[2012] JMSC Civ. 91

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 03318

BETWEEN	**DIGICEL (JAMAICA) LIMITED**	**APPLICANT**
AND	**THE OFFICE OF UTILITIES REGULATION**	**RESPONDENT**

Mr. Michael Hylton Q.C., Mrs. Symone Mayhew and Mr. Kevin Powell, instructed by Michael Hylton and Associates for the Applicant.

Mr. Allan Wood Q.C. and Mrs. Daniella Gentles-Silvera, instructed by Livingston Alexander & Levy for the Respondent.

Mr. Ransford Braham Q.C., Mrs. Denise Kitson and Mrs. Suzanne Risden-Foster instructed by Grant Stewart Phillips & Co. for the interested party Cable and Wireless Jamaica Limited "Lime".

Heard: 15th, 21st, 25th, 29th June and 4th, 5th and 12th July 2012

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW – THRESHOLD TEST – ARGUABLE GROUNDS WITH REALISTIC PROSPECT OF SUCCESS – FLEXIBILITY OF TEST – DIFFERENCES BETWEEN STAY AND INTERIM INJUNCTION

MANGATAL J

[1] This is an application by Digicel (Jamaica) Limited " Digicel" pursuant to Part 56 of the Civil Procedure Rules 2002 "the CPR", seeking leave to apply for judicial review and seeking that the grant of leave operate as a stay.

[2] Digicel is a limited liability company and is a provider of telecommunication services. It is the holder of licenses issued under the Telecommunications Act, 2000 (as amended) ("the Telecoms Act") and is subject to regulation by the Office of Utilities

Regulation “the OUR”.

[3] The OUR is a body corporate established under section 3 of the Office of Utilities Regulation Act, “the OUR Act” and is the Respondent to this application. The OUR is empowered to regulate the telecommunications sector pursuant to powers under section 4 of the OUR Act and section 4 of the Telecoms Act.

[4] Cable and Wireless Jamaica Limited t/a Lime, “Lime”, is a limited liability company and is a telecommunications provider licensed pursuant to the Telecoms Act, and is also subject to regulation by the OUR. Lime is one of two mobile carriers in the telecommunications market in Jamaica, the other carrier being the applicant, Digicel.

[5] On the 15th of June 2012 Digicel’s application for leave to apply for judicial review was set before me for hearing ex parte. On that date, after I had had some time to reflect upon the issues involved, I directed the applicant Digicel to give notice of the hearing to the OUR and to the Attorney General pursuant to Rule 56.4(4) of the Civil Procedure Rules 2002 ”the CPR”. The application was then fixed for the 21st of June 2012.

[6] On the 21st of June 2012 Attorneys-at-Law representing the OUR attended the hearing and so too did Attorneys-at-Law for Lime. Lime had just prior to the hearing filed an application seeking leave to intervene and be added as a party, or in the alternative that it be heard on the application for leave and for stay. Lime’s application was heard on the 25th of June 2012. At this juncture, Queen’s Counsel Mr. Braham, who appeared on behalf of Lime, indicated that Lime had decided not to pursue at this time the application to be added as a party, and was seeking only to be heard upon Digicel’s application. Mr. Michael Hylton Q.C., lead Counsel for Digicel, stated that Digicel would not oppose Lime’s application to be heard on the question of whether leave should operate as a stay, but indicated its opposition to Lime being heard on the question of leave.

[7] On the 25th I ruled that in my judgment the most just course was to allow Lime to be heard on the issue of leave, as part and parcel of the Court's consideration of Lime's contentions on the issue of whether the grant of leave should operate as a stay.

DIGICEL'S APPLICATION

[8] Digicel is applying for the following orders:

1. That leave be granted to apply for judicial review of the decision of the OUR pursuant to section 37A of the Telecoms Act (as amended) as set out in its determination Notice for an Interim Mobile Termination Rate dated June 4, 2012 setting an interim mobile termination rate of $5.00 per minute for all calls of both domestic and international origin with effect from July 15, 2012 "the Determination".
2. The grant of leave to apply for judicial review of the Determination operate as a stay of the Determination until the hearing and determination of the application for judicial review.

[9] As regards the specifics of the remedies in respect of which leave is sought, Digicel is seeking leave to apply for an order of certiorari quashing the Determination, and is seeking leave to apply for an order of prohibition preventing the OUR from taking any steps consequent on the Determination.

[10] At paragraph 5 of the application, Digicel sets out its grounds, the gravamen being those set out at sub-paragraphs l, m, and n. It is useful to set out paragraph 5 in its entirety as it sets out the grounds as well as the background to the application:

5. The Applicant seeks the above relief on the following grounds which are not exhaustive:

a. Effective May 24, 2012 the Act was amended by The Telecommunications (Amendment) Act, 2012 ("the Amending Act").

b. The applicant acquired its telecommunications licenses under the Act and made other necessary capital investments prior to the enactment of the Amending Act.

c. One of the amendments to the Act created a new section 37A which provides that the OUR may set interim connection charges and an interim price cap for retail rates for telecommunications services.

d. The Act does not specifically provide for the circumstances in which the Office may exercise its powers under section 37A of the Act. Furthermore, the full magnitude of the proposed amendments was not announced in the Government's own ICT Policy which was finalized in March 2011, and that policy has not been updated in any way.

e. The Applicant launched its mobile telecommunications service in Jamaica in 2001 based on:

i. interconnection rates (a) with the incumbent fixed network operator that were determined by the OUR further to a consultation process and/or agreed with the fixed network operator and(b) agreed with other mobile telecommunications network operators, all of which have been charged and paid (with some adjustments) by the various operators since then;

ii. the right to set its own retail rates (including the retail rates from the incumbent Lime's fixed network to the Applicant's mobile network); and

iii. the legitimate expectation that the OUR would always abide by the rules and procedures under the Act and the rules of natural justice.

f. It could not have been intended that in exercising any powers under section 37A of the Act the OUR could overrule the established rates described in paragraph e. above without first consulting the Applicant or giving the Applicant an opportunity to be heard.

g. Section 4(2) of the Act provides that in making a decision in the exercise of its functions under the Act the OUR shall observe reasonable standards of procedural fairness, act in a timely fashion and observe the rules of natural justice.

h. The new section 37A provides that in exercising its powers under that section, the OUR is not subject to section 4(2) of the Act.

i. Interim interconnection charges could have serious effects and consequences on all affected licensees under the Act, including the Applicant, and it could

not have been intended that in exercising any powers under section 37A of the Act, the OUR would not be bound to observe and follow the rules of natural justice as guaranteed by the Constitution of Jamaica and the common law.

j. On May 8, 2012 the Applicant's attorneys wrote to the OUR informing them of the Applicant's interpretation of the application of the new section 37A including that any decision that the OUR intends to make under that section would be subject to the rules of natural justice and that the section should not apply where permanent rates are already in place.

k. On May 15, 2012 the OUR responded indicating, among other things, that it does not agree with the Applicant's interpretation of the application of section 37A.

l. On June 4, 2012 the OUR issued the Determination without following the standards of procedural fairness or observing the rules of natural justice.

m. The Determination was made in breach of the legitimate expectation of the Applicant that the Applicant would be consulted and/or given an opportunity to be heard before any decision or determination is made by the OUR affecting the Applicant or the Applicant's licence.

n. The OUR erred in law and/or acted irrationally by:

i. Making the determination in circumstances where long standing permanent rates are in place, having been made with the consultation and approval of the OUR and an interim interconnection rate is not necessary or justified.

ii. Making the Determination in circumstances where there is an ongoing process to reviewing mobile termination rates in Jamaica and it is scheduled to be concluded in September 2012.

iii. Failing to consider that lower mobile termination rates may also lead to higher retail costs.

iv. Using inaccurate and incomplete data to calculate a Herfindahl Hirshman index to determine the competitiveness of the mobile market;

v. Failing to consider that the other existing telecommunications licensees

proposed higher interconnection rates for incoming international calls;

vi. Finding that there is a fragile state of competition in the mobile sector in the absence of any or any verifiable evidence to that effect;

vii Purporting to make the Determination to increase or improve the state of competition in the mobile sector but taking into account the fixed network sector's ability to compete, innovate and expand and failing to take into account the mobile sector's ability to compete, innovate and expand.

viii. By making the Determination in such a way as to suggest that it applies to interconnection charges for calls terminating on mobile networks from fixed networks in circumstances where mobile termination rates are inapplicable.

(My emphasis)

[11] At paragraph 6, Digicel states that no alternative form of redress exists, at paragraph 8 that the application has been made promptly and that the time limit for making it has not been exceeded. These are all relevant matters when making an application for leave pursuant to Rule 56.3 of the CPR. In paragraph 9, Digicel states that in the circumstances, particularly those in paragraph 5, Digicel is directly affected by the Determination.

[12] Digicel's application is supported by two Affidavits of Richard Fraser, attorney-at-law, and head of Regulatory Affairs for Digicel, filed respectively on the 13th and 25th of June 2012.

[13] The OUR has opposed both Digicel's application for leave and its application for leave to operate as a stay of the proceedings. The OUR filed one Affidavit, that of Rohan Swaby, Senior Regulatory Analyst at the OUR, filed on the 25th of June 2012.

[14] Lime has also opposed both the grant of leave and Digicel's application for the grant of leave to operate as a stay of the Determination. Three Affidavits of Rochelle Cameron, Attorney-at-Law, Lime's Head of Legal and Regulatory Division have been

filed, one on the 21st of June, and two on the 25th of June 2012 respectively.

[15] In order to properly appreciate the statutory framework within which the OUR has been established to operate, it is necessary to have regard to the objects of the Telecoms Act and the functions, mandate, powers and duties of the OUR.

[16] Amongst the objects of the Telecoms Act (section 3) are to promote and protect the interest of the public, by promoting fair and open competition in the provision of specified services and telecoms equipment, providing for the protection of customers, and promoting universal access to telecommunications services for all persons in Jamaica, to the extent that such access is reasonably practicable. The OUR is required to facilitate the achievement of these objects in a manner consistent with Jamaica's international commitments in relation to the liberalization of telecommunications. Additionally, the OUR must promote the telecommunications industry in Jamaica by encouraging economically efficient investment in, and use of, infrastructure to provide specified services. By virtue of section 4(1) of the Telecoms Act, the OUR is required to, amongst other things, regulate specified services, promote the interest of customers, while having due regard to the interests of carriers and service providers, and promote competition among carriers and service providers.

[17] Sub-section 4(2) of the Telecoms Act, states as follows:

> *4(2) In making a decision in the exercise of its functions under this Act the Office shall observe reasonable standards of procedural fairness, and observe the rules of natural justice, and, without prejudice to the generality of the foregoing, the Office shall-*
>
> > *(a) consult in good faith with persons who are or are likely to be affected by the decision;*
> >
> > *(b) give to such persons an opportunity to make submissions to and to be heard by the Office;*
> >
> > *(c) have regard to the evidence adduced at any such hearing and to the matters contained in any such submissions;*

(d) give reasons in writing for each decision;

(e) give notice of each decision in the prescribed manner.

[18] Section 37 A reads as follows:

37A-(1) Subject to subsection (2), the Office may set interim interconnection charges and an interim price cap for retail rates for telecommunications services.

(2) Interim interconnection charges and interim price caps for retail rates set pursuant to subsection (1) shall –

(a) be applicable for a defined period, being a period not exceeding twelve months;

(b) be established, pending the completion of the process to determine interconnection charges or to make price cap rules, as the case may be, in accordance with sections 4(2), 33 and 46.

(3) When setting an interim interconnection charge or an interim price cap for retail rates, the Office shall have regard to reciprocity, local or international benchmarks or such other relevant data or information as may be available to the Office, from time to time.

(4) In the event that the Office is unable to determine interconnection charges or make price cap rules for retail rates before the expiration of the defined period, the Minister may extend the application of the interim rates or interim price caps for retail rates for a further period, being a period not exceeding six months.

(5) If after the further period, the interconnection charges or price cap rules for retail rates are still not determined by the Office, the mid-point between the interconnection charges or retail rates that were applicable before and after the setting of the interim interconnection charges or interim price cap rules for retail rates shall apply until such determination is made by the Office, but shall not have retroactive effect.

(6) The power of the Office to set interim interconnection charges or interim price cap for retail rates under this section shall not be subject to the provisions of section 4(2), 33, 46, 60 or 62.

[19] Section 33 speaks to the principles to guide determination of prices at which interconnection is to be provided by a dominant carrier. Section 46 deals with price cap restrictions. Section 60 provides for reconsideration by the OUR of a decision it has made upon application being made by an aggrieved person. Subsection 60(8)(a) provides that upon application by an applicant, the OUR has the power to order that its decision shall not take effect until its reconsideration is determined. Section 62 concerns appeals to the Appeals Tribunal in respect of decisions by the OUR. Subsection 62(3) provides that upon application by an appellant, the Tribunal has the power to order that the decision of the OUR shall not have effect until the appeal is determined. In other words, under these subsections 60(8)(a) and 62(3) the OUR and the Tribunal respectively have power to stay a decision of the OUR pending the determination of the reconsideration or appeal. The new section 37A(6) provides that the OUR's power to set interim interconnection charges shall not be subject to any of those sections, i.e. 33,46,60,and 62, as well as 4(2).

[20] Judicial Review is the Court's way of ensuring that the functions of public authorities are carried out in accordance with the law and also that these bodies are held accountable for any abuse of power or unlawful or ultra vires acts. It is the process by which the private citizen can approach the Courts seeking redress and protection against unlawful acts of public officers or authorities, and acts carried out in excess of jurisdiction. Public bodies must exercise their duties fairly. In a constitutional democracy, one of the roles of judicial review is the vindication of the rights of the individual against abuse of power carried out by public officials.

[21] On the other hand, the requirement of leave is one of the aspects of the court's function to act as a filter in relation to judicial review claims. As Michael Fordham Q.C. eloquently describes it in his invaluable work Judicial Review Handbook, 5th Edition, at paragraph 13.1:

"Public authorities have an important role and function. There must necessarily be questions which it is for them, rather than judges, to decide. In considering whether a public body has abused its powers, Courts must not abuse theirs. In constitutional

terms, just as judicial vigilance is underpinned by the rule of law, so judicial restraint is underpinned by the separation of powers". It is part of the Court's function when it dons its "review hat" to be astute to avoid applications being made by busybodies with hopeless, weak, misguided or trivial complaints. Public authorities need protection from unwarranted interference and plainly, the business of government could grind to a halt and good administration be adversely affected if the Courts do not perform this sifting role efficiently and with care. It must for example, in the field of commercial endeavour, ensure that its processes are not used or misused as a mere ploy in competition battles, or take-over or acquisition strategies, or used for ulterior motives such as obstructing or delaying a public authority from carrying out its statutory duties with a view to maximizing profit. Nor should it allow its process to be used to put a competitor out of business- in relation to this latter see The Business of Judging, Selected Essays and Speeches by Senior Law Lord Tom Bingham, cited by OUR's Attorneys. Thus the Court has to balance these types of considerations with the citizen's right to seek redress and protection against abuse of public power. It has to decide whether to give the green light for an applicant to proceed with a claim for judicial review.

THRESHOLD TEST

[22] Whilst Rule 56.3(1) of the CPR states that in order to claim judicial review, leave must first be obtained, the Rules are silent as to the threshold that must be crossed in order to obtain the leave. It has been accepted in a number of unreported local decisions, namely **Rv. IDT ex parte Wray and Nephew Ltd.** 2009 HCV 04798, a decision of Sykes J. delivered 23 October 2009, **Coke v. Minister of Justice et al** 2010 HCV 02529, a decision of McCalla C.J., delivered 9 June 2010, and my own decision in **Tyndall et al v. Carey** 2010 HCV 00474, delivered 12 February 2010, that the test as explained by the Judicial Committee of the Privy Council in **Sharma v. Brown-Antoine** [2007] 1 WLR 780, is the applicable test.

[23] In **Sharma**, it was held that there must be an arguable ground with a realistic prospect of success. At page 787, (4) of the joint opinion of Lord Bingham and Lord Walker, it is stated as follows:

(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; see R v. Legal Aid Board, ex p Hughes (1992) 5 Admin LR 623, 628 and Fordham, Judicial Review Handbook 4th ed. (2004), p.426. ***But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.*** *As the English Court of Appeal recently said with reference to the civil standard of proof in R (N) v. Mental Health Review Tribunal (Northern Region([2006] QB 468, paragraph 62, in a passage applicable mutatis mutandis, to arguability:*

*"****the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.****"*

It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen": Matatulu v. Director of Public Prosecutions [2003] 4 LRC 712,733.

(My emphasis)

[24] Then at page 789(6) it is stated:

(6) Where leave to move for judicial review has been granted, the court's power to set aside the grant of leave will be exercised very sparingly: R. v. Secretary of State for the Home Department, Ex p Chinoy (1991) 4 Admin LR 457, at 462. But it will do so on inter partes argument that the leave is one that plainly should not have been granted: ibid. These passages were cited by Simon Brown J in R v. Secretary of State for the Home Department, ex p Sholola [1992] Imm AR 135

and the Board does not understand him, in his reference to delivering "a knockout blow", at p.139, to have propounded a different test.

[25] The Board of the Privy Council pointed out (788(5)), that judicial review of a prosecutorial decision is a highly exceptional remedy. At page 792(24), it was commented that the judge at first instance who had granted leave to apply for judicial review, by failing to bear that context in mind, as a result "approached the question of arguability without any recognition of the very ambitious case the Chief Justice was seeking to establish". Then at 793(25) it was pointed out that the judge was wrong to assume, for the purpose of ascertaining whether there was an arguable case, that the facts as raised by the Chief Justice were true. "This was not a demurrer, but an application for exceptional relief, to be judged on **all the evidence** (and it is perhaps surprising that the matter was ever thought suitable for decision ex parte). **If the facts raised by the Chief Justice were taken as true, it necessarily followed that the Chief Magistrate's statement was false, a conclusion which would raise very disturbing and far-reaching questions**. (My emphasis)

[26] In the **IDT ex parte Wray and Nephew** decision, my learned brother Sykes J. describes the threshold test as being a new and higher test than had previously obtained. I agree with his analysis, and that the CPR, being a new procedural code applicable to judicial review, signified that things have moved on. At paragraph 58 he discussed the leave requirement in the following terms:

58. The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. The judges, regardless of the opinion of the litigants, are required to make an assessment of whether leave should be granted in the light of the now stated approach….(This) *also means that an application cannot simply be dressed up in the correct formulation and hope to get by. An applicant cannot cast about expressions such as "ultra vires", "null and void", "erroneous in law", "wrong in law", "unreasonable" without adducing in the required affidavit evidence making these conclusions arguable*

with a realistic prospect of success. These expressions are really conclusions.

[27] In the instant application, whilst Digicel, the OUR and Lime all agree that the applicable test is that set out in **Sharma**, there are differences as to just how varied or flexible the test is, especially as to whether there are differences when the application is being considered ex parte or is the subject of inter partes hearing.

[28] It was Queen's Counsel Mr. Hylton's submission that the flexibility of the test is based on the arguability of the claim sought to be made and this must be considered in the context of the nature and gravity of the issue to be argued. It was further submitted that the test would be equally applicable whether the application is heard ex parte or at an inter partes hearing. I think that the test is in truth equally applicable whether the application is made ex parte or is the subject of an inter partes hearing. However, it is clear that where it is felt by the Court that, because of the serious nature and gravity of the issues to be argued, or the seriousness of the consequences if the allegation is proved, or the urgency of its resolution, that the application for leave ought to be determined at an inter partes hearing, the judge does have to look at all of the evidence and submissions relevant to the question of arguability, including that put forward by the respondent. Whilst it is not for the respondent to deploy his whole case that would be considered on a substantive hearing, the judge cannot assume that the facts or allegations put forward by the applicant are true, in order to decide whether there are arguable grounds with a realistic prospect of success. Further, it could hardly be appropriate that the judge, having sought to have the respondent present at the hearing, would ignore the basis upon which the respondent argues that there is no arguable ground with the requisite prospects of success. Whilst the Court must not engage in a full-scale delving into the issues such as would be appropriate after leave were granted, it follows, and I therefore agree with Queen's Counsel Mr. Wood, that in those circumstances a more rigorous examination of the evidence or arguments may be employed. In the present case, I have had the benefit of very detailed submissions and the hearing has taken place over a number of days. It is relevant that in judicial review proceedings, although the power exists to order cross-examination, it is rarely

exercised. This is because the court in judicial review proceedings is not generally concerned with resolving factual disputes. Therefore, at this stage, since the judge cannot assume that the facts or allegations put forward by the applicant are true, one would have to look at the evidence on paper and decide, where there are any conflicts of evidence, why what one party says is more persuasive than the other, and to see whether, having regard to all the relevant material, there are sufficient grounds raised requiring the matter to proceed for further investigation. At paragraph 21.1.2(C) of the Fordham, it is suggested that the Court's task in deciding whether to grant leave and whether a case meets the threshold is essentially the same whether the papers are few or voluminous, or whether the putative issues are simple or complex. Further, that there should be no greater tendency to grant leave in a complex than in a simple case. I think that the **Sharma** test described by the Privy Council as "flexible in its application" supports that reasoning.

[29] I also agree with Mr. Wood that on points of law, such as statutory construction, it cannot be ignored that the judge at the leave stage who has had the benefit of an inter partes hearing may well be in no less a position to construe the point of law than the judge at the substantive hearing. The well-known decision of the Judicial Committee of the Privy Council, emanating from the Jamaican Courts, in **N.C.B. v. Olint** [2009] UKPC, 16 in relation to interlocutory injunctions, was cited by learned Queen's Counsel Mr. Hylton in relation to the question of the principles applicable if the stay amounts to an injunction. In that case the Privy Council took a very robust approach to examining questions of law. Indeed, to my mind the Board appeared to encourage such an examination, when at an interlocutory or early stage a Court is being asked to examine whether, in relation to points of law, there are serious issues to be tried. This search for "whether there are serious issues to be tried"- referred to by Lord Diplock in the oft-cited passage of **American Cynamid** [1975] A.C. 396, at page 407, was also interchangeably referred to by the learned Law Lord, at page 408A, as an examination of the material available to the court, to see whether it discloses that the claimant has "real prospects of succeeding" in his claim for the permanent injunction at trial. This arguably suggests that there is not a great deal of difference between the criteria and

analysis in relation to the level of sustainability of the claim necessary for the grant of interim injunctions, and the threshold required on an application for leave to apply for judicial review. In **NCB V. Olint** the Board held that the judge at first instance, Jones J. had been correct to decide that there was no triable issue and to have refused an injunction on that ground. It seems to me that the approach of examining points of law at the earliest opportunity at which they can properly and fairly be examined by a Court, is particularly appropriate against the backdrop of our new Civil Procedure Rules. These Rules specifically provide for the objective of dealing with cases justly as set out in CPR Rule 1.1, including ensuring that there is an appropriate allocation of the court's resources to matters coming before it, while taking into account the need to allot resources to other cases. In short, judicial time is a resource which must not be wasted and its use must be maximized. It should be noticed that at a number of junctures where applications fall for consideration under the CPR, judges are called upon to apply the test of arguability with a realistic prospect of success, for example, applications for summary judgment, setting aside default judgments, and for amendment to a claim or defence in the face of an application to strike out as disclosing no reasonable grounds for bringing the claim.

THE NATURE AND GRAVITY OF THE ISSUES TO BE ARGUED

[30] At paragraphs 16, 20 and 21 of Mr. Swaby's Affidavit, filed on behalf of the OUR, he states that:

> *16. That the Telecommunications(Amendment) Act 2012 sets out a new statutory regime in relation to the setting of interim rates by the OUR…….*
>
> *20. The reasons for the interim rate and the basis of the rate were detailed in the Determination Notice. Section 2 of the Determination outlined the negative effects of above-cost Mobile Termination Rate(MTR) in the sector including cross subsidization, ring fencing of subscribers on a network, higher retail pricing and high on-net off net price differentials, and indicated that the OUR was of the view "that there is a need for an interim MTR, pending the completion of the cost study, to prevent the two remaining mobile operators from leveraging their dominance in terminating calls on their respective networks".*

21. The OUR considers these to be valid reasons for exercising its powers under section 37A and in keeping with its obligation under section 4(1) of the Telecoms Act to promote the interests of customers, while having due regard to the interests of carriers and service providers and to promote competition among carriers and service providers.

[31] Digicel's application seeks to obtain leave to apply for certiorari to quash the Determination Notice setting the interim MTR, which rate the OUR as regulator decided was needed in the relevant sector. At paragraph 2.1 of the Determination Notice it is stated that having an MTR that is significantly above cost could distort the proper functioning of the markets and retard the level of competition. To my mind there can be no question but that this challenge has the potential of having very serious implications and a significant impact on a wide cross-section of the Jamaican public.

[32] It is Digicel's position that, (see paragraph 20 of its written submissions dated 21st June 2012), that even in the absence of section 4(2), the OUR would be bound to observe the rules of natural justice, including giving Digicel a right to be heard before making a decision which will affect it. It was submitted that in the absence of clear words in the statute indicating an intention to overrule the common law rules, section 37A(6) should not be interpreted as doing so. However, according to the OUR's written submissions dated 28th June 2012, (see paragraph 14), it was in the factual/historical context that the OUR had not been able to fix interconnection charges for dominant carriers for eight years, due to the stalling of the process, amongst other reasons, that Parliament by section 37A enacted that the power conferred on the OUR to set an interim interconnection charge would not be subject to the provisions of section 4(2) of the Act and nor would it be subject to any appeal under section 62. Further, in Lime's written submissions dated 4th July 2012, at paragraph 29 , Lime stated that sections 60 and 62, which have been excluded from operation by section 37A(6), deal with the grant of stays by the OUR and the Appeals Tribunal. It was further submitted that by excluding the application of sections 60 and 62 Parliament is demonstrating a clear intention that stays ought not to be granted when the OUR acts under section 37A.

[33] In my view, the relevance of these points to the manner in which the flexible test for granting leave should be applied, is that if leave is granted, then one of the very things which according to the OUR and Lime, if they are correct, Parliament intended to prevent, i.e. further delays and protracted, drawn-out proceedings, may well result. The OUR presently anticipates that the consultative process on the final MTR will be completed by September 2012. It is very unlikely that if leave is granted a hearing of the substantial judicial review could take place before the end of September. In my judgment, Mr. Hylton is correct that in the present case the Court is not dealing with allegations of the same level or order of gravity as those involved in the **Sharma** case. However, having regard to the uncontested aspects of the preceding historical context of the telecoms industry, and the potential consequences of this application, the situation can be described as being potentially at somewhat of a "cross-roads". Due to the very serious nature of the issues and potential consequences, in my judgment these are grave and serious allegations that require their arguability to be demonstrated with considerable strength or quality in order to meet the required threshold. Whilst I bear in mind that a ground with a realistic prospect of success is not the same thing as a ground with a real likelihood of success, the point however is that the prospect of success has to be realistically and amply demonstrated.

SUFFICIENT INTEREST

[34] I am satisfied that the criteria of sufficient interest has been met. The OUR's decision fixes interim mobile termination rates. Digicel is a provider of mobile services and is directly regulated by the OUR. It plainly has a sufficient interest in the matter- Rule 56.3(h).

PROMPTNESS OF THE APPLICATION

[35] I am satisfied that this application fulfills the requirements of Rule 56.6(1) of the CPR, that is, that it was made promptly, and in any event , within three months of the date when grounds for the application first arose. The Determination was dated June 4 2012, and made public on June 5 2012. The application was filed on June 13 2012.

ALTERNATIVE REMEDY

[36] Rule 56.3(d) requires the applicant for leave to state whether an alternative form of redress exists, and if so, why judicial review is more appropriate or why the alternative has not been pursued. In their written submissions at paragraph 13, Digicel's Attorneys state:

> *13. Section 62 of the Act provides that "a person aggrieved by a decision of the [OUR] may appeal against the decision to the Appeal Tribunal…" Section 37A provides that section 62 will not apply to the Determination, thereby depriving Digicel and any other party of any other remedy. Judicial review is therefore the only remedy available in this case.*

The OUR have submitted that a form of alternative remedy does exist and thus I will return to this issue later.

EXAMINATION OF THE GROUNDS TO SEE WHETHER THEY HAVE A REALISTIC PROSPECT OF SUCCESS.

GROUND 1(5 l)-BREACH OF NATURAL JUSTICE

[37] Reference was made by learned Queen's Counsel Mr. Hylton to a number of authorities, including **Ahmed and others v. Her Majesty's Treasury** [2010] 2 WLR, 378, and **Child Poverty Action Group v. Secretary of State for Work & Pensions** [2010] UKSC 54. In essence, Digicel submitted that on a proper construction of section 37A(6), the common law right to natural justice is not excluded by that section. This, it was submitted, was because even if there had never been a section 4(2) in the Act, the OUR would still be subject to the rules of natural justice and would still have to observe the constitutional right to due process. Further, that the non-application of section 4(2) is not an express abrogation of the common law right to natural justice and thus there is, it was submitted, an arguable case with a realistic prospect of success as to whether section 37A should be construed otherwise. Mr. Hylton readily submitted that this ground really turns on a point of law and is a matter of construction of the relevant legislation. This ground was also referred to by Digicel's Counsel as being their primary ground of challenge.

[38] Mr. Wood Q.C. referred me to a number of authorities, including Bennion on Statutory Interpretation, 5th Edition, pages 585-589, and Halsbury's Laws of England, 4th Ed. Vol. 44(1) at paragraphs 1414, and 1415, as to the informed interpretation rule. It was submitted that as with any other legal instrument, the construction of an enactment of Parliament must be informed by the relevant context of that enactment, including all matters that might illumine the text. This is to be distinguished from the situation where ministerial papers and statements recorded in Hansard may in exceptional circumstances be admitted to resolve an ambiguity.

[39] In its submissions on this point, the OUR submitted initially that the factual/historical context to the enactment of section 37A was that the fixing of the interconnection charges for dominant carriers pursuant to section 33 of the Act had been stalled and delayed for eight years and continued to be frustrated by continuing flagrant breach by Digicel of its statutory obligation to provide the requisite information so that the process could be completed. It was submitted that it was in this context that the power conferred on the OUR, would not be subject to the provisions of s 4(2) of the Act which required the OUR, to comply with the rules of natural justice, and nor would it be subject to any right of appeal. Ample opportunity had already been given, it was argued, for consultation and for the application of the rules of natural justice and the legislature was now clearly requiring the OUR to act by conferring the power to fix an interim rate. Further, that the exercise of the power should not be subject to being further delayed or frustrated by reference to rules of natural justice and consultation and then appeals.

[40] Mr. Hylton Q.C. did not dispute that the construction of the relevant provision in the Act must be informed by the relevant facts. However, Digicel claimed that the OUR's submissions refer to a factual background which is disputed by Digicel, and on which the evidence is contradictory. It was Digicel's posture that it did not attempt to, or deliberately delay the process as alleged by the OUR. Indeed, Digicel alleges that at certain points, it was the OUR that was itself guilty of delay. Further, Mr. Hylton Q.C. referred to the Memorandum of Objects and Reasons For the Act, and submitted that

this document does not suggest in any way that the Act was a response to Digicel or anyone else delaying the OUR in setting mobile termination rates. It was argued that this is also in line with the fact that section 37A is a general power to set interim connection charges and retail caps and is not focused on the mobile termination rates alone.

[41] In response, Mr. Wood Q.C. modified his original submission and said that we need not get into any issue as to who was responsible for the delay. This, he submitted, is because it is an objective fact that the matter of mobile termination rates should have been regulated from 2004 and that for eight years this has not occurred. Mr. Wood disagreed that the Memorandum of Objects and Reasons did not suggest that there was any urgency to the situation. On the contrary, he said that even if it was not spelt out, the language was "pregnant" with the needs, speaking as it does to the inadequacy of the current legislation to meet a liberalized and converged ICI environment. He also indicated that this memorandum should be read with Prime Minister Golding's Statement to Parliament in August 2011, exhibited to Miss Cameron's Second Affidavit. Mr. Golding, who was the Minister of Telecommunications at the time of Digicel's acquisition of Claro, spoke about the fact that one of the issues that arose for consideration was the impact that the acquisition would have on the level of competition within the mobile telecommunications market and in that regard, concern was expressed about the wide disparity that exists in relation to termination rates among carriers. He also spoke of the urgent need for amendments to the legislation and how the issue had brought into sharp focus the need to strengthen the legal and regulatory framework for the telecommunications industry, to bring it in line with contemporary best practices and ensure that the interest of the consumer is paramount.

[42] In my view, on the objective facts to be gleaned from the evidence presented, it seems clear that the context in which the amendment came into being, specifically section 37A, was one where, separate and apart from whether any one player or party was to blame, there had been an over eight year lapse in the determination of mobile interconnection rates. Deadlines for consultation had passed without information

requested by the OUR of Digicel, as one of the two remaining operators in the mobile telecommunications sector, being provided, or being provided in a timely way, for whatever reason. Further, the May 1 2012 deadline fixed in the OUR's 2012 consultation document for the determination had also passed. From as long ago as 2004, the OUR had made a Determination, pursuant to section 28(1) of the Telecoms Act that all mobile carriers were dominant in call termination services on their respective networks. This triggered the statutory obligations set out under section 30 of the Telecoms Act upon dominant carriers, which includes the obligation that their interconnection charges must be cost oriented and guided by the principles set out in section 33. However that whole process had been in limbo for years. There was concern about perceived reduction in the competitiveness of the mobile telecoms market thought to require an urgent response to the current changed situation in the sector. One of the main concerns had to do with the undesirable effects of above cost mobile termination rates. This perceived changed landscape was due to the fact that whereas previously there had been three operators, there were now only two, with the largest operator in the market, by any objective standard, increasing its market share.

[43] Mr. Hylton submitted that where in Bennion there is reference to the fact that the rule also requires that the post-enactment history be taken into account, this should include the fact that the interim rate is being fixed for the first time, section 37A is discretionary and not mandatory, and the OUR estimates that the consultative process on the "final" MTR will be completed in September 2012. He also submitted that the fact that there is going to be a constitutional challenge to section 37A by Digicel, separate and apart from any application for judicial review, should also be taken into account.

[44] Having looked at matters that have helped to illumine the text, and looking at the context of the enactment, in my judgment there can on a balance of probability be no real doubt as to its meaning. The rules of natural justice are referred to and enshrined in section 4(2) of the Telecoms Act which mandates the OUR to observe the rules of natural justice in carrying out its functions under the Act and also to observe reasonable standards of procedural fairness. The section reminds the OUR that they must observe

the rules of natural justice. The section goes on to elaborate that, without prejudice to the generality of the foregoing, the OUR shall for example, consult, and give parties likely to be affected by a decision an opportunity to be heard. However, it does not at all seek to limit the generality of the terms "the rules of natural justice" and "reasonable standards of procedural fairness". The Telecoms Act and the section do not provide any special definition of "the rules of natural justice". It therefore seems obvious that the rules of natural justice and/or procedural fairness referred to in section 4(2) encompass the rules of natural justice at common law. Section 37A (6) states that the power of the OUR to set interconnection charges under section 37A shall not be subject to the provisions of section 4(2). Therefore the power is not governed by the provisions of section 4(2). This can really only have one meaning; and that is that the exercise of the power to fix interim, as opposed to final rates, is not subject to the rules of natural justice or procedural fairness. It means that the OUR are not required to observe the rules of natural justice. In my view the section cannot be given any other intelligible meaning without doing violence to the provision.

[45] Where a duty to comply with natural justice has been deliberately omitted from legislation, the Court cannot import a duty to give a hearing or consult when it is clear that the legislature has intentionally excluded such a right- see Halsbury's Laws of England Volume 1(1) 4th Edition paragraphs 105 and 107, cited by Mr. Wood. Paragraph 105- "In a particular context, the presumption in favour of the rule may be partly or wholly displaced where compliance with it would be inconsistent with a paramount need for taking urgent preventive or remedial action….." It is also useful to have regard to the Judicial Review Handbook by Fordham, 5th Edition, paragraphs 60.3.4 to 60.3.6 referred to by the OUR.

[46] In **Wiseman v. Borneman** [1971] A.C. 297 at 308; [1969] 3 All E.R. 275 at 277, Lord Reid noted that the power to supplement the procedures set out in legislation in order to import natural justice is an unusual power and before it is exercised it must be clear that the statutory procedure is insufficient to achieve justice. The Court must ensure that to require additional steps would not frustrate the purpose of the legislation.

It was also pointed out, at 318 C/285 (i), that the legislature may certainly exclude or limit the application of the general rules of natural justice, but the courts have always insisted that this must be done clearly and expressly, from express words of plain intendment. As Mr. Wood pointed out, the authority of **Ahmed v. Her Majesty's Treasury**, cited on behalf of Digicel in support of their arguments as to construction, at paragraphs 44,111,193 and 204 supports the principles as enunciated in **Wiseman v. Boreman**. The Canadian decision of **Manitoba v. Canada (National Transportation Agency** [1994] Carswellnat 1442F, cited by Lime is also instructive.

[47] I note that at paragraph 60.3.6 of the Fordham, under the heading "Supplementing the Act and preserving legislative purpose", there is a reference as follows:

> …..*R v. Secretary of State for Education and Employment and the North East London Authority, ex p M [1996] ELR 162, 208D ("The underlying statutory objectives of this new group of powers must not be stultified by an over-zealous super-imposition of common law procedural requirements").*

[48] In my judgment, the language used in section 37(6) is expressly, absolutely and patently clear, that it was intended to exclude any right to a hearing or consultation in exercising the power to fix interim charges. It is not realistically arguable that the section is capable of another meaning.

[49] In this case, Digicel complains, despite the express provisions of the Act, that in fixing the interim rates the OUR ought to have had further consultation. However, it is clear on the evidence that from as far back as 2010, considerable opportunity has been provided by the OUR for consultation, and that Digicel has been consulted.

[50] Further, there has been ongoing consultation, as evidenced by the Consultation Document of February 2012 referred to in Mr. Fraser's First Affidavit.

[51] In addition, the ultimate final rate will continue to be subject to compliance with

the rules of natural justice and consultation under Rule 4(2). The fact that Parliament omitted those provisions from the interim determination of rates does therefore also support the stance, as argued by Counsel for the OUR, that the omission was deliberate and the necessary intendment of the amending legislation.

[52] I think that it is also important to note that the new power under section 37A to set interim interconnection charges does not exist in a vacuum. The Statute clearly identifies the scheme and stage at which the OUR may exercise the power to set interim rates. What does the section say? Subsection (1) that provides that the OUR may set interim interconnection charges. However, subsection 37A(1) states that it is subject to subsection 2. This means that subsection (1) is governed by subsection (2). Subsection 2(a) speaks to the fact that the interim charge is to be for a defined period. Subsection 2(b) is the subsection that I really wish to emphasize in this context. It states as follows:

> *(2) Interim interconnection charges……set pursuant to subsection (1) shall-*
>
> *(a)…*
>
> *(b) be established, pending the completion of the process to determine interconnection charges*
>
> *……., in accordance with sections 4(2), 33 and 46.*
>
> (My emphasis).

[53] The interim rate-setting power can only be exercised therefore after the process to determine the ultimate interconnection charges has been commenced and before its completion. However, the power to set those ultimate charges are governed by section 4(2) and natural justice and procedural fairness. This means that the interim rates will be set against the backdrop of the ultimate charge setting process which is covered by all of the natural justice safeguards. The interim rate setting stage is therefore a stage/ process within a process that is itself fully cloaked and adorned with the protective coat of natural justice, including the right to consultation. I think that Digicel's submission in their reply to the OUR's authorities, at paragraph 15, is correct that some of the decisions relied upon by the OUR in saying that "where the decision is an interim

decision, which will be subject to a further hearing and consultation leading to a final determination, justice will be achieved and the Courts shall not intervene", are of a different type than the interim decision in the instant case. This is because in some of them, such as the taxpayer and the suspension cases, the right to further consultation or hearing or the right of appeal is in relation to a different type of subject matter than here. In the instant case the right of consultation or hearing or appeal is in relation to the process to set a final rate, but not in relation to the interim rate set by the Determination. That may be true, but what Digicel's submissions do not take account of is the fact of the overlap in terms of the stage at which the interim rate can be set; it can only take place within the ambits and parameters of that process for the setting of the final rate. By virtue of its timing, it takes place within the consultation process. It is only the OUR, the Regulator, not the Court, not Digicel or Lime, that is empowered to set the interim rates. Therefore, the imput of Digicel and the other operators in relation to the setting of the interim rates can be amply covered in the underlying consultation process, about costs and other data requested by the OUR in respect of the final rates. Therefore, as the interim rate setting stage occurs along the timeline of the final rate setting process, there is really consultation going on, before, around and after the setting of the interim rate. The statutory procedure is therefore a comprehensive code and there is no gap or necessity for the Courts to fill any gap. It is sufficient to achieve justice and to require additional steps would really be unnecessary, and would frustrate and stymy the apparent purpose of the legislation.

[54] In my judgment, Ground 1, or rather Ground 5 l of the application, is not an arguable ground that has any realistic prospect of success. It should be noted that my decision in respect of this ground in no way affects the Constitutional challenge which Digicel has indicated it intends to mount in relation to section 37A.

GROUND 2(5 m)- LEGITIMATE EXPECTATION

[55] In relation to this ground also there does not appear to me to be any arguable ground with a realistic prospect of success. It is clear from the evidence, in particular the exhibit to Mr. Fraser's First Affidavit that the OUR made a continuing attempt to consult,

and this was inclusive of the issue of consultative documents published 21 February 2012 which set out clear guidelines and timetables for the necessary information to be provided. It indicated that responses were to be received by 20 March 2012 and 3 April 2012, respectively and in keeping with that schedule, the further timetable that the date for publication of the determination of the interconnection rates as determined by the OUR would be May 1 2012. As Digicel's supplemental submissions indicate, this ground, like the natural justice ground, is not affected by any dispute as to facts.

[56] In addition, as Lime's Counsel Mr. Braham pointed out in the written submissions on behalf of Lime, this is a new power, and there could be no legitimate expectation if it required the OUR to act contrary to the terms of the new section 37A legislation-see **Regina v. Secretary of State for Education and Employment, ex parte Begbie** [2000] 1 W.L.R. 1115.

THE OUR'S SUBMISSIONS THAT DIGICEL SUPPRESSED MATERIAL INFORMATION AND HAS BEEN IN BREACH OF STATUTORY DUTIES AND FAILED TO PROVIDE INFORMATION TO THE OUR

[57] In the course of making submissions, the OUR have submitted that Digicel have suppressed information and have failed to comply with their statutory duty to provide the information that would be the basis for consultation. They have referred to these alleged breaches as a basis for finding that Digicel has not come with clean hands, and that in so far as judicial review is a discretionary remedy, the improper conduct of Digicel is a proper basis upon which to refuse leave. Reliance was placed upon a number of authorities, including **R v. Kensington Income Tax Commissioners, ex parte Polignac** [1917] 1 K.B. 486. However, Digicel's conduct is also relied upon by the OUR in the context of the ground placing reliance upon legitimate expectation. Paragraphs 8-12, 29, 32 and 33 of Mr. Swaby's Affidavit are particular relevant, as are the exhibits 4-7, being letter dated 8th June 2010 from the OUR to Digicel, letter dated 1st February 2011 from OUR to Digicel, emails dated 21st February 2011, and email dated 22nd November 2010 from Richard Fraser to Maurice Charvis and George Wilson. At paragraphs 33 and 34, the OUR's Counsel submit as follows:

33. In any event, there would be nothing to consult about when Digicel had failed to comply with its statutory duty to provide the information that would be the basis for the consultation and that failure amounted to a criminal offence. …

34. Accordingly, there could be no breach of any legitimate expectation in the circumstances until Digicel complies with its statutory duty to provide its supporting cost and traffic data, which is the pre-condition for consultation. It was simply futile for the OUR to engage in any further attempt to obtain the information which Digicel had failed to provide for the preceding two years….

[58] At paragraph 4-1 of the Determination, the OUR stated that " In preparation for setting a regulated MTR, the Office asked operators to submit an RIO inclusive of rates along with justification for how those rates were derived. In response, LIME submitted a fully allocated cost (FAC) model and Claro submitted a top-down LRIC model while, Digicel has not to date submitted any justification for its termination rate despite repeated requests to do so". At paragraphs 44-46 of his First Affidavit Mr. Fraser purports to respond to the OUR's criticisms.

[59] At paragraph 46 a,b amongst other matters, Mr. Fraser proferrs a context as follows:

46. I note the OUR's criticism of Digicel for not producing a costs model. Although not strictly relevant in relation to whether the OUR had proper evidence before it on which it could assess the need for and level of interim mobile termination rates, I wish to set out the context:

a. In November 2010, Digicel submitted a draft RIO, and proposed that its existing mobile termination rates be applicable for the purposes of its draft RIO. The rationale for proposing our existing rates was that these rates were first implemented in 2001 and had remained unchanged since, despite the Jamaican dollar devaluing by over 85% in the intervening period.

b. Furthermore, the OUR had on several occasions indicated that their work to develop a cost model was "around the corner". As a result Digicel

did not consider it necessary to incur the additional expense (which would exceed US$500,000.00) of developing its own cost model for this purpose…

[60] During the course of the hearings, Mr. Wood indicated that Mr. Hylton had brought to his attention an email from Mr. Fraser to Mr. Swaby dated May 5 2012, submitting certain cost information. This email was handed up to the Court. Mr. Wood also handed the Court an email from Mr. Swaby to Mr. Fraser and Mr. Tjernell, dated February 21 2012. It was Mr. Wood's position that the information referred to in Mr. Fraser's email of May 5 relates to data requested for the development of the LRIC Model that was actually requested. It was the OUR's position that this information does not relate to the substantiation of the RIO proposed by Digicel, which RIO was submitted late, and in respect of which the supporting data was requested from June 2010. The OUR's position as stated in paragraph 11 of the Affidavit of Mr. Swaby is that substantiation remains outstanding. According to Mr. Hylton the raw data has been provided and he opined that the data does not change depending upon the purpose it is being used for.

[61] Be that as it may, it is quite plain that Digicel did not for an extended period of time, produce the information and data requested by the OUR. First Digicel queried the necessity for what the regulator the OUR was asking for, then there was unarguably delay in providing the information, assuming Digicel have even now provided the requested information, which the OUR say they have not.

[62] In my view, the contents and context of the correspondence and emails, and the general approach of Digicel to the OUR's request and overtures for information and data is such as to put Digicel's complaint of a lack of consultation in a significantly different light. It also impacts on the ground based upon legitimate expectation. Further, it seems clear, having regard to the evidence, that Digicel were tardy in providing information. Indeed Mr. Hylton quite candidly and understandably conceded that there is no dispute that there was a delay in providing data. Even if Digicel provided

information on May 5 2012, that would have been well after deadlines provided and repeated requests. I am reminded of the words of Lord Hailsham of St. Marylebone in **Pearlberg v. Varty** [1972] 1 WLR 534, at 540 G:

> *The taxpayer in this case will be given a reasonable opportunity of presenting his case at the proper time, if not at the stage he demanded it, that is when the proceedings had not yet reached the point of judicial determination. If this comes a little late for his liking, it is at least in part because he thought it fit to make no income tax returns at all from 1936 to 1957, although he was repeatedly invited by the revenue authorities to do so by the service of the statutory notices, at least in the years relevant to this appeal*

[63] In addition, I accept on the evidence, Mr. Swaby's statement at paragraph 32 that Digicel did not prior to the commencement of this matter indicate the reasons referred to in paragraph 46 of the Fraser Affidavit for failing to submit the requested data. In fact, this is objectively supported by the fact that via an email from Mr. Fraser dated February 21, 2011 Digicel indicated that the information was being prepared for submission to the OUR in the required format. Further, at paragraph 15 (a) of his Affidavit Mr. Swaby, stated:

> *15. That I respond to paragraph 24 of the Fraser Affidavit as follows:*
> *(a) the fact that rates may be long standing does not mean that they could never be changed. Indeed all mobile carriers from as early as 2004 were aware that the OUR would be reviewing and approving mobile termination rates and the actual review would have been completed had Digicel not sought to appeal the OUR's determination and obtain a stay of same. Further and in any event as the Telecoms Act requires that interconnection charges of a dominant carrier be cost oriented. Periodic review and adjustment of the interconnection charges would therefore be necessary to ensure this as since 2001 there have been significant changes in the telecoms sector (both market situation and technology) which would impact cost.* (My emphasis)

[64] Common sense tells me that this question of the impact on costs and movement

over time makes the explanation by Mr. Fraser at paragraph 46(a) of his Affidavit as to why in November 2010 Digicel felt justified in submitting the rates first implemented in 2001 in its draft RIO, a little bit hard to accept. See also paragraph 2.9 of the OUR's Determination Notice dated February 2001, exhibited to the First Affidavit of Mr. Fraser.

[65] All of these considerations I bear in mind in addition to the fact that the power to fix an interim rate was a new power created by the amendment in May 2012, which clearly provided that the exercise of the power was not subject to any duty to consult or to give a hearing by the exclusion of section 4(2). In my view, this second ground of legitimate expectation is also misconceived, weak, and has no realistic prospect of success.

GROUND 3 (5m) –**IRRATIONALITY**

[66] In relation to the ground of irrationality, there are two main limbs of complaint. Firstly, Digicel submits that there is no rational basis on which the OUR decided to issue the Determination. Secondly, in issuing the Determination the OUR took into account wrong factors and failed to take into account relevant factors.

[67] As regards the issue of whether there was no rational basis for the OUR to decide to issue the Determination, I am reminded that there are clearly matters that are within the province of, or best resolved by, bodies such as the OUR possessed of specialist knowledge, not possessed by the Courts. It is not for the Court or any of the operators in the mobile telecommunications industry to set interim interconnection rates; it is for the OUR. That is the body to whom Parliament has entrusted this duty, power, and discretion. Regulation of this industry has been entrusted to the OUR, and the questions of dominance, its effects and the promotion of fair competition, protection of the customer, and what best suits the needs of the market have been left in the hands of the OUR. This is a market which also involves scientific and technological expertise. When Parliament entrusts an expert body with the task of fulfilling the intentions of Parliament in a specialized sphere, I start from the premise that the courts will be very slow to interfere. It is well known that the threshold for irrationality is quite high because

courts are not set up to review the merits of the competent authority's decision. The unreasonable decision is therefore required to be something exhibiting an overwhelming sort of flavor. Where it concerns the balance of relevant considerations, a decision is unreasonable and therefore unlawful if manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration.

[68] I note that in their supplemental submissions Digicel's Counsel submit that there may be disputes as to fact in relation to this ground. Further, that even in the unusual event that the court needs to resolve any factual disputes, which factual disputes between the parties it was submitted have been revealed from the filing of the Affidavits of the OUR and Lime, the court would have to do so at the substantial stage and not at the leave stage. It was further submitted by Digicel that in determining whether Digicel has an arguable case with a realistic prospect of success, it would not be necessary and in fact would be inappropriate for the court to attempt to resolve these factual disputes. Digicel submits that this is because Digicel meets the threshold for leave notwithstanding the disputed facts. However, I wish to make it clear that in examining the evidence supporting the arguability of this ground of irrationality I have not at all attempted, nor needed to resolve any disputes as to fact. What I have done is to look at the relevant evidence and to see whether, after looking at it, an arguable ground, meeting the desirable threshold, is revealed. It is to be remembered that in **Sharma** the Privy Council reminded that the Court had to look at all of the relevant evidence and could not simply assume that the allegations put forward by an applicant are true. Since there is only rarely cross-examination in judicial review, and certainly not at the leave stage, what practically does this signify? It must mean that the Court has to look at all the evidence relevant to arguability, and decide whether arguable grounds with realistic, not notional or illusory, prospects of success are made out.

[69] When it comes to regulators in specialized areas such as this commercial industry, it is not the function of the court in anything other than a clear case to second guess their decisions, or to have their decisions under a microscope. Essentially, they ought, except in cases that are clear and strong, to be left to get on with the business at

hand. One of the complaints made is that there is no rational basis upon which the OUR decided to issue the Determination Notice. However, the OUR have been given the power by Parliament. They have been given that discretion by Parliament and they must be given reasonable latitude within which to exercise that discretion. The complaint here is that the OUR did not have to, or there was no necessity for them to have set Interim Rates. Let us assume that it is so. In what way has Digicel shown by the evidence or argument that there is a realistic arguable ground that this was manifestly wrong, perverse or unfair? In my judgment, what has been put forward by Digicel falls woefully short of this.

[70] The only matters which the OUR must have regard to in setting the interim rates are-

(a) reciprocity;

(b) local or international benchmarks; or

(c) such other relevant data or information available to the OUR from time to time.

[71] The OUR had the power to set interim rates pursuant to section 37A and it could not be said on the evidence or on the grounds set out in the application that there are arguable grounds with reasonable prospects of success that the OUR's decision to set the interim rates was so unreasonable that no authority acting reasonably could have come to it. It is not arguable with any real prospect of success that it was arbitrary or illogical. It could not be said to have been outside the range of reasonable responses in the circumstances. It may be that Digicel did not think it was necessary, but that is really not the relevant issue. It is also clear from a reading of the Determination that the application of the HH Index about which Digicel complains, did not inform the actual interim determination of a $5.00 MTR. Mr. Swaby in his Affidavit makes the point that the results of the HH Index merely provided background information and did not inform the value of the interim rate set. Further, as the OUR's Attorneys point out in their submissions, the merger of Claro and Digicel which occurred in August 2011 was a merger of carriers who had already been found by the OUR to be dominant on their own

networks. The OUR concluded that Claro's exit from the market caused the industry to become more concentrated and thereby more fragile. The OUR concluded that the merger resulted in a reduction in the competitiveness of the market. Quite apart from the technicalities of the HH Index, I agree with Mr. Wood Q.C that the conclusion is supported by common sense when two of three carriers merge and in circumstances where prior to the merger, Digicel, one of the carriers involved in the merger, was the largest carrier. Digicel is not by way of this application seeking leave to apply for an order of certiorari to quash the OUR's use of the HHI Index, it is the Determination of the Interim Rates that Digicel is seeking to quash.

[72] In addition, there has been evidence that there have been recent actions by Lime marketing on-net calls at $2.99 and subsequently Digicel has been marketing on-net calls at $2.89. At paragraph 31 of his Affidavit, Mr. Swaby states that these rates show that the OUR was not unreasonable or irrational in setting the $5.00 rate. This is because, according to Mr. Swaby, the $2.99 and $2.89 involve both the origination and termination of the call. Mr. Swaby reasons that as the majority of the operators calls are on-net, this reduces the probability that these rates are below costs.

[73] In my judgment Digicel has not adduced evidence to the requisite high standard to make the conclusions set out in its grounds on irrationality arguable with a realistic prospect of success. What evidence there is before the Court demonstrates that the OUR took into account the matters specified in section 37A as being the matters which it should consider. Digicel also does not have any realistic prospect of succeeding on this ground either. As Sykes J. indicated in **R v. IDT, ex p. Wray and Nephew**, an application cannot "simply be dressed up in the correct formulation and hope to get by". The evidence must be strong and clear to make the conclusions of unreasonableness and irrationality arguable with realistic prospects of success. There is none such in this case.

THE ISSUE OF WHETHER AN ALTERNATIVE REMEDY EXISTS

[74] I agree with the OUR that an alternative remedy does not have to be an appeal

to the court. I also accept that alternative remedy redress can encompass the situation where an interim decision is taken, following the process laid down in a statute and where this process leads to a final decision in circumstances where natural justice is afforded. There is clearly some room for adjustment, in so far as the process is still on-going and interim rates are by their nature temporary, and subject to change. As stated in The Business of Judging Essays, at page 190, there is obvious good sense in the rule requiring exhaustion of remedies where the alternative remedy may give the applicant substantial relief on the merits as opposed to mere correction of procedural error. It is clear that Digicel has been, is being, and the OUR assures, will continue to be, consulted during this process for arriving at the final rates. However, I am not satisfied that, as submitted by the OUR, any loss to Digicel caused by the interim decision can be "put right" or taken into account in the final determination. At paragraph 41 of the written submissions it is stated that the OUR expect that with the cooperation of the operators/providers, the OUR is committed to completing the determination process in September 2012. The September 2012 time frame is well ahead of any date that could be arranged for judicial review. In those circumstances awaiting the final Determination may well afford a quasi-alternative remedy, on balance, and weighing the relevant issues proportionately and in perspective. At the same time, if the OUR does not act reasonably with regard to keeping to this timeline no doubt Digicel could then consider what legal recourse is then available to it at that time. It is well-known that in relation to judicial review, Courts do not grant remedies in vain. There must also therefore be at the time of an application for leave a realistic prospect that the court would give a remedy in the exercise of its discretion. The availability and on-going nature of the process to determine the Final rate is a relevant consideration for me to take into account in deciding overall how to exercise my discretion, even if the remedy does not operate at such a high level as to amount to a discretionary bar to the grant of leave.

THE DISCRETION

[75] As set out above, I am of the view that the applicant Digicel has failed to meet the threshold for the grant of leave to apply for judicial review. Most of the relevant

factors can be approached through the prism of arguability and the realistic prospects of success. However, in any event, it does appear to me that in so far as the leave stage involves the application of a discretion, leave is not simply granted as a matter of course –see **R. v. The General Commissioners for the Purposes of the Income Tax Acts for Kensington, ex p. De Polignac** [1917] 1K.B. 486. An applicant for leave to apply for judicial review has the same duty of good faith and of not approaching the court with unclean hands as does an applicant for equitable relief, however the approach and weight to be attached to an applicant's conduct must be exercised with caution. I would not agree with Counsel for the OUR that there has been any suppression of facts by Digicel, or that it could be said that Digicel has approached the Court with unclean hands. At the same time I think that it has been very useful for this application to have been heard inter partes, so that in considering whether to grant leave, a more full and contextual, factual and circumstantial matrix and evidential base has been available for assessment by this Court. Even if Digicel has now provided some information, which the OUR states is still not the information that it has been requesting for the past almost two years, I find that the correspondence which was put before the Court by the OUR was useful. Albeit there was mention of this correspondence in Appendix 1 of the 22- page Determination Notice placed before the Court on the ex parte application, the manner in which it has been presented by the OUR has clarified and placed focus on the fact that the OUR has at different stages (whether rightly or wrongly), considered that the applicant Digical was deliberately disregarding its requests for information, and further, that the regulator the OUR considered Digicel to be in breach of its statutory obligations under the Telecoms Act. Digicel has conceded, quite rightly I think, that there has been delay in the provision of information, though they have proferred explanations for this. These are in my view important facts that should have a judge's specific attention alerted to it so that the total picture can be assessed. This is particularly so in the context of this application, involving as it does, principally a complaint that Digicel has been treated unfairly by the OUR, which has allegedly misconstrued its powers under the legislation, acted in breach of the rules of natural justice, and not afforded proper consultation to Digicel.

[76] In my judgment, for all of the foregoing reasons, the application for leave to apply for judicial review ought to be refused. In light of that decision, the question of whether or not the grant of leave should operate as a stay of proceedings does not arise.

WHETHER GRANT OF LEAVE SHOULD BE ORDERED TO OPERATE AS A STAY

[77] However, in the event that I am wrong to refuse leave, and that leave ought to be granted, for a number of reasons I will now try to analyze whether, if leave were to be granted, the grant should operate as a stay of the Determination. I am doing so because of the very important issues raised in this case as to the true meaning of a stay, its unclear relationship with interim injunctions, its potential effects on third parties, and its interrelationship if any with interim injunctive relief. I also do so because of the dearth of local authority on the point, and out of deference to the very thorough and comprehensive alternative arguments addressed to me by experienced Counsel, in extensive form, both written and oral.

[78] A stay does not follow automatically from the grant of leave. Rule 56.4(9) states:

> *56.4(9) Where the application is for an order (or writ) of prohibition or certiorari, the judge must direct whether or not the grant of leave operates as a stay of the proceedings.*

[79] In the Privy Council decision of **Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Ltd.** [1991] 4 All ER 65, cited by all Counsel in this case, the applicants who were retail motor dealers applied for an order of certiorari to quash the decision of the Minister to reduce the allocation of imported vehicles made to them for the year 1988-89, or alternatively for an order of prohibition directed to the Minister prohibiting him from implementing the allocation. As a further alternative an order of mandamus was sought directing the Minister to make a fair allocation, and the applicant further applied for an order that all allocations be stayed pending the final determination of the proceedings. The Privy Council held that what was really being sought was an injunction, and therefore the order which had been made for a stay was inappropriate and inapplicable. At pages 71c-72a, Lord Oliver discussed the nature of a stay of

proceedings. He stated:

> *A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place. It is not an order enforceable by proceedings for contempt because it is not, in its nature, capable of being 'breached' by a party to the proceedings or anyone else. It simply means that the relevant court or tribunal cannot, whilst the stay endures, effectively entertain any further proceedings except for the purpose of lifting the stay and that, in general, anything done prior to the lifting of the stay will be ineffective, although such an order would not, if imposed in order to enforce the performance of a condition by a plaintiff(eg. to provide security for costs), prevent a defendant from applying to dismiss the action if the condition is not fulfilled…. Section 564B of the Civil Procedure Code provides:*
>
> *'..the grant of leave under this section to apply for an order of prohibition or certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the court or judge otherwise orders.'*
>
> *This makes perfectly good sense in the context of proceedings before an inferior court or tribunal, but it can have no possible application to an executive decision which has already been made. In the context of an allocation which had already been decided and was in the course of being implemented by a person who was not a party to the proceedings it was simply meaningless. If it was desired to inhibit JCTC from implementing the allocation which had been made and communicated to it or to compel the appellant, assuming this were possible, to revoke the allocation or issue counter-instructions, that was something which could be achieved only by an injunction, either mandatory or prohibitory, for which an appropriate application would have had to be made . The appellant's apprehension that that was what was intended by the order is readily understandable, but if that was what the judge intended in ordering a stay, it was an entirely inappropriate way of setting about it. He had not been asked for an injunction nor does it appear that he considered or was even invited to consider*

whether he had jurisdiction to grant one. Certainly none is conferred in terms by s.564B. An injunction cannot be granted, as it were, by a sidewind and if that was the judge's intention it should have been effected by an order specifying in terms what acts were prohibited or commanded. As it was there were no 'proceedings' in being upon which the 'stay' could take effect. One is left with only two possibilities. Either Clarke J was granting relief which was entirely inappropriate and inapplicable to the circumstances before him or he was seeking to enjoin the activities of the JCTC, which was not a party to the action, and to do so by wholly inappropriate machinery. In either event, the order was meaningless.

[80] It was Mr. Hylton's submission that **Vehicles and Supplies** was based upon an interpretation of section 564B of the CPC and that that section was very different from the regime created by the Civil Procedure Rules 2002. He pointed out that subsequent authorities since **Vehicles and Supplies** have criticized the decision and distinguished it on the basis that it is confined to the specific(now repealed) provisions of the CPC-**R v. Secretary of State for the Home Department ex parte Muboyayi** [1991] 4 All E.R. 72, 90 . Reference was made to **R (on the application of Ashworth Hospital) v. Mental Health Review Tribunal for West Midlands and North West Region** [1993] 3 All E.R. 537, where the English Court of Appeal at paragraph 42 stated:

[42] The purpose of a stay in a judicial review is clear. It is to suspend the 'proceedings' that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the benefit of his success. In Avon, Glidewell L.J. said that the phrase "stay of proceedings" must be given a wide interpretation so as to apply to administrative decisions. In my view, it should also be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in Vehicles and Supplies ….would indeed be regrettable, and if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for

judicial review.

[81] The Court in that case preferred to follow **R v. Secretary of State for Education and Science, ex p. Avon** [1991] 1 Q.B. 558, where the Court decided that the phrase "a stay of proceedings" is apt to include decisions, and the process of arriving at such decisions, made by persons and bodies other than courts of law.

[82] Mr. Wood submitted that the stay that is being sought by Digicel is a stay of the Determination until the hearing and determination of the application for judicial review. It is not a stay of any proceedings that are continuing before the OUR but rather what is sought is an order to restrain or prohibit the Determination from coming into effect. It is therefore, Mr. Wood submits, an attempt to obtain an interim injunction by a sidewind, as prohibited in **Vehicles and Supplies**. This injunction is being sought without an express application for an injunction, and without squarely facing and dealing with the relevant principles governing the grant of such an interim injunction to restrain the order made under a statutory power from taking effect. It was Mr. Wood's submission that the decision in **Vehicles and Supplies** does not turn on any interpretation of any special rule as to what is a stay. It is, he submitted, a decision of general application and it continues to be binding on this Court unless it has been overruled as incorrect bya subsequent decision of the Privy Council or the House of Lords/UK Supreme Court.

[83] In relation to the question of whether the grant of leave should operate as a stay, Lime's Attorneys submit that a stay in these circumstances is inappropriate as this is not simply an action between Digicel and the OUR, rather this matter affects all carriers in the telecommunications market including Lime. In relation to the nature and effect of a stay, Lime's lead Counsel Mr. Braham Q.C. also referred to the **Vehicles and Supplies** decision. The Court was also referred to the leading text De Smith's Judicial Review, (6th Ed) (2007), paragraphs 18-017-18-018, where **Vehicles and Supplies**, **Avon** and **Muboyayi** are discussed. The text states:

Stay of Proceedings

18-017

Under the C.P.R. r. 54.10(2), the court may grant a stay of proceedings when the claimant is granted permission to proceed with a judicial review claim. Authorities are divided as to the scope and effect of such a "stay". The Court of Appeal has held that the term is apt to include executive decisions and the process by which the decision was reached and may be granted to prevent a minister from implementing a decision. The Privy Council has however held, obiter, that a stay of proceedings is merely an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place, and that it could have no possible application to an executive decision which has already been made. The position still awaits clarification by the House of Lords.

18-018

Given the fundamental conflict of authorities over the basic nature of the order, it is difficult to describe with any certainty the principal features of a stay of proceedings. Unlike an injunction it is an order directed not at a party to the litigation but at the decision-making process of the court, tribunal or other decision-maker. It may not, therefore, be an order capable of being breached by a party to the proceedings, or anyone else, and may not be enforceable by contempt proceedings. A decision made by an officer or minister of the Crown can be stayed by an order of the court. Now that it is clear that interim injunctive relief can be ordered against officers and Ministers of the Crown, and the court has power to make interim declarations, this characteristic of the stay is of less importance than it once was. There is much to be said for the view that, in the light of these developments, stays of proceedings may be confined to use in relation to judicial proceedings. It does however, as we point out below, act as an effective brake on administrative action and it is not only the judicial proceedings which are brought to a halt while the stay is in operation.

[84] It is of more than passing interest, that unlike the **Muboyayi** decision, where the Court was of the view that s. 564B of the CPC is in different terms than those contained in RSC Order 53 r. 3(10), the learned authors of the De Smith, at footnote 46, state that

in **Vehicles and Supplies**, “The Board was considering s. 564B of the Jamaican Civil Procedure Code which was in similar terms to RSC, Ord. 53 r. 3(10)(a) (now CPR r. 54.10(2)..” I also note that where the learned author has stated that the position still awaits clarification by the House of Lords, a footnote appears which states that “The Law Commission has recommended that “proceedings” in this context ought to be given a narrow meaning. This is in light of the fact that injunctions are now available against ministers on a claim for judicial review and the suggestion that the court ought to be empowered to grant interim declarations…” I take that to suggest that it is being recommended that a restricted meaning along the lines discussed in **Vehicles and Supplies** should be applied.

[85] Mr. Braham submitted that the position stated by the Privy Council in **Vehicles and Supplies** represents the law in Jamaica when dealing with a stay of proceedings in judicial review proceedings. Counsel submitted that as a consequence, this Court is disabled from granting a stay in these circumstances where there is not a court or tribunal carrying on a hearing. It was also pointed out, I cannot now recall by which of the learned Counsel making submissions, that , not only is **Vehicles and Supplies** a decision of Jamaica’s present highest court, the Judicial Committee of the Privy Council, but in addition, the decision is in respect of an appeal from the Court of Appeal of Jamaica.

[86] The position is really not very clear. It is true, that as Mr. Hylton submits, the CPR, unlike s, 564B of the CPC, does mandate the Court to on every occasion when an application is made for leave to apply for an order of certiorari or mandamus, direct whether or not the grant of leave shall operate as a stay of proceedings. It is also true that unlike the CPC, the CPR, specifically Rule 56.4(10), (read in conjunction with Rule 17.1), expressly allows a Court to grant injunctive relief in judicial review matters.

[87] However, I do not really think that in discussing the nature of a “stay” in **Vehicles and Supplies** the Privy Council’s decision turned on the interpretation of the particular rule s. 564B of the CPC, anymore than in discussing the nature of interim injunctions in

NCB v. Olint Lord Hoffman was interpreting rules in Part 17 of the CPR. The wording of Rule 564B and the wording of Rule 56.4(9) are not in any event sufficiently dissimilar to support the distinction contended for by Digicel's Counsel. I agree with Mr. Hylton that the language of CPR 56.4(9) could suggest that a "stay of proceedings" was meant to include a decision of an administrative body such as the OUR, by virtue of the fact that a judge must direct in all applications for leave to apply for certiorari whether or not the leave is to operate as a stay. I can see the force of arguing that implicit in this wording is a premise that all decisions that are subject to certiorari are capable of being stayed. This is because it could be argued that all decisions are therefore considered to take place in the context of what may be termed "proceedings". However, that is not the only reasonable interpretation that can be placed on the Rule. It may also mean that although the judge must make a direction whenever there is an application for leave to apply for certiorari as to whether the grant of leave is to operate as a stay of the proceedings, the judge must order that there is no stay where there are no proceedings in being upon which the stay can take effect, meaning that there are no proceedings going on before an inferior court or tribunal.

[88] It is with some regret that I have come to the conclusion that I am bound to hold that the reasoning in **Vehicles and Supplies** applies to the instant case. In **Vehicles and Supplies**, the Privy Council considered that a stay has no application to a factual situation where it is to prevent a decision which has already been made but not yet implemented or fully implemented, from taking effect, such as the allocation of quotas for the importation of motor vehicles. It does not appear to me that the factual situation here can be readily distinguished, given that the OUR's Determination decision has already been made, even if not yet implemented, it is scheduled to come into effect on July 15 2012, and there are no "proceedings" in relation to the Determination ongoing before the OUR.

[89] I say that it is with regret that I have come to that view because I think that there is much to be said for the fact that a stay in relation to judicial review proceedings is really for the purpose of enhancing and facilitating the court's review of the challenged

proceedings and that the phrase “stay of proceedings” ought to be given a wide interpretation. It is not really there for the parties as such, as I indicated, was my view in **Tyndall**. I can see the merit in preserving the status quo and that this may in many instances make the judicial review process more effective. A stay can ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the benefit of his success. In that regard, it may well be more comparable to a stay of execution, rather than an injunction. I can also conceive of a situation where a gap in the armoury of judicial review powers may exist if a stay is not given a wider interpretation. A stay is an order directed to the decision-making body and unlike an injunction, it is not directed to a party. Judicial review by way of an application for certiorari is a challenge to the way in which a decision is arrived at, and the decision-maker is not an opposing party anymore than an inferior court whose decision is challenged is an opposing party. An order therefore that a decision of a person or body whose decisions are open to judicial review shall not take effect until the final determination of the challenge does in my view fit more readily under the label of a “stay” rather than an “injunction” as opined in the **Avon** decision. I do not think that it does any real violence to the notion to treat proceedings as being capable of meaning administrative proceedings, or of “proceedings” meaning “the process”, including the decision itself. In **NCB v. Olint**, the Privy Council there criticized the “box-ticking approach” to the question of whether an interlocutory injunction ought to be granted, i.e. by first deciding whether the injunction is mandatory or prohibitory. I can’t help but wonder whether in the arena of applications for leave to apply for judicial review, in some instances arguments over whether an order preventing the implementation of a decision, or the process of arriving at those decisions, is to be classified as a stay or an injunction are not also barren. This is particularly so since the underlying theme, whether of an interim injunction, or a stay is to take the course that is likely to cause the least irremediable harm or prejudice at a time when the Court is uncertain as to the final outcome.

[90] If therefore, the reasoning in **Vehicles and Supplies** is to prevail, then, given that Digicel has not applied for an injunction, and are not entitled to obtain injunctive

relief by a sidewind, then the application for the grant of leave to operate as a stay, must be refused at the outset. Further, or in any event, the Court would have to order that the grant of leave shall not operate as a stay of the proceedings.

[91] In the event that the application in this case does involve a true "stay" application, on the facts of this case it does not appear to me that it would be necessary for a Court to order a stay in order to effectively carry out the review process; there would be no need for a pause. The failure to grant a stay would not render the outcome of the review in favour of Digicel ultimately quashing the Determination nugatory. Nor would the implementation of the Determination affect the Court's ability to carry out its review process.

[92] It follows from the discussion above that it is only if the Court is permitted to look at a stay as encompassing not only the process of arriving at the decision, but the decision itself, and as covering an order suspending or preventing the implementation of the decision, that the cases which indicate that where the grant of a stay may detrimentally affect a third party, the court should treat the application for a stay as akin to an injunction, would arise for consideration in the circumstances of this case. In other words, if what is being applied for cannot fall within the definition of a stay, then there can be no question of treating with it as akin to an injunction. The applicant would have to apply for an actual interim injunction because the applicant must not be granted an injunction by a sidewind.

[93] In the event that I am wrong on this issue, and the application herein can fall within the umbrella of a "stay of proceedings", then I will go on to discuss the applicability of those cases that speak to the correct approach to be taken by the Court when the grant of the stay could detrimentally affect third parties, as I think is arguable here.

[94] In **R v. Inspectorate of Pollution, ex parte Greenpeace Ltd.** [1994] 1 W.L.R. 570, it was held that in proceedings for judicial review, when considering an application

for interlocutory relief by way of a stay of a decision permitting executive action by a third party who is not a party to the proceedings, the court should apply the same principles, in the exercise of its discretion, as it applies when a third party has been made a party to the proceedings and the applicant seeks an interlocutory injunction against that party. It was pointed out by Glidewell L.J., at pages 576 that the Court should look to the substance rather than to the form of the application. It was also held that a cross-undertaking as to damages would have been an entirely permissible condition of the grant of relief, and that the judge was entitled to take into account the fact that there had been no offer by the applicant of such an undertaking.

[95] During the course of this hearing, indeed, on the very last day, in the course of replying to the authorities cited by the OUR and LIME, Queen's Counsel Mr. Hylton indicated that he had instructions from his client Digicel to give an undertaking as to damages, an undertaking by Digicel, that in the event that a stay ought not to have been granted, Digicel will pay any damages suffered by other relevant service providers. Mr. Hylton also sought to explain why Digicel did not see it necessary to give an undertaking as to damages in respect of losses the public may allegedly suffer. In response to a specific enquiry from the Court as to whether the application is for a stay or for an injunction, Mr. Hylton indicated that the application remains an application for a stay. In response to Mr. Wood Q.C.'s comment that Digicel was attempting to move the proverbial goalpost, Mr. Hylton denied that this was so and alluded to his Supplemental Written Submissions, where the possibility of the Court treating an application for a stay as it would an injunction was discussed.

[96] Mr. Wood responded that it would then be for the Court to determine whether the application is for a stay. If it has the effect of an injunction, Mr. Wood submitted that the undertaking proferred goes nowhere near addressing the real harm which will be suffered, that harm being the harm and loss that will ultimately be passed on to the public. He submitted that this is at the heart of the matter and what the OUR are really concerned about. That is what involves the consideration of the public interest and without which there would be no need for these operators to be regulated.

[97] The OUR referred to the decision of the Privy Council in **Belize Alliance of Conservation Non-Governmental Organizations v. Department of Environment of Belize** [2003] 1 WLR 2939. The Privy Council set out the principles that should guide the grant of interim injunctions in public law cases as follows, in an opinion delivered by Lord Walker:

> ***Injunctions in public law cases***
>
> *35. Counsel were agreed (in the most general terms) that when the court is asked to grant an interim injunction in a public law case, it should approach the matter along the lines indicated by the House of Lords in American Cynamid Co. v. Ethicon Ltd. [1975] A.C. 396, but with modifications appropriate to the public law element of the case. The public law element is one of the possible "special factors" referred to by Lord Diplock in that case, at p.409…*
>
> *36. The court's approach to the grant of injunctive relief in public law cases was discussed(in particularly striking circumstances) by Lord Goff of Chielveley in R. v. Secretary of State for Transport, ex p Factortame Ltd. (No. 2)(Case C-213/89)[1991] 1 A.C. 603, 671-674….Lord Goff stated, at p.672, that where the Crown is seeking to enforce the law, it may not be thought right to impose upon the Crown the usual undertaking in damages as a condition of the grant of injunctive relief. Lord Goff concluded, at p. 674:*
>
> *"I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; ….In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken……*
>
> *…*

[98] Lime referred to a number of authorities, including **R v. Ministry of Agriculture, Fisheries and Food and Another, ex p. Monsanto Plc (Clayton Plant Protection Ltd…Intervener)** [1999] QB 1161. I found that case very instructive, particularly as it

discussed competition issues and the considerations of the public interest.

[99] In the course of research being conducted in relation to this application, a decision of the Fair Trading Commission of Barbados, No. 1 of 2012, "the Commission" came to hand and I referred Counsel for all parties to it. Interestingly, the decision was concerned with an application by Digicel(Barbados) Limited for a review of the Commission's decision on the LRIC Guidelines dated 12 December 2011.The Commission's LRIC Decision stated that following the publishing of LRIC Guidelines, Cable & Wireless (Barbados) Limited was required to provide the Commission with proposed model specifications that were consistent with the said Guidelines. The Commission would then review the proposed model specifications and provide feedback to C&W on any required amendments. Subsequently they would then be required to develop the LRIC model based on these agreed model specifications. However, Digicel (Barbados) Ltd. was dissatisfied with the Commission's decision upon a number of grounds and sought a review. Digicel (Barbados) also applied for a stay of the Commission's decision. The stay was refused. The decision makes for interesting reading, not so much for its discussion of law, since I appreciate that whilst the Commission may be a specialist body fulfilling functions analogous to the OUR, like the OUR, it is not a Court and so its views as to the applicable law were not the focus of my attention. However, I found the Commission's discussion of the commercial, business and practical considerations involved in the matter before them, helpful as a matter of logic, and methodological reasoning. The Commission discussed concepts such as actual harm and irreparable damage, public and other interests as well as potential benefits, as well as the nature of guidelines.

[100] In my judgment, in applying the approach along the lines indicated in **American Cynamid**, as expanded upon in **NCB v. Olint,**, the basic principle is that the Court should take whichever course seems likely to cause the least irremediable harm.

[101] In order so to determine this course, the Court has to look at the question of whether there are serious issues to be tried. I have already indicated in relation to my

analysis of whether Digicel had met the threshold for the grant of leave that I do not think that they have done so. I am of the view that there are no serious issues to be tried and therefore a claim for a stay having the effect of an injunction should be refused. However, in the event that I am wrong and there are in fact serious issues to be tried, or arguable grounds with a realistic prospect of success, the applicant Digicel's case is clearly, at best, a weak case. Applying the principles gleaned from the cases, the decision of the OUR is prima facie valid and made in strict compliance with the enabling power section 37A of the Telecoms Act which expressly excludes the rules of natural justice and duty to consult. The case is not of the prima facie firmly based order described in **The Belize Alliance** case, such as to justify so exceptional a course being taken as to restrain a public authority by a stay in the nature of an interim injunction from enforcing an apparently authentic law. A prediction as to the final outcome in this case as discussed in the **Factortame** case, would weigh heavily in favour of the OUR, and against the applicant Digicel.

[102] In this case, as in the **Monsanto** case, the normal principles for the grant of interim relief are to be applied, that is to be done in the context of the public law questions to which the judicial review proceedings give rise; and such proceedings were generally intended to provide swift relief against abuse of executive power, They were not intended for or suited to inhibiting commercial activity, particularly over an indefinite and substantial period of time.

[103] Among the matters which the Court may take into account is the prejudice or harm that Digicel may suffer if no stay is granted or the OUR or Lime or anyone else will suffer if it is. The Court will also take into account the likelihood of that harm occurring. However, here the evidence did not establish actual or likely loss. At paragraph 64 of Mr. Fraser's First Affidavit, Digicel merely throws figures at the Court, as alleged by the OUR. Amongst other matters, Digicel states that it will suffer substantial damage and injury if the Determination comes into effect. It is claimed that an interim mobile termination rate of J$5.00 per minute would result in a loss of revenue of approximately US$2,255,000.00 per month to Digicel. Mr. Fraser also spoke about a further loss

regarding if the MTR applies to FTM calls but the OUR has since clarified that position. In response to the OUR's criticism of a lack of proof of the alleged loss, learned Queen's Counsel Mr. Hylton conceded that there were indeed no details, breakdowns or substantiation placed before the Court. However, it was his submission that those were not matters that needed to be put before the Court at this stage, and that those were matters for trial. With all due respect, it seems to me that this is not so. The applicant is asking the Court to grant a stay now, not at the trial. Clearly before the Court will exercise such a jurisdiction, which, it must be remembered is an exceptional jurisdiction not following as a matter of course whenever an application is made, however baseless, there must be proper evidence of the alleged or apprehended harm. There is no a priori assumption of harm. Much more than what Digicel has provided is required. I find strong support for my views in the **Monsanto** decision. At pages 1172 H-1173A, it was stated:

> *…in our judgment, the evidence before this court does not establish actual or likely loss. There are 35 other competitors. Monsanto's own report suggests that, if prices fall, increased sales result. In the absence of any relevant figures from Monsanto we reject the suggestion that this principle is inapplicable to the United Kingdom market. Monsanto's evidence provides no detailed calculations. We are unimpressed about vague assertions about what could happen.*
>
> (My emphasis).

[104] At paragraphs 67 and 68 Digicel claim that they may suffer reputational damage and further reputational damage in relation to prospective adjustments to its rates. The evidence falls far short of demonstrating a real risk of this occurring. As pointed out above, there is no solid evidence upon which such revenue loss or potential loss as alleged in paragraph 64 could be seen. There is also nothing to suggest that if such losses are experienced, they would be irreparable. As to the losses of revenue which Digicel alleges, I refer to paragraph 37 of Mr. Swaby's Affidavit where he issues the timely reminder that as a dominant carrier, Digicel is required by law to provide termination services at cost oriented rates. Mr. Swaby goes on to state that these alleged losses may therefore represent revenue to which Digicel is not entitled under

the law. That is a persuasive point. This is particularly so when one considers the unchallengeable delay by Digicel in providing the cost and traffic data and information requested by the OUR in respect of the interconnection rates proposed in Digicel's RIO, despite repeated requests. I think it is noteworthy again that at paragraph 15(a) of his Affidavit Mr. Swaby says that since 2001 there have been significant changes in the telecommunications sector in both market situation and technology which would have impacted cost. In contrast, in his First Affidavit at paragraph 46(a) Mr. Fraser appears to be saying that in November 2010 when Digicel submitted its draft RIO, it proposed its existing rates, which were the same as had obtained in 2001because"these rates were first implemented in 2001 and had remained unchanged since, despite the Jamaican dollar devaluing by over 85% in the intervening period". I note that nowhere in any of the evidence put before me has Digicel expressly come out and stated or alleged that its true termination costs are higher than the $5.00 MTR set by the OUR as an interim rate, as opposed to stating what it claims to be its loss of revenue.

[105] Indeed, in so far as this question of loss and harm is concerned, the Court has to look at the fact that Digicel did offer its customers on June 22 2012 the ability to make on net calls (Digicel to Digicel) for $2.89 per minute, after the OUR had announced the interim MTR rate of $5.00 per minute. Digicel admits that its offer, termed "Sweet Plan", was a competing plan in response to Lime's "Talk EZPlan" –see paragraph 24 of Mr. Fraser's Second Affidavit. At paragraphs 24 and 25, Mr. Fraser states:

> *24……Each of these offers is crafted as a result of commercial considerations and market forces-<u>they are not done in reliance on the introduction of interim mobile termination rates.</u>*
>
> *25. Further, these events clearly illustrate that the mobile market is in fact vibrant and competitive, contrary to the statements by the OUR, in its Determination, which asserts that the mobile market is in a fragile state of competition.*
>
> (My emphasis).

[106] But what does Lime say about the application for the stay generally, and specifically about its "Talk EZ Plan"? At paragraphs 13-18 of the First Affidavit of Ms.

Cameron, which was filed on June 21 2012, in support of Lime's initial application for leave to intervene or to be heard, Ms. Cameron states as follows:

> *13. That further as Digicel has been able to consolidate the Claro Network with their network, the same has opened the Claro number ranges in their network and has made it easy for Claro customers to migrate seamlessly to the Digicel network. That this factor not only puts Lime at a competitive disadvantage in relation to those customers and additionally,* ***but for the implementation of the interim MTR*** *it will cost Lime an additional $27 M annually in payments to Digicel due to the acquisition of these numbers, based on the difference in MTRs that Lime will have to pay. As indicated in the 2012 Determination, Lime had contracted with Claro for the payment between them of a MTR of $4.00 per minute as against the cost of $9.00 per minute which Digicel charges. Additionally* ***without the application of the 2012 Determination****, the difference in payment intervals for Fixed to Mobile calls from Lime Fixed to Digicel Mobile on a per minute basis in comparison to Lime Fixed to Claro Mobile on a per second basis results in an increased payment out payment figure to Digicel.*
>
> (Ms. Cameron's emphasis)
>
> *14. The application filed by Digicel also asks that the grant of leave to Apply for Judicial Review of the Determination Notice operate as a stay of the Determination Notice pending the hearing and determination of the application for Judicial Review . It is the position of Lime that a stay ought not to be granted in the circumstances set out above and where the action which is sought to be challenged is not simply an action between Digicel and the OUR. The determination affects all carriers in the telecommunications market.*
>
> *15. Further, in the circumstances where LIME has fully complied with all its obligations and provided all traffic information and cost of operations as required by the OUR and has acted in reliance on Determination Notice issued pursuant to the amended legislation, and has launched a reduced mobile retail rate in reliance on the Determination Notice effected in accordance with the Telecommunications Act as amended in April 2012, third party rights have accrued and would be affected by a stay and by judicial review as Lime would*

incur substantial losses and suffer tremendous reputational damage.

16. Additionally the public at large who have acted pursuant to the promotion launched by LIME and who have entered into contractual arrangement pursuant thereto have thereby accrued third party rights, would be affected should a stay be granted. That accordingly the stay would only benefit Digicel to the detriment of numberous persons and to the detriment of LIME.

17. In summary, LIME wishes to intervene to oppose the application for leave to apply for Judicial Review of the Determination Notice on the basis that:

a. The Determination Notice was lawfully promulgated in accordance with the provisions of section 37A of the Telecommunications Act 2000 as amended.

b. In effect a reversal of the Determination Notice will have dire financial consequences for LIME which has invested millions of dollars in launching its new mobile termination rates in reliance on the OUR's Determination Notice;

c. The reversal of the Determination Notice will have severe implications for LIME's goodwill and will cause reputational losses by reason of the fact that LIME has offered to the public at large its new rate reductions and within six days of the launch some over 20,000 subscribers have contracted with Lime;

d. LIMe will also face the real possibility of action being taken by members of the public aggrieved by LIME's inability to continue to offer its new rates on the basis of the reversal of the Determination Notice.

18. LIME's financial and reputational rights would be plainly and directly affected by a challenge to the determination and the grant of a stay and accordingly it is desirous that LIME be present before the court to participate in the matter so that all issues in dispute between the parties may be fully ventilated and resolved.

[107] I note that although in his Second Affidavit Mr. Fraser responded to some matters, and some paragraphs of Ms. Cameron's First Affidavit, there was no response to paragraph 13 where LIME speaks to competitive disadvantages that it has

experienced since the consolidation of the Claro network with the Digicel network, as well as potential increases in outpayment figures to Digicel if the interim MTR is not implemented.

[108] In my judgment Digicel has not made out a case that it will suffer actual, likely or irreparable harm or loss.

[109] On the other hand, it does appear to me that Lime will likely suffer financial damage and reputational loss if a stay is granted, particularly as they have indicated that they have already relied upon the interim Determination Notice. If the implementation of the new rate will contract the payment out figure that LIME currently pays to Digicel as contended for by LIME, and reduce the competitive disadvantages experienced by LIME as a result of the increased concentration of the mobile telecommunications market, then Lime would be adversely affected by a stay. Additionally, if as the OUR predicts, the interim Rates will immediately reduce the imbalance which exists between fixed line networks, and mobile networks.

[110] However, more importantly, it is the public who stand to lose the most if a stay is granted. This is because the OUR state that the interim rates will prevent or lessen the effects of above cost mobile termination rates. Some of the adverse effects of an above-cost MTR are set out in Part 2 of the Determination Notice, i.e. cross-subsidisation, ring fencing of subscribers on network; higher retail price, and high on-net off-net price differentials. All of these difficulties can affect the public because they reduce fair and open competition, which, along with protection of customers, the OUR is statutorily mandated to promote and secure. This is all explained in great detail and with great clarity at pages 10-11 of the Determination Notice.

[111] According to the OUR, the Jamaican public is bearing the burden of transferring unwarranted revenues to Digicel in excess of the true cost of termination services as required by the Telecoms Act which the public will not be able to recover if the final rates are ultimately less. Further, that in light of the amendments to the Telecoms Act

which require the application of a pure LRIC or avoided cost approach to the determination of termination rates, the OUR thinks that the cost model will quite likely result in further reductions of the MTR.

[112] If the stay is granted, the OUR's attempts to regulate the mobile telecommunications sector and to secure to the consumer the benefits of increased open and fair competition, and reduction in the potential for remaining mobile operators to leverage their dominance in terminating calls on their respective networks, will be stymied and or stalled, to the detriment of the public and in frustration of the intentions and purpose of the legislation.

[113] As regards the question of the adequacy of damages, it is my view that damages would not be an adequate remedy, given the widescale and incalculable effect, and potentially adverse effects on members of the public. In any event, Digicel did not offer a cross- undertaking in damages until it did so orally through its Counsel at the 11th hour in these proceedings. However, the undertaking given was expressly in relation to loss and harm that other relevant service providers might suffer. Digicel was not prepared to give an undertaking in relation to the type of losses that the OUR alleged that the public would suffer, which Digicel declined to give because its position was that neither the OUR nor Digicel can predict the effect on the public of movements in the MTR. I agree with Mr. Wood Q.C. that the undertaking proferred goes nowhere near addressing the real harm which may be suffered, that harm being the harm and loss that may ultimately be passed on to the public. The harm also consists of the deprivation of the potential benefits that may be achieved by a reduction in the MTR as embodied in the Determination which Digicel seeks to have stayed. Mr. Wood submitted that this is at the heart of the matter and what the OUR are concerned about. That is what involves the consideration of the public interest and without which there would be no need for these operators to be regulated. It is the fact that these charges may ultimately be borne directly or indirectly by the public, why the OUR has been given the powers that it has. That is why the OUR steps in when a finding is made as to dominance in order to perform its other statutory duties triggered by this finding. Even in the event that I am

wrong about Digicel's failure to prove harm or potential for irremediable harm, it is plain in any event that the injustice and potential for injustice to the public and to Digicel would be completely different in kind and entirely disproportionate. When weighed against each other, the scales would be tipped heavily in favour of the public interest in refusing the stay.

[114] Where a public authority is involved, the balance of convenience has to be viewed widely and must take into account the interests of the public in general to whom the duties are owed, In that regard, there is a strong presumption against any order for interim relief, since such an order would restrict free competition. The implementation of the interim rates appears to be in the public interest because of its potentially positive effects in achieving fair and free competition. Further, though this was not the most weighty of the considerations, it was in the public interest that until set aside, the decision of a public body should be respected. Accordingly, the balance of convenience, on the basis of where the lower risk of injustice lies would in my judgment clearly require that no stay of the OUR's decision be granted. If therefore leave were to have been granted, and the relief sought capable of being ordered as a stay, I would have refused the stay on the basis that that is the course that would seem to minimize the risk of an unjust result.

DISPOSITION

[115] The application for Leave to Apply For Judicial Review filed June 13, 2012 is refused.