respondent, sought judicial review of the decision of the Telecommunications Regulatory Commission ("TRC"), the appellant, dated 1st June 2012 ("Decision") which followed its investigation of a complaint made on 14th July 2009 by one of the respondent's competing providers of mobile services in the BVI concerning the respondent's All Talk Calling Plan which had been offered to consumers since November 2008. The appellant made the finding that contrary to section 75(1)(a)(iii) of the Telecommunications Act, 2006 ("the Act") the respondent had participated in a form of margin squeeze by setting retail rates below the level of wholesale charges applied by its affiliates.

In reaching the Decision, the appellant applied the definition of margin squeeze used by the Organisation of Economic Co-operation and Development ("OECD"), namely that a margin squeeze occurs "when there is such a narrow margin between an integrated provider's price for selling essential inputs to a rival and its downstream price that the rival cannot survive or effectively compete. A margin squeeze can arise only when (a) an upstream firm produces an input for which there are no good economic substitutes, (b) the upstream firm sells that input to one or more downstream firms and (c) the upstream firm also directly competes in that downstream market against those firms". The appellant found that there had been a form of market squeeze by the respondent which, had it continued, would have likely had anti-competitive effects contrary to public interest.

The appellant, acting pursuant to section 75(2)(b) and (g) of the Act, ordered the respondent to cease and desist from re-offering the said plan, and imposed a substantial fine on the respondent

The respondent was granted leave by the High Court to seek judicial review of the Decision on the specific grounds of "illegality and irrationality, taking into account irrelevant considerations and failing to take into account relevant considerations".

After trial of the matter, the High Court ordered the Decision to be quashed on the ground that section 75(1)(a)(iii) of the Act only permitted the appellant to take enforcement action against existing conduct whereas the appellant had made a finding in the Decision that the impugned conduct had ceased by August 2010. The appellant appealed this decision and the respondent cross appealed against the dismissal of the other grounds raised in its claim for judicial review.

Held: allowing the appeal and the cross appeal in part and ordering that the appellant pay the costs of the appeal and cross appeal to the respondent at the rate of one half of the costs in the court below, as opposed to the usual two thirds under CPR Part 65.13, to reflect the success of the appellant on the appeal, that:

1. The correct interpretation of the Act section 75(1)(a)(iii) is that the relevant point in time at which it should be determined whether a licensee is carrying on or is likely

to carry on business in a detrimental manner contrary to section 75(1)(a)(iii) is when the investigation into the impugned conduct commences.

R v Secretary of State for the Environment, Transportation and Regions ex parte Spath Holme [2001] 2 AC 349 referred to; Douglas v The Police (1992) 43 WIR 175 referred to.

2. There is no requirement that TRC must make a finding of dominance under section 26 of the Act in order to determine whether there is anti-competitive conduct by a licensee under section 75(1)(a)(iii) of the Act. Where there is a finding of anti-competitive conduct that involves anti-competitive pricing or acts of unfair competition, TRC has the discretion to act either under section 29 or under section 75 of the Act. TRC therefore did not act ultra vires the Act by proceeding under section 75 where it was of the view that there was a form of margin squeeze.

3. Section 75(1)(a)(iii) of the Act is to be interpreted as permitting both ex ante and ex post competition investigation and regulation and that no matter which classification is employed with respect to the statutory provision, TRC had the statutory authority to regulate the impugned conduct and so acted intra vires the Act in the exercise of its enforcement powers against LIME BVI.

4. Notwithstanding that TRC had jurisdiction under the Act to investigate the impugned conduct and to take enforcement action under section 75(1)(a)(iii), TRC, however, took into account irrelevant factors in determining that LIME BVI was engaged in anti-competitive conduct, namely the conduct of LIME BVI's affiliates outside the jurisdiction which were not regulated by TRC. TRC failed to discharge the onus that laid on it to satisfy the court that the consideration of these irrelevant matters was not significant to the Decision and that the Decision would inevitably have been the same had they not been considered. On this basis, the cross appeal should be allowed and the Decision should be set aside.

Smith v North East Derbyshire PCT [2006] 1 WLR 3315 applied; R v Broadcasting Complaints Commission ex p Owen [1985] 1 QB 1153 applied; R v Secretary of State for Work and Pensions [2012] EWCA (Civ) 332 applied; Associated Provincial Picture House Ltd v Wednesbury Corporation [1947] 2 AER 680 applied.

JUDGMENT

[1] CARRINGTON JA [AG.]: The Telecommunications Regulatory Commission ("TRC") is a statutory body established under the Telecommunications Act, 2006

("Act").[1] Its role, according to the long title to that Act, is to "license, regulate and develop the telecommunication services industry in the Virgin Islands and to provide for other matters connected therewith".

[2] Cable & Wireless (BVI) Limited (hereinafter "LIME BVI") is one of three providers of mobile telephone services in the territory. LIME BVI is wholly owned by Cable & Wireless plc, which, through other associated companies, provides mobile and other telecommunication services in most of the other English speaking islands of the Caribbean. In these jurisdictions, the "LIME" brand is used by the respective Cable & Wireless group companies for telecommunication services.

[3] This appeal arises from the fixed date claim brought by LIME BVI in the High Court for judicial review of a decision of TRC dated 1st June 2012 ("Decision"). LIME BVI was successful on one of the six grounds on which it sought to review that decision. TRC appeals to this Court to overturn the decision made by the court below (Byer J) quashing the Decision made by TRC on this ground. LIME BVI cross appeals against the learned judge's refusal to quash the Decision on four of the other five grounds on which it had unsuccessfully sought review of the Decision. LIME BVI has abandoned the sixth and remaining ground which it had advanced in the court below.

[4] The Decision arose from a complaint made to TRC by Caribbean Cellular Telephone Limited ("CCT") on 14th July 2009 about the "All Talk Calling Plans" ("Plan") being then offered by LIME BVI to its customers in the territory. LIME BVI's customers who subscribed to the Plan, which was in existence from November 2008 to August 2010, paid a fixed monthly fee of $50 which entitled them to 6000 minutes of calls to other LIME Caribbean destinations (i.e. calls that were terminated on networks operated by the respective LIME mobile network operators ("MNOs") in these jurisdictions).

[1] Act No.10 of 2006, Laws of the Territory of the Virgin Islands.

[5] CCT's complaint was that the average retail price per minute for calls being charged under the Plan was significantly below the wholesale price being charged by the LIME affiliates to CCT, for calls being terminated by its customers on those networks. CCT also claimed that LIME BVI would not be able to offer the Plan if it were subject to the same termination rates as CCT, which was effectively paying a wholesale price that was approximately five times the average retail price being charged to LIME BVI's customers under the Plan.

[6] The Decision recites that following the receipt of CCT's complaint TRC opened an investigation into LIME BVI's conduct and on 17th June 2011 made its recommendations to the board of TRC that enforcement action should be taken against LIME BVI. TRC then issued a notice to LIME BVI setting out its provisional findings and intention to take enforcement action against LIME BVI on 17th June 2011 (the "Sanction Notice"). LIME BVI responded to the Sanction Notice and thereafter written and oral hearings took place in which LIME BVI participated. On 1st June 2012, almost 3 years after the complaint had been made, TRC issued the Decision. It is useful to quote in full paragraph 1 of the Decision:

> "This is the decision of the British Virgin Islands ("BVI") Telecommunications Regulatory Commission (the "TRC") pursuant to section 75(1)(a)(iii) of the Telecommunications Act, 2006 (the "Act") in respect of the TRC's investigation as to whether LIME (BVI) Limited (sic) ("LIME BVI") has engaged in anti-competitive conduct."

[7] In its Decision, TRC found that during the period January 2009 to August 2010, LIME BVI, by setting retail rates below the level of wholesale charges applied by its affiliates, created or participated in "a form of margin squeeze". At paragraph 33 of the Decision, TRC applied the Organisation of Economic Co-operation and Development ("OECD") definition of a margin squeeze as occurring:

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

one or more downstream firms and (c) the upstream firm also directly competes in that downstream market against those firms."

[8] TRC further found, at paragraph 43 of the Decision, that had it continued, the form of margin squeeze would likely have had anti-competitive effects contrary to the public interest and to have been detrimental to consumers in the BVI in the long term.

[9] TRC found that CCT paid on average $0.169pm for mobile termination and $0.113pm for fixed termination on other LIME affiliated MNOs and LIME BVI paid on average $0.164pm for mobile termination and $0.0865pm for fixed termination to these MNOs. LIME BVI's customers however paid an average of $0.03pm for calls terminating on LIME BVI's affiliates' networks.[2] The Plan therefore resulted in average monthly losses to LIME BVI of $28,905 for the relevant period in which TRC found that the form of margin squeeze existed.[3]

[10] TRC also applied the equally efficient operator (EEO) test[4] of "subscription revenue + termination revenue - termination costs" to determine that "there was a margin squeeze from January 2009 to August 2010 between the relevant average retail price paid by LIME BVI customers to make calls to LIME affiliate numbers in the Caribbean ($0.03pm) and the average wholesale price charged to LIME BVI to terminate calls to other LIME affiliate numbers in the Caribbean ($0.164pm)".

[11] TRC found that although only a small percentage of LIME BVI customers are on the Plan, the presence of the Plan acted as a deterrent to LIME BVI customers moving to CCT[5] and the harm caused by the Plan must be viewed in terms of its competitive relationship with the more popular and more damaging Digicel BVI Caribbean plans.

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[2] This is found at para. 14 of the Decision.
[3] This is found at para. 21 of the Decision.
[4] This is found at para. 38 of the Decision.
[5] This is found at para. 48 of the Decision.

[12] TRC concluded at paragraph 59 of the Decision that:

> "It is the view of the TRC that, for the period January 2009 to August 2010, LIME BVI priced in an unlawful manner, a service in the retail market which CCT could not price at the same level or provide a comparable product (a call to another Caribbean destination which terminates on an affiliated network) at the same price. In the view of the TRC this provided an advantage to LIME BVI which was not in line with the principle of fair competition which the TRC had and has a statutory duty to protect under the Act. It is also the view of the TRC that it was at all material times necessary to be able to offer all services, including calls to other Caribbean destinations, in order to be able to compete in the VI market on a fair basis."

[13] Based on these findings, TRC found that there was a breach by LIME BVI of section 75(1)(a)(iii). Acting pursuant to section 75(2)(g) of the Act, TRC ordered LIME BVI to desist from re-offering the Plan to the extent that it contributed to the margin squeeze identified in the Decision and, pursuant to section 75(2)(b) of the Act, imposed a fine on LIME BVI in the sum of $493,665.

[14] LIME BVI applied for leave for judicial review of the Decision on 26th June 2012 and leave was granted by Redhead J ex parte on 28th June 2012. Thereafter, TRC obtained rders from the court (Wallbank J) on 17th July 2012 for the provision of the materials filed to obtain the order for leave, as well as the transcripts and notes of the hearing for the grant of leave. TRC then applied to set aside the grant of leave and in her decision dated 9th August 2013, Ellis J set aside the order of 28th June 2012 but re-granted leave to LIME BVI to seek judicial review on the grounds of "illegality and irrationality - taking into account irrelevant considerations and failing to take into account relevant considerations".

[15] LIME BVI filed an amended fixed date claim form on 5th May 2015 which was re-amended on 20th November 2015 in which it sought a declaration that the Decision was ultra vires the Act and an order for certiorari quashing the Decision. LIME BVI advanced the following grounds on which it claimed that the Decision was ultra vires, which are the grounds relevant to this appeal and cross appeal:

(a) The TRC wrongly purported to carry out an ex post competition investigation under sections 6(d) and 75(1)(a)(iii) of the Act when it has no jurisdiction to carry out such an investigation either under those provisions of the Act or at all. The Act empowers the TRC to determine a public supplier dominant with respect to a relevant market pursuant to section 26(3) and then to apply ex ante regulation. It does not empower the TRC to engage in ex post regulation.

(b) Further or alternatively, the TRC wrongly purported to take enforcement action against LIME BVI for acting in an anti-competitive manner under section 75(1)(a)(iii) without having first determined that LIME BVI was dominant with respect to a relevant market pursuant to section 26(3) of the Act. On the contrary, the TRC asserted that it was not seeking to designate LIME BVI as dominant for the purposes of sections 26 and 29 of the Act (paragraph 2.14, Sanctions Notice) and, further, that "strict" market definition was not required for the purposes of the Decision (paragraph 27, Decision)

(c) Further or alternatively, the TRC wrongly purported to take enforcement action against LIME BVI under section 75(1)(a)(iii) for "conduct which took place between January 2009 and August 2010" which "conduct has now ceased" (paragraph 58, Decision). However, section 75(1)(a)(iii) makes no provision for enforcement action being taken for past conduct. It only makes provision for enforcement action in respect of present or future conduct, i.e. if a licensee "is carrying on or is likely to carry on business detrimental to the public interest, including an anti-competitive manner …" .

(d) Further or alternatively, the TRC wrongly purported to take enforcement action against LIME BVI for acting in an "anti-competitive manner" under section 75(1)(a)(iii) on the basis of an alleged margin squeeze involving upstream conduct (i.e. the provision of termination services for calls on the networks of affiliated MNOs elsewhere in the Caribbean) which took place outside the BVI and/or was engaged in by persons outside the BVI. However, the Act only

allows the TRC to regulate and/or take enforcement action against persons or licensees within the BVI. The TRC's assertion that it had statutory authority to take the Decision on the basis that LIME BVI "sold to CCT wholesale termination services on its affiliates' networks on behalf of those networks" (paragraph 25(1), Decision) involved an error of law.

(e) The TRC could – through a declaration of dominance under section 26 of the Act following a market analysis, the appropriate designation of markets and a public consultation – have applied a regulatory remedy to address the alleged anti-competitive conduct under sections 26 and/or 29 of the Act (as it has done for other markets). The TRC's failure to do this, but instead to proceed under sections 6(d) and 75(1)(a)(iii) of the Act, was ultra vires.

[16] The claim was heard by Byer J in the High Court. In her reserved decision, the learned judge firstly considered together grounds (a), (b) and (e) of the amended fixed date claim form stated at paragraph 15 above. She concluded that there was no connection between sections 26 and 29 of the Act and section 75 so as to prevent enforcement action being taken pursuant to section 75 in the absence of a determination under section 26, that the offending party was dominant in the market or under section 29, that the offending party was engaged in anti-competitive pricing or acts of unfair competition. This finding is being challenged on the cross appeal by LIME BVI.

[17] The learned judge next found, on ground (c) of the Amended Fixed Date Claim Form, that the proper interpretation of section 75(1)(a)(iii) is that the enforcement power thereunder can only be exercised in relation to present and future conduct so that in using this power in 2012 in respect of conduct which had ceased by August 2010, TRC acted ultra vires the Act. The Decision was quashed on this ground. This finding is challenged on the appeal by TRC.

[18] The learned judge then dealt with ground (d). She concluded that TRC had acted ultra vires the Act in taking into account the conduct of LIME BVI's affiliates in other jurisdictions to support its finding of anti-competitive conduct by LIME BVI but that this was not sufficient to warrant the setting aside of the decision. LIME BVI also challenges this finding on the cross appeal.

[19] I propose to deal first with the appeal by TRC. The short question is whether section 75(1)(a)(iii) permits TRC to take enforcement action with respect to conduct that is past or only conduct that is present or future. This sub-section reads as follows:

> "75. (1) The Commission may take enforcement action against a licensee … if,
>
> (a) in the opinion of the Commission, the licensee …
>
> (i) has contravened or is in contravention of this Act, the Regulations or the Telecommunications Code;
>
> (iii) is carrying on or is likely to carry on business in a manner that is detrimental to the public interest, including an anti-competitive manner, or detrimental to the interests of clients, creditors or investors;"

[20] Mrs. di Iorio who appeared with Mr. Hall for TRC submitted that the interpretation adopted by the learned judge was incorrect and that the Act must be interpreted in a way which does not render it and its purpose futile or pointless. The correct interpretation must be that the subparagraph (iii) of the section must refer, notwithstanding that it is written in the present and conditional tenses, also to activities that have been completed prior to the decision. In other words, the court should read into the subparagraph the words "has carried on". TRC submits that such an interpretation would be consistent with the interpretation given to similar provisions in enactments in the United States (the Sherman Act) and in the United Kingdom Competition Act.

[21] Ms. Smith, QC who appeared for LIME BVI submitted that the learned judge was correct as neither the grammatical meaning nor the context of the enactment

supported the interpretation put forward by TRC, nor would the interpretation adopted by the learned judge below lead to absurdity in the application of the Act.

[22] In R v Secretary of State for the Environment, Transportation and Regions ex parte Spath Holme[6] Lord Nicholls observed at page 396:

> "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used."

[23] In Douglas v The Police[7] our then Chief Justice, Sir Vincent Floissac stated:

> "The function of the court in relation to a statute is to interpret the statute by ascertaining the legislative intention in regard thereto. That legislative intention is an inference drawn from the primary meanings of the words and phrases used in the statute with such modifications of those meanings as may be necessary to make them consistent with the statutory context."

[24] Parliament is expected to say what it means and mean what it says. The first recourse in determining the meaning of a statutory provision should be to the grammatical meaning of the words used and their context. If the grammatical meaning of the words used is clear and the context does not lead to the conclusion that the words used may have more than one meaning or a different meaning from the natural grammatical meaning, then effect should be given to the clear grammatical meaning as disclosing the intention of Parliament in using them.

[25] When considering the context of words in an enactment, one has to consider the enactment as a whole, and not only the section in which the words under consideration appear, as well as all facts relevant to the subject matter of the Act that are before the court, including any commentary supplied by the drafters of the

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[6] [2001] 2 AC 349.
[7] (1992) 43 WIR 175.

Act. The ultimate aim of the court is to arrive at what Bennion on Statutory Interpretation[8] refers to as an informed interpretation of the legislation under consideration. Bennion on Statutory Interpretation[9] suggests that this is arrived at in two stages:

> "What may be called first stage of interpretation arises when the enactment is first looked at. Here a provisional view may be formed, perhaps that the meaning is clear. Or it may appear at the first stage that the enactment is grammatically ambiguous or vitiated by semantic obscurity. In all three cases it is necessary to go on and apply the informed interpretation rule. Thereafter, at second stage interpretation, a final view on legal meaning is formed."

Bennion's "informed interpretation rule" is that the court should infer that the legislator, when settling the wording of legislation intended it to be given a fully informed, rather than a purely literal interpretation (though the two usually produce the same result).[10] I agree that this is the proper approach to be adopted by a court in interpreting statutory provisions.

[26] The words under consideration appear in the enforcement provisions of a statute under which TRC is given the power to regulate the telecommunications industry in the Territory. The grammatical meaning of section 75(1)(a)(iii) is that enforcement action can only be taken in respect of specific, current and potential future conduct, i.e. conduct that is detrimental to the stakeholders of the licensee or the industry as a whole. By contrast under the preceding sub-paragraph, TRC was empowered to take enforcement action against specific past conduct, i.e. contravention of the Act, Regulations or Code.

[27] A first look at the section 75(1)(a)(iii) reveals that, as found by the learned judge below, the words can be read in a way that makes grammatical sense and from which one can see a clear meaning. The words used in the sub-paragraph under consideration are not ambiguous as they appear to address a specific situation

[8] 5th edn. Lexis Nexis, 2008.
[9] At code section 204.
[10] At code section 201.

and type of conduct. This reading satisfies the first stage of interpretation and supports the conclusion of the court below. Where the learned judge may have erred, however, is that she did not then appear to move on to the second stage of interpretation suggested by Bennion on Statutory Interpretation in order to confirm whether the literal meaning reflected the intention of Parliament.

[28] As indicated above, the context of the words under consideration is the taking by TRC of enforcement action against persons regulated by it. If, as the literal meaning of the words suggests, this action can only be taken against presently existing or likely conduct, the relevant issue in my view becomes: what is the relevant point in time contemplated by the statute? i.e. at which point in time should the conduct be in existence for the TRC to be able to exercise its enforcement powers?

[29] In considering the context of section 75(1)(a)(iii) it is useful to consider that Part XIII of the Act contemplates that the TRC will (a) investigate the conduct of the licensee; (b) determine if there has been anti-competitive conduct or a contravention of the Act; and (c) impose the appropriate penalty when an adverse finding against a licensee is made. In my view, these statutory roles are all conducted under the umbrella of the term "enforcement action". Section 75 therefore deals with the final stage, namely (c) above, of the enforcement action that commences in my view when TRC opens its investigation into the conduct of a licensee. The enforcement action ends when a determination is made after the investigation whether a contravention has been made out and if it has been, what power should be exercised. Section 75(2) therefore states:

> "75(2) If the Commission is entitled to take enforcement action under subsection (1), it may, without prejudice to its powers under sections 49 and 76, exercise one or more of the following powers."

The section then goes on to list the powers which includes the power of imposition of a fine[11] as was done in the instant case.

[11] Section 75(2)(b) of the Act.

[30] In my judgment, the relevant point in time in which it should be determined whether a licensee is carrying on or is likely to carry on business in a detrimental manner contrary to section 75(1)(a)(iii) is when the investigation into the impugned conduct commences. This interpretation avoids the mischief that conduct can be brought to an end, voluntarily or otherwise, before TRC reaches a determination on the matter or section 75(2) powers are exercised where, as in the instant case, the need for and duration of an investigation which should be fair to the licensee is contemplated by the legislation itself.

[31] I therefore agree with the learned judge in the court below, that section 75(1)(a)(iii) is to be interpreted in accordance with its grammatical meaning as relating only to existing and future potential conduct by a licensee. I find, nevertheless, that the question whether conduct is existing is to be answered by reference to the time when the investigation, which leads to the determination that there is impugnable conduct, commences. On the facts of the case at bar, I find that this investigation commenced in 2009 when TRC received the complaint from CCT about LIME BVI's Plan. At that time, LIME BVI was engaging in the conduct complained of by CCT.

[32] I would therefore allow the appeal by TRC on the basis that while I agree with the learned judge that section 75(1)(a)(iii) of the Act is only meant to cover current or future conduct, I am of the view that in determining whether conduct is current, the Act requires the TRC to have regard to what is current at the beginning rather than at the end of the enforcement process. I therefore find that TRC had jurisdiction under the Act to exercise its powers in 2012 under section 75(2) based on its findings in relation to conduct of LIME BVI that continued until 2010.

[33] I now turn to the cross appeal by LIME BVI. As stated at paragraph 16 above, the learned judge dealt with grounds (a), (b) and (e) raised by LIME BVI together. Nevertheless, these appear to raise separate legal considerations and I propose to deal with them individually. These grounds are set out in paragraph 15 above.

[34] Ground (a) raises the issue whether TRC is empowered under the Act to do ex post regulation or is limited to ex ante regulation, i.e. the imposition of forward looking controls over the activities of its licensees.

[35] Ground (b) raises the issue whether TRC was able to take enforcement action under section 75(1)(a)(iii) without having made a finding that LIME BVI was dominant in the market under section 26(3).

[36] Ground (e) raises the issue whether TRC acted ultra vires by proceeding with enforcement action under section 75(1)(a)(iii) of the Act rather than by proceeding with regulatory action under sections 26 or 29 of the Act.

[37] The learned judge dismissed all three grounds finding that the scheme of the Act was to give the TRC the option to impose ex ante regulation but does not restrain the TRC to such regulation in all respects of their duties and functions. She also found that there was no connection between sections 26 or 29 and the enforcement powers under section 75(1)(a)(iii) so as to require TRC to make a finding of dominance or anti-competitive behavior under these sections before it could take enforcement action under section 75(2).

[38] At paragraph 2.11 of the Sanction Notice, TRC explained the difference between ex ante and ex post regulation:

> "Ex ante regulation, as defined in the TRC's Market Review 2010, sets out regulation in advance as a preventive remedy of potentially anti-competitive behaviour. Ex post competition policy addresses competition problems from a backward looking perspective, assessing conduct which has already taken place. In this investigation, we have been assessing the potentially anti-competitive behaviour of LIME BVI (together with its affiliates) …and are as such carrying out an ex post competition investigation."

The relevant subsections of section 26 of the Act read as follows:

> "(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 licence 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 licence 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. "

[39] Section 29 reads as follows:

"29 (1) Prices for telecommunications services, except those regulated by the Commission in accordance with this section,

shall be determined by providers in accordance with the principles of supply and demand in the market.

(2) The Commission may establish price regulation regimes to promote efficiency and sustainable competition and maximize consumer benefits, which shall be specified in the Telecommunications Code, for setting, reviewing and approving prices, in any case where:

(a) there is only one licensee operating a public telecommunications network or providing a public telecommunications service, or where one licensee has a dominant position in the relevant market;

(b) a sole or dominant licensee operating a public telecommunications network or providing a public telecommunications service cross-subsidises one telecommunications service provided by such licensee by revenues arising from the provision of any other service; or

(c) the Commission detects anti-competitive pricing or acts of unfair competition.

(3) A service provider shall publish the prices, terms and conditions for its public telecommunications services at such times and in such manner as the Commission shall specify."

[40] LIME BVI submitted that the Act does not contain provisions that outlaw anti-competitive conduct generally, unlike, for example, the UK Competition Act or the Jamaican Fair Competition Act, which are both examples of legislation dealing with competition matters generally. The only specific powers under the Act by which TRC can ensure fair competition are the provisions for ex ante regulation set out in sections 26 and 29. Where section 75(1)(a)(iii) therefore permits enforcement action against the carrying on of business in an anti-competitive manner, this can only refer to carrying on business contrary to an ex ante regime imposed pursuant sections 26 and 29 of the Act. Section 75(1)(a)(iii) does not give TRC a free-standing right to take ex post regulatory action against a licensee. This section merely sets out the logically subsequent stage of the regulatory process whereby TRC takes enforcement action following on from decisions that it

had made in line with previous sections of the Act, namely a finding that LIME BVI was dominant under section 26.

[41] LIME BVI also referred to and relied on the BVI Government's statement of policy in its publication, "Telecommunications Liberalisation in the British Virgin Islands" which indicated that TRC would only put in place a system for ex ante regulation of dominant operators as determined under section 26 without putting in place a general competition law. LIME BVI concluded that there was therefore no suggestion that TRC would be able to carry out generally ex post regulation of companies acting in an anti-competitive manner in the absence of a finding of dominance.

[42] In response TRC submitted that section 75(1)(a)(iii) was a self-contained and free-standing section which included the grounds on which TRC could take the enforcement action. There was therefore no need for a finding of dominance or breach of any regulatory requirements imposed under sections 26 or 29 of the Act. Equally the absence of a general statute regulating competition was irrelevant where the Act itself addresses competition in the market which it regulates.

[43] TRC further submitted that the proper interpretation of the Act is that there are two regimes, one of ex ante regulation under sections 26 and 29 which depend on a finding of dominance and one of ex post regulation under section 75 which employs TRC's enforcement powers to address contravention of the Act, Code or Regulations and that both of these regimes are encapsulated in section 6(d) under which TRC is responsible for regulation of licensees and for ensuring fair competition among licensees. TRC therefore had the option to proceed under either section 26 or section 75 and so proceeding under the latter section cannot be ultra vires.

[44] Logically, the first issue to be decided should be whether TRC has the statutory power under section 75(1)(a)(iii) to take enforcement action in the absence of a

determination of dominance under section 26. In other words, is section 75 a free-standing section as submitted by TRC and found by the learned judge below or is it secondary to sections 26 and/or 29 as advanced by LIME BVI?

[45] Under section 26, TRC may find that a provider is dominant in respect of a network or of a service for the purposes of the Act. Where this finding is made, section 26(4) requires that TRC must attach certain terms and conditions to the licence of the dominant provider inter alia for the protection of the interest of users and for ensuring fair competition among licensees. These measures are targeted at a specific licensee.

[46] Under section 29, TRC may impose price regulation regimes to promote sustainable competition where inter alia a licensee has a dominant position or a dominant licensee cross-subsidises one service with revenues from another service or TRC detects anti-competitive pricing or acts of unfair competition. Each of these is stated as alternative so that the detecting of anti-competitive pricing or acts of unfair competition does not depend on a finding of dominance. Section 29 is potentially of broader operation as a price regulation regime need not be targeted at one provider only and anti-competitive pricing or acts of unfair competition can involve concerted actions by more than one provider.

[47] Section 75 permits TRC to exercise its powers under section 75(2) based on the finding of any of the circumstances set out in section 75(1). None of these depend on the existence of dominance as is the case of the exercise of powers under section 26 and, to some extent under section 29. Further, while the powers under sections 26 and 29 are exercised to ensure fair competition or to promote sustainable competition, none of the powers under section 75(2) have such objectives. The exercise of section 75(2) powers is meant to punish or compel certain conduct on the part of a licensee as seen from ensuing sub-sections by which an offence is committed if the licensee fails to comply with any enforcement

action and the court may make orders requiring the licensee to comply with the enforcement action.

[48] One of the grounds on which enforcement action can be taken is where TRC is of the opinion, under section 75(1)(a)(iii), that the licensee is carrying on or is likely to carry on business in a manner that is detrimental to the public interest including an anti-competitive manner or detrimental to the interest of clients, creditors or investors. The thrust of this ground is the detrimental manner of carrying on business of which acting in an anti-competitive manner is only an example.

[49] It therefore appears that where TRC finds that a licensee is conducting business in an anti-competitive manner, it has to determine whether (a) it should impose a price regulation regime under section 29; or (b) it should take enforcement action under section 75 where the conduct in question has reached the level of being detrimental. Both of these sections involve to an extent the application of ex post regulation as they both depend on the finding of anti-competitive conduct.

[50] LIME BVI's argument that there must be a finding of dominance under section 26 in order to determine whether there is anti-competitive conduct breaks down when one considers that neither section 26 nor section 29 defines anti-competitive conduct. Section 26 speaks of imposing conditions in licences for the purpose of ensuring fair competition when a licensee is dominant. It does not define what amounts to unfair competition. This is left to the determination of TRC as the regulator. Similarly, section 29 speaks of the use of price regulation tariffs to promote sustainable competition when anti-competitive pricing or acts of unfair competition are detected but again leaves it to the regulator, TRC, to determine if and when these circumstances exist. The scheme of section 75(1)(a)(iii) which permits TRC to determine what amounts to the conduct of business in an anti-competitive manner is therefore consistent with that of section 26 and 29 where TRC is also the determinant of what amounts to unfair competition or anti-competitive pricing.

[51] I find therefore that under the scheme of the Act, (a) there is no requirement that TRC must make a finding of dominance in order to determine whether there is anti-competitive conduct by a licensee and (b) where there is a finding of anti-competitive conduct that involves anti-competitive pricing or acts of unfair competition, TRC has the discretion to act either under section 29 or under section 75 of the Act. To that limited extent there is a connection between sections 29 and 75 as contended for by LIME BVI but this connection does not require action under section 75 to be preceded by a finding of dominance as is required where section 29 powers are exercised based on findings under section 29(2)(a) or (b) nor does it prohibit TRC from taking enforcement action under section 75 in circumstances when it may alternatively institute a price regulation regime under section 29 based on a detection of anti-competitive pricing or acts of unfair competition under section 29(c). I find therefore that TRC did not act ultra vires the Act by proceeding under section 75 where it was of the view that there was a form of margin squeeze. For these reasons, I would not allow grounds (b) and (e) of the cross appeal.

[52] With respect to ground (a), in my judgment, it follows from the interpretation which I have given to section 75(1)(a)(iii) that it may very well be incorrect to regard this section as involving purely ex post regulation. As the application of the section depends on the existence of current or future likely conduct of a licensee's business, there is an element of ex ante regulation or perhaps more accurately a hybrid of both ex ante and ex post regulation in its application as it can be used both as preventative and penal.

[53] A dogmatic statement that TRC has no power to engage in ex post regulation is, in any event, incorrect as section 75(1)(a)(i) permits enforcement action for past breaches of the Act, Regulations or Code. Such enforcement action can only be by way of ex post regulation.

[54] The specific nomenclature of the principles behind the regulation makes little difference in the instant case. The references to ex ante and ex post regulation refer to policy considerations of TRC with regard to the exercise of its powers under the Act but such policies are just one of the contextual considerations in the interpretation of the specific provisions of the Act. The question still remains: does section 75(1)(a)(iii) permit regulation of conduct which was in existence at the commencement of the enforcement process but had ended before the completion of the enforcement process? In finding that the section should be interpreted that it does permit such regulation, I have found that no matter which classification is employed with respect to the statutory provision, TRC has the statutory authority to regulate such conduct and so acted intra vires the Act in the exercise of its enforcement powers against LIME BVI.

[55] I would therefore also refuse to interfere with the findings of the learned judge on ground (a) of the cross appeal.

[56] The remaining ground of the cross appeal is ground (d). LIME BVI's complaint under this ground before the court below was that TRC acted wrongfully in purporting to take enforcement action against LIME BVI under section 75(1)(a)(iii) on the basis of an alleged margin squeeze involving the conduct of LIME BVI's affiliates which took place outside BVI and on the basis that LIME BVI sold the wholesale termination services of these affiliates to CCT.

[57] At paragraph 2 of the Decision, TRC found the relevant conduct to be as follows:

> "LIME BVI charged average <u>retail</u> prices to its customers for calls to LIME affiliates (mobile network operators or "MNOs") in other Caribbean jurisdictions which were below the wholesale charges available to its competitor in the BVI, Caribbean Cellular Telephone ("CCT") for the termination of calls on those affiliates' networks."

[58] TRC concluded at paragraph 32 of the Decision, "By setting retail rates below the level of wholesale charges applied by its affiliates, LIME BVI created or participated in 'a form of margin squeeze'". TRC did not make clear what this form

of margin squeeze was but at paragraph 33 of the Decision it referred to the OECD definition of a margin squeeze which I have set out at paragraph 7 above. This definition includes a statement that a margin squeeze can arise only when the upstream firm also directly competes in the downstream market against other firms that purchase its input for which there is no good economic substitute.

[59] TRC found (at paragraph 25 of the Decision) that it had statutory jurisdiction under the Act to make the Decision for the following reasons:

(1) For the duration of the margin squeeze, LIME BVI sold to CCT wholesale termination services on its affiliates' networks on behalf of those networks. CCT has clarified that for the relevant period it only made payments directly to LIME BVI. The charges that LIME applied at both wholesale and retail levels were aspects of the manner in which it carried on business in the BVI.

(2) In any event, for the entirety of the period under investigation, LIME BVI has determined the retail charge applicable in the BVI. This is an aspect of the manner in which LIME BVI carries on business in the BVI. For the reasons set out below, LIME BVI has carried on this aspect of its business in the BVI over the relevant period in an "anti-competitive manner".

[60] LIME BVI led evidence before the court below that the operators of LIME networks on other Caribbean islands, the LIME affiliates, were different entities from LIME BVI and LIME BVI did not set the pricing for termination of calls on those networks. Further, although CCT may have made payments for termination services on LIME affiliates' networks to LIME BVI, LIME BVI accepted such payments "only as a matter of convenience" and this was the only involvement of LIME BVI with the provision of these services. TRC did not respond to this evidence so the learned judge was correct to accept it. It was therefore open to her to find that TRC took into account factually inaccurate matters as well as the conduct of LIME affiliates.

[61] LIME BVI therefore complained that the definition of margin squeeze could not be satisfied as LIME BVI was not an integrated provider in that it was not both selling inputs, i.e. call termination services on other islands, to CCT and setting the downstream price, i.e. retail rates to customers in the BVI. A finding that LIME BVI was engaged in a margin squeeze therefore involved considering the actions of entities that were not licensees of TRC and also penalizing LIME BVI for the actions of such entities.

[62] The learned judge below found that although the Decision, i.e., paragraphs 2 and 32 quoted above, stated that TRC had only considered the conduct of LIME BVI, in arriving at its findings, TRC nevertheless appeared to have taken into account the actions of the LIME BVI's affiliates that had actually set the wholesale prices, in reaching the conclusion that LIME BVI had created a margin squeeze. The learned judge concluded that TRC acted ultra vires the Act in respect of utilizing the conduct of the LIME BVI affiliates to shore up its determination as to anti-competitive conduct by LIME BVI. TRC did not challenge that finding on appeal but appear to concede in its written submissions that it may have taken into account the conduct of LIME affiliates to a "minimal extent".

[63] In spite of the above finding that TRC took into account irrelevant and factually incorrect matters , the learned judge held that this was not sufficient to warrant setting aside of the decision. **Fordham's Judicial Review Handbook**[12] states that it is a basic and long-standing principle of judicial review that a public body should take into account all relevant consideration and no irrelevant ones.[13] This principle received its clearest expression in the well-known judgment of Lord Greene MR in Associated Provincial Picture House Ltd v Wednesbury Corporation.[14] The recent authorities show, however, that where judicial review is sought on the ground that the administrative body took into account irrelevant matters, the courts

[12] 6th edn. Oxford 2008.
[13] At p. 511, P56.1.
[14] [1947] 2 AER 680.

have considered the materiality of the irrelevant matter to the final decision. In R v Secretary of State for Work and Pensions,[15] Lord Neuberger MR stated:

> "Where a decision-maker has taken a legally irrelevant factor into account when making his decision, the normal principle is that the decision is liable to be held to be invalid unless the factor played no significant part in the decision-making exercise. … Even where the irrelevant factor played a significant or substantial part in the decision-maker's thinking, the decision may, exceptionally, still be upheld, provided that the court is satisfied that it is clear that, even without the irrelevant factor, the decision-maker would have reached the same conclusion".

At paragraph 81, Lord Neuberger acknowledged:

> "The high hurdle that has to be crossed by the decision-maker before he can persuade the court that his decision would have been the same if he had ignored a factor which he illegitimately had taken into account"

[64] In R v Broadcasting Complaints Commission ex p Owen,[16] May LJ stated:

> "Where the reasons given by a statutory body for taking ... a particular course of action are not mixed and can clearly be disentangled, but where the court is quite satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, then this court will not interfere by way of judicial review."

[65] In Smith v North East Derbyshire PCT,[17] May LJ said:

> "Probability is not enough. The defendant would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision."

[66] Having not challenged and perhaps even conceded the learned judge's finding that TRC took into account irrelevant matters, namely the conduct of persons who were not its licensees, it was for TRC to discharge the burden of showing that either the wholesale prices set for termination of calls by LIME BVI's affiliates or the finding that LIME BVI sold the wholesale call termination services to CCT did

[15] [2012] EWCA (Civ) 332 at paras. 67-68.
[16] [1985] 1 QB 1153, 1177.
[17] [2006] 1 WLR 3315 at para. 10.

not play a significant or substantial part in its finding that LIME BVI was conducting its business in an anti-competitive manner or that the Decision would inevitably have been the same even if it ignored those prices.

[67] Byer J, in refusing to quash the Decision on this ground, did not refer to the tests stated above. She stated at paragraph 85 of her judgment:

> "The Court is therefore not convinced by the arguments for justification by the Respondent and it holds that the Respondent acted ultra vires in respect of utilizing the conduct of the affiliates to shore up their determination as to anticompetitive conduct but like in the ***Digicel*** case, I do not find that this is sufficient to warrant the setting aside of the decision."

This suggests that she may have found the reliance on the conduct of the LIME affiliates to have been insignificant or insubstantial to the eventual Decision. If this is so, it is an inference from the Decision which this Court is entitled to review on appeal.

[68] In my judgment, the tenor of paragraphs 2 and 32 of the Decision which I have quoted above is that the "form of margin squeeze" arose from CCT being subject to the opposing forces of the level of the wholesale prices set by LIME BVI's affiliates and the level of LIME BVI's retail prices under the Plan. This, to my mind, signals that the level of the wholesale prices for termination of calls must have been a significant or substantial consideration in TRC's decision, as the impugned conduct by LIME BVI was its setting of its retail prices below those wholesale prices.

[69] Mrs. di Iorio submitted that the Decision was regulating only LIME BVI's conduct in setting retail prices (under the Plan) in a way that resulted in negative revenues and which was therefore plainly anti-competitive. This submission does not take the matter any further as the finding of negative revenues could only arise in the context of the level of the wholesale prices charged by the LIME BVI's affiliates.

[70] In my view, the proper inference to be drawn is that the consideration of the wholesale pricing set by LIME BVI's affiliates was significant to the Decision. So far as the learned judge may have come to the opposite conclusion, I would set aside her finding in this regard as being inconsistent with the terms of the Decision.

[71] TRC has not overcome in my view the high hurdle that it has to meet to show that the consideration of the irrelevant matters, namely, the conduct of LIME BVI's affiliates in other jurisdictions and the finding that LIME BVI sold the wholesale termination services on its affiliates' networks was not significant to the Decision or that the Decision would inevitably have been the same even without taking into account these matters.

[72] I would therefore allow this ground of the cross appeal and order that the Decision should be quashed on the basis that TRC took into account irrelevant matters in arriving at the Decision.

[73] Taking matters in the round, I therefore find that while TRC correctly based its jurisdiction to take enforcement action against LIME BVI on section 75(1)(a)(iii) of the Act, in that LIME BVI's conduct was existing at the time that the enforcement action commenced, the Decision was nevertheless reviewable on the ground that TRC took into account irrelevant factors in determining that LIME BVI was engaged in anti-competitive conduct. I have therefore come to the same conclusion as the learned judge below, albeit on different grounds, that the Decision should be set aside.

[74] Although both parties have had some measure of success before this Court, I find that LIME BVI is still the substantially successful party in the appeal and would therefore order that TRC pay the costs of the appeal and cross appeal to LIME BVI at the rate of one half of the costs in the court below. This discount from the normal figure of two thirds of the costs in the court below under CPR Part 65.13 is

meant to reflect the success of TRC on the appeal which involved a substantially shorter issue than those dealt with on the cross appeal.

I concur.
Louise Esther BIenman
Justice of Appeal

I concur.
Eamon Courtenay, SC
Justice of Appeal [Ag.]

By the Court

Chief Registrar