[2013] JMSC Civ. 38

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM N0. 2006 HCV 01186

BETWEEN	MOSSEL (JAMAICA) LIMITED	CLAIMANT
AND	CABLE & WIRELESS JAMAICA LIMITED	DEFENDANT

Mr. Paul Beswick instructed by Ballantyne, Beswick & Co. for Claimant
Mrs. Denise Kitson instructed by Grant, Stewart, Phillips & Co for Defendant

Heard: November 2 and 5, 2009; Adjourned to 24th January 2010 for written submissions - CAV 22nd March, 2013

One Telecommunication Company seeks declarations by Court for breaches by competitor of Telecommunications Act 2000 and damages

D.O. MCINTOSH, J.

Claim

[1] The Claimants claimed against the Defendants:

1. Declarations in relation to Defendants refusal to comply with the terms of the Telecommunications Act 2000 and the determinations of the Office of Utilities Regulations.
2. Damages for Breaches of Statutory Duty.

3. Damages for Breach of Contract.
4. Repayment of monies illegally withheld by the Defendant from the Claimant with interest in accordance with Clause 9.4 of the Interconnection Agreement.

[2] From the pleadings it was clear that the Claimants case was dependent on the court findings that the Defendants had refused to comply with the terms of The Telecommunications Act 2000 and the determinations of the OUR.

[3] The evidence given was recorded by a Court Reporter. Claimant called an Officer appointed by the Director General of the OUR who gave sworn evidence on their behalf. No witness statement had been given by this crucial pivotal witness. At the end of the trial Claimants' attorney requested that time be given for submissions to be put in writing.

[4] On the 22nd January 2010 when the submissions should have been filed, the transcript of evidence was not yet available and submissions were put on hold.

[5] These submissions were filed in August, 2011 this Court was made aware of them when counsel for Claimant made enquiries about the court's decision. The submissions could not be located in the Registry so copies were requested and are at hand.

Claimants Submissions

Factual Background

[3] The claimant and defendant are licensees under the Telecommunications Act (the Act), and regulated by the Office of Utilities Regulations (OUR), being the statutory regulator appointed by the Act.

[4] Both claimant and defendant are competitors in the public voice telephone market. The claimant is a new entrant relative to the defendant, providing only

cellular or mobile telecommunications services and who obtained its license pursuant to the liberalization of the telecommunications market in the Island arising out of the passing of the Act. The claimant's license was purchased at auction for a price of US$45 million. In contrast, the defendant who was the entrenched monopolist at the time of the passing of the Act, and is a long established entity, provides both public mobile and land (fixed) line services in the Jamaican market.

[5] Pursuant to s.29 of the Act, all public telecommunication service providers are required to interconnect their public works. The claimant is therefore entitled to an the defendant obliged to provide this interconnection with the defendant's public mobile network. This interconnection can be accomplished either by direct interconnection of the claimant's public network to the defendant's public mobile network or by way of transiting another network which is interconnected to both mobile networks. In this latter case, the intermediary network, accepts the voice call from the originating network and then transfers or routes it to the destination network.

[6] From both a technical and cost perspective, direct interconnection of the public mobile networks is in the best interests of the consumer for two reasons – firstly, the removal of an additional point of failure or interference with call quality, and secondly, the removal of the obligatory transit charge or fee which the intermediary network or networks will charge, and which necessarily becomes a part of the cost calculation for the call which ends up being paid by the consumer.

[7] Prior to the claimant's entity into the mobile cellular market in Jamaica, the defendant was the sole telecommunications provider for the provision of cellular, and public fixed line services in this market and the major provider of internet services.

[8] The defendant being the existing telecommunications carrier, and based on but not in full compliance with the interconnection requirements of s.29 of the Act, by an Interconnection Agreement dated 18th April, 2001, (ICA), offered the claimant indirect interconnection of the claimant's public mobile network to the defendant's public mobile network.

[9] This indirect interconnection arrangement requires the claimant's mobile network, as it presently does, to traverse the defendant's fixed network in order to serve the claimant's cellular customers. The claimant is, instead seeking to obtain mobile-to-mobile direct interconnection, so as not to traverse the defendant's fixed network, and to *inter alia*, avoid the cost of the defendant's fixed line network.

[10] The defendant has however, refused to permit mobile-to-mobile direct interconnection between its mobile network and the mobile network of the Claimant.

[11] The claimant, since the commencement of providing mobile services, is being charged a fixed transit fee by the defendant for the use of the defendant's fixed network in transiting calls from the claimant's mobile network.

[12] The claimant has indicated to the defendant that the claimant is willing and able to meet its equal share of costs for direct interconnection.

[13] The defendant remains uncooperative with the claimant to establish mobile to mobile direct interconnection and continues to charge the claimant a transit fee for traversing its fixed network. This has caused a dispute between the claimant and the defendant.

[14] This dispute was eventually referred to the OUR. By its Determination Notice issued 7th February, 2002, the OUR directed the defendant that effective 1st March, 2002, the network charge should be removed and terms of mobile-to-

mobile interconnection proposal to be submitted by the Defendant to the OUR and interested parties by 28th February 2002.

[15] As a result of the defendants efforts in successfully depriving the claimant of mobile-to-mobile direct interconnection and unduly extending the process of negotiation between the parties for such direct interconnection, by agreement effective June 1, 2005, in the face of higher operating costs caused by the transit charge, the claimant accept from the defendant a discount of sixty percent (60%) on transit fees.

[16] As another tactic of delay the defendant further disingenuously raised the question of the OUR's assessment of Dominance in the mobile market which in this particular case would not change the outcome of mobile-to-mobile direct interconnection The status of dominance provides for regulation of the commercial agreements between the dominant entities but the OUR is still vested with its regulatory power and duty "*ex post facto"* to make determinations on disputes between the entities. Indeed, the Judicial Committee of the Privy Council has confirmed the right of the OUR to regulate all parties to any agreement dealing with the interconnection of licensed telecommunications providers.

[17] A further obstacle raised by the defendant is, in breach of the legislation, a request that the claimant pays the full cost of direct interconnection as well as a per minute cost alleged to be the recoupment of additional expenditure required to meet the defendant's interconnection obligations. The claimant has stated without challenge that it is willing and able to meet its equal share of costs of direct interconnection in accordance with the legislation. Indeed, the defendant has actually admitted that the claimant is perfectly placed to undertake the obligations of interconnection.

Breach of statutory duty – Principles Breach of statutory duty-principles applicable

[18] Part 13 of the Act entitled "*Enforcement*", contains the following provision:

> **67. Civil liability**
>
> 67. Every persons who engages in conduct which constitutes –
>
> (a) a contravention of any obligations or prohibitions specified in the relevant provisions of this Act;
>
> is liable in damages for any loss caused to any other person by such conduct.

[19] Plainly therefore, any breach of obligations under the Act which gives rise to loss or damage to any person is actionable and the loss may be recovered by a civil action. It is submitted that the defendant has committed a breach of statutory duty under the following distinct heads:

[20] Firstly, the defendant has failed to provide direct interconnection to its mobile network. This is conceded by the defendant without more. The failure to provide this direct interconnection is a breach of the defendant's statutory duty to comply with the directions and regulatory authority of the OUR.

[21] S.4 of the Act provides *inter alia.*

> **4. Functions of Office**
>
> 4. (1) The office shall regulate telecommunications in accordance *with* this Act and for that purpose of the Office shall –
>
> (a) regulate specified services and facilities;
>
> …

[22] S.32 of the Act reads:

> **32. Filing of offer by dominant and other carriers**
>
> *32. (1) Every dominant carrier shall, and any other carrier may, lodge with Office a proposed reference interconnection offer setting out the terms and conditions upon which the other carriers may*

interconnect with the public voice network of that dominant or other carrier, for the provision of voice services;

(2) Each dominant public voice carrier who is required under this Part to provide interconnection in relation to voice services shall submit a reference interconnection offer to the Office

(a) within ninety days after the date of determi(a) within ninety days after the date of determination of dominance pursuant to section 28; or

(b) at least ninety days before the date of expiry of an existing reference interconnection offer,

and the existing telecommunications carrier shall submit its initial reference interconnection offer within thirty days after the appointed day.

(3) A reference interconnection offer shall contain such particulars as may be prescribed.

(4) A reference interconnection offer or any part thereof shall take effect upon approval by the Office in the prescribed manner .

[23] It is apparent from the contents of these sections that the OUR has been granted the legal authority to regulate telecommunications in the Island and in particular to regulate the conduct of dominant carriers. The defendant, who falls into the category of the *existing telecommunications carrier* and is treated in relation to the requirement to file a RIO as a dominant carrier, is therefore obligated to comply with the dictates of the OUR. It is submitted that failure to comply as directed amounts to a breach of the defendant's statutory duty.

[24] The Determination Notice the subject of this claim was issued by the OUR pursuant to the approval of the defendant's RIO 4. Accordingly, it could not be in doubt that the defendant was bound by the Act to comply with the terms of this

notice. After all, the Act is sanguine that

> *(4) A reference interconnection offer or any part thereof shall take effect upon approval by the Office in the prescribed manner*.

[25] In the course of the hearing the defendant's witness, Ian McNaughton, the Ahead of Carrier Services which is the department which deals with all interconnection between other carriers and the defendant, sought to distinguish the effect of the OUR's determination and direction in respect of the fixed PSTN (fixed Line) service from the PLMN (Mobile or cellular) service which the defendant provides. It is submitted that such a distinction leads to barren arguments about the services which the defendant, a single legal entity, offers.

[26] The stark and unchallengeable legal fact is that the OUR's Determination Notice 3.4 is directed to the defendant, i.e. to Cable & Wireless Jamaica Ltd. The document title is "Assessment *of Cable & Wireless Jamaica's Reference Interconnect Officer*. The assessment is neither confined to the mobile arm of the defendant, nor is its direction intended only to be observed by the fixed line department of the defendant. It is a directive to the defendant, the legal and incorporated entity known as Cable & Wireless Jamaica Ltd.

[27] Determination 3.4 reads as follows:

> *Effective March 1, 2002 the fixed network charge should be removed from the Terminating PLMN service. C & W J is to provide the office and interested parties (by February 28, 2002) with the proposed terms and conditions specific to mobile to mobile interconnection.*

[28] As a regulatory direction, Determination 3.4 demands the following steps as compliance by the defendant.

(a) That on 1st March, 2002, the fixed network charge should be removed from the PLMN terminating service;

(b) That by 28th February, 2002, the defendant is to provide the OUR as well as an interested parties with the proposed terns and conditions specific to interconnection with direct mobile to mobile interconnection.

[29] It is significant that these directives are on their face conjunctive. Neither directive is dependent on compliance or otherwise with the other. Hence, whether or not the defendant complied with the second directive, it is still bound to comply with the first, viz., to remove the fixed network charge from the PMLM terminating service by 1st March, 2002.

[30] On its face therefore, this simple determination can only be complied with in its entirety if the defendant removes the fixed network charge from its PLMN terminating service, i.e. the removal of the transit charge from the mobile service provided by the defendant.

[31] It is submitted that as a matter of simple fact, the defendant has admitted in oral evidence that it is not compliant with this direction. In cross-examination, the following cross examination, the following extract from the transcript reflects the exchange between the Court and the defendant's witness Mr. Ian McNaughton.

Q. Mr. McNaughton, have you removed the transit charge from the PLN.

A. No.

Q. And the PLMN service still exist? (sic)

A. Yes

[32] It is submitted that therein lies the conclusion which the Court is asked to make. The Defendant has not removed the fixed line transit charge from the

PLMN service and continues to offer this service in a form which is in clear defiance of a regulators direction which binds it.

[33] The determination which the OUR issued was pursuant to its powers in ss.4(1) and 32 of the Act. In particular, the assessment of the defendant's RIO and the issue of the determination notice effectively created an obligation under the Act which the defendant was bound to comply with. The failure to comply with this obligation resulted in damage to the claimant to the extent that it was and continues to be overcharged by the defendant, and, because this damage has occurred as a breach of the defendant's obligations under the Act, also results in liability of the defendant pursuant to s.67 of the Act.

The claimant's statutory right to direct mobile-to-mobile interconnection

[34] It is submitted that a purposive interpretation of the Act coupled with the determinations of the OUR make it abundantly clear that the claimant is entitled to direct mobile-to-mobile interconnection between its mobile voice network and the equivalent network maintained by the defendant.

[35] S.29 of the Act reads as follows:

29. – (1) Each carrier shall, upon request in accordance with this Part, permit interconnection of its public voice network the public voice network of any other carrier for the provisions of voice services.

(2) A public voice carrier shall provide interconnection in accordance with the following principles –

(a) any-to-any connectivity shall be granted in such manner as to enable customers of each public voice network to complete calls to customers of another public voice network or to obtain services from such other network;

(b) end-to-end operability shall be maintained in order to facilitate

the provision of services by an interconnecting carrier to the customer notwithstanding that the customer is directly connected to a different network;

(c) interconnecting carriers shall be equally responsible for establishing interconnection and doing so as quickly as is reasonably practicable.

(3) Copies of all interconnection agreements shall be lodged with the Office which may object to any such agreement in the prescribed manner.

(4) The Office may, either on its own initiative in assessing an interconnection agreement or in resolving a dispute between operators, make a determination of the terms and conditions of call termination, including charges.

(5) When making a determination of an operator's call termination charges, the office shall have regard to the principle of cost orientation, so, however, that if the operator is non-dominant then the Office may also consider reciprocity and other approaches.

(6) For the purposes of subsection (5), "reciprocity" means basing the non-dominant carrier's call termination charges on the call termination charges of another carrier."

[36] Section 29(2)(a), it is submitted, gives a new entrant, the claimant in this instance, an entitlement to interconnection of its mobile network to the mobile network of the incumbent existing telecommunications carrier, who is the defendant. Alternatively, this section puts an incumbency obligation on the defendant to provide interconnection of its mobile network to the entrant, the claimant.

[37] The type of interconnection required by the Act can be ascertained from section 3 of the Act which states:

> 3. The objects of this Act are –
>
> (a) to promote and protect the interest of the public by –
>
> *(i) promoting fair and open competition in the provision of specified services and telecommunications equipment;*
>
> *(ii) promoting access to specified services;*
>
> *(iii) ensuring that services are provided to persons able to meet the financial and technical obligations in relation to those services;*
>
> *(iv) providing for the protection of customers;*
>
> *(v) promoting the interests of customers, purchasers and other users …. promote universal access to telecommunications services for all persons in Jamaica to the extent that it is reasonably practicable to provide such access; ….”*

[38] The present arrangement of indirect interconnection of the claimant's mobile network to the defendant's mobile network, requires the claimant's mobile network to unnecessarily traverse the Defendant's fixed network for a fee. The levying of this fixed transit fee, by the defendant, amounts to an increase in the claimant's cost of providing mobile cellular service to the end users on its mobile network. This higher cost has to be borne by the end users. This arrangement, therefore, is not in conformity with either section 3(a) (iv) which provides for *"… the protection of customers*", or section 3(a) (v) which protects *"… the interests of customers, purchasers and other users …"*

[39] It is submitted that the defendant's refusal to provide direct interconnection to the claimant's mobile network has plainly increased the claimant's operating costs of providing mobile cellular service to its customers as required by the section 3 (a)(iv) and (v) of the Act. The scale of the amount withheld by the defendant speaks cogently to the increased cost to the claimant's customers. As at 28th February, 2007, the unchallenged amount withheld buy the defendant from 1st March, 2002, was $155,838,721.00. Furthermore, the defendant has continued to withhold transit fee charges since the filing of this action.

[40] S. 2(1) of the Act differentiates between *"fixed network*" and *":mobile network*" as follows:

> *"fixed network" means a telecommunications network that is not a mobile network;*
>
> *"mobile network" means a telecommunications network used to provide specified services that –*
>
> *(a) permits a user to move continuously between places (including places accessing that network through different mobile base facilities) during the provision of a single call;*
>
> *and*
>
> *(b) does not require physical contact between the network and the customer equipment;*

[42] It is therefore submitted that the Act requires that the interconnection provided must be relevant to the type of network. The words *"in such manner"* in s. 29(2)(a) qualify the definitions of different types of network in section 2(1) and are indicative of the appropriateness or relevance of the type of connection relative to the nature of the connection seeker's business.

[43] It is undeniable that in this action, the claimant is primarily in business of providing mobile voice telephone services and would undoubtedly prefer and

request a direct mobile-to-mobile network direct interconnection and has therefore sought and continues to seeking an agreement with the Defendant to move from an indirect interconnection arrangement to one of direct interconnection between their respective mobile networks.

[44] The use of a fixed network to rout or transit calls from the claimant's mobile network to the defendant's mobile network and *vice versa* is not a requirement nor is it necessary for the provision of mobile cellular services between these parties. The court will note that in this instance, the defendant provides both mobile and fixed line services and for its fixed line services it needs a fixed network, whilst the claimant does not provide fixed line services and therefore, unlike the defendant, does not have a need for the use of any fixed line network.

[45] S.29(2)(b) of the Act requires the defendant to maintain end-to operability (E2E) between its network and interconnected networks. The significance of E2E was illustrated in the recent U.K. Court of Appeal case, *Hutchinson 3G UK Ltd. V. The Office of Communications, Interveners-British Telecommunications Plc and T-Mobile (UK) Ltd.* On appeal from The Competition Appeal Tribunal, relating to an interconnection dispute between Hutchinson 3G UK Ltd. and British Telecommunications Plc Ltd. (BT). Lloyd, LJ., succinctly stated the importance of the interconnection obligation in relation to E2E.

> *BT might well be regarded as having SMP in markets where it is a supplier, having regard (among other things) to the size of its customer base, and its ownership of much of the infrastructure. It is itself constrained in several relevant respects, including by an obligation to allow other network operators to interconnect with it, on reasonable terms, known as end-to-end connectivity (E2E). It is important position in relation to relevant markets derives not only from its own large customer base, but also from the fact that other operators are able to send calls*

from their networks via that of BT, under transit arrangements, for an appropriate charge.

[46] It is submitted that the defendant's steadfast refusal to provide direct interconnection of its mobile network to the claimant's mobile network, thereby giving the claimant no option to serve its customers except by transiting the Defendant's fixed network is an egregious breach of the E2E obligation.

[47] Furthermore, the obligation cast on the defendant as the existing communications carrier, to allow the claimant to interconnect with its mobile network, on reasonable terms, and in particular to maintain (E2E) must be interpreted against the context of the claimant's network and the service it offers. The distinction at section 2(1) between fixed network and mobile networks clearly suggests the requirement for different arrangements in the interconnection of users by the use of the words *in such manner*, best interpreted to mean relevance to the particular to the particular usage of the voice network.

[48] It is submitted that read purposively and bearing in mind always the Act's repeated emphasis on protection of end-users and consumers by the reduction of cost, that direct mobile to mobile interconnection is a requirement of the Act, and that the defendant is as a result of its failure and/or refusal to provide this method of interconnection, is in breach of s.29 of the Act.

The Defendant's Defences

[49] The following grounds of defence *inter alia,* were raised by the defendant in its pleaded Defence:

(a) That it was not obliged to remove the transit charges as they had been approved by the OUR;

(b) That the same transit fee has not remained in place since its inception;

(c) That the OUR has provided a clarification of Determination 3.4 in which it has permitted the transit charge to remain as an alternative to direct mobile to mobile interconnection.

(d) That the defendant has not refused to permit direct mobile to mobile Interconnection;

These will be dealt with serially.

The Transit Charges had been approved by the OUR

[50] In the Defence filed by the defendant, the following assertion is made:

> *Paragraph 21 of the Particulars of Claim is admitted and the Defendant will add that the OUR* ***Determination on Reference Interconnection Offer (RIO -5) and Tariff Schedule 5A*** *exhibited by the Claimant confirms at Determination 3.3 which is titled 'Transit Service' stated that:*
> *"The charges in this category (Part 4) of RIO5A are approved but with the provision that where an interconnection seeker is willing and able direct interconnection with C&WJ's mobile network the charges shall not apply."*
> *The Defendant reiterates and unequivocally states that it has remained willing and able to provide direct interconnection to the Claimant.*

[51] On this basis, the defendant contends that the OUR has permitted it to retain the transit fee which is the subject of this action. It is submitted that such a conclusion is a patent exercise in illogic is unsustainable because.

(a) The condition required to be satisfied for the retention of the transit charge is the contra of the following statement: *"where an*

interconnection seeker is willing and able to provide direct interconnection with C& WJ's mobile network;"

(b) This plainly means that only where the interconnection seeker is unwilling or unable to provide direct interconnection with the defendant's mobile network can the charges continue to apply;

(c) The condition has nothing whatsoever to do with the state of willingness or ability of the defendant to provide direct mobile interconnection;

(d) This defendant has acknowledged both in its pleadings and in oral evidence that the claimant is both willing and able to engage in direct mobile to mobile interconnection with the defendant's mobile network. In response to the assertion in the Particulars of Claim that the claimant had written to the defendant requesting direct interconnection of the mobile networks of both parties on the basis of a 50/50 split of the joining service costs and no additional surcharges, the defendant stated:
In response to paragraph 33, the Defendant agrees that on February 7, 2006 a letter was sent to the Claimant in response to the Claimant's letter of January 18, 2006 …

(c) Furthermore, in cross examination the defendant's witness was specifically questioned about the defendant's understanding of the claimant's willingness and ability to engage in direct mobile to mobile interconnection: The following is the relevant extract:

Q: Do you agree with me that Digicel has indicated its willingness to interconnect?
A: Absolutely.
Q: Do you agree that Digicel is able to interconnect?

A: I have no doubt about that.

(f) Accordingly, this defence fails because it is clear that the condition required to be satisfied pursuant to Determination 3.3 of the Assessment of RIO 5A in order to justify the retention of the transit charge has not been made out. That condition requires that this claimant be either unwilling or unable to engage in direct mobile to mobile interconnection. The evidence before the Court indicates that this is patently not the case.

(g) This reliance on Determination 3.3 in RIO 5A, issued on 19/11/2004, also fails to address the fact that Determination 3.4 was issued on 7/2/2002, almost 3 years before. Even if it could be contended that Determination 3.3 had somehow altered the direction to the defendant, it is clear that this could not have taken effect during the period before the issue of Determination 3.3, and at the very least it would have meant that the defendant was bound to remove the transit charge between the date stated in Determination 3.4, and the issue of determination 3.3 Had this occurred, followed by the defendant reinstating the charge after the issue of Determination 3.3, the defendant, lacking nay legal underpinning for its defence, would have been placed at least on some higher ground.

(h) The fact that no such withdrawal of the transit fee, followed by its reinstatement after the issue of determination 3.3, puts the lie to any contention that the defendant genuinely believed that determination 3.3 had granted any rights in relation to the levying of a transit charge through its fixed network for the routing of calls to its mobile network, where it is clear that the interconnecting

operator is ready and willing to interconnect directly with the defendant's mobile network.

(i) Further, and in any event, if indeed the defendant was at any time willing and able to engage in direct mobile to mobile interconnection, it is submitted that this is entirely irrelevant and does not constitute in these circumstances a valid basis to continue the transit charge.

The same Transit Fee had not remained in place since inception

[52] It is submitted that this defence is on its face worthless. Determination 3.4 makes no statement about the level of the transit charge nor permits a different or deduced transit charge to replace that existing at the time of the issue of the determination notice.

[53] Determination 3.4 simply and plainly orders the removal of the transit charge and nothing less. Arguments about the level of the transit fee or indeed about the existence of bulk discounts or other facilities afforded to the claimant by the defendant, are entirely barren and it is submitted, exist entirely to obfuscate the real issue before the court, i.e., whether the defendant has complied with Determination 3.4 issued by the OUR on 7/2/2002.

[54] The principal question before the court in relation to the transit charge is whether the charge has been restricted by the OUR. The answer to this question does not lie in the details of the actual charge itself, nor in considerations about the level of discounts offered by the defendant to the claimant. The transit charge is either permitted or it is not. The claimant asserts that plainly, on the face of the Determination Notice, the transit charge is not authorized and the defendant has failed to comply with the direction of the OUR to remove this charge from March 1, 2002.

[55] In addition to oral evidence, in its Defence, the defendant also admitted that the transit fee has remained in place as contended by the claimant. In its Defence, the defendant stated:

> *16) In response to paragraph 18, the Defendant states that it is not true that the same transit fee has remained in effect from inception. As was stated in paragraph 10 hereof the Claimant and the Defendant signed an agreement in June 1 2005 giving the Claimant a 60% discount on transit charges which has remained in effect to the present time.*

[56] This statement is simply nothing less than an admission of the defendant's refusal to accept and comply with the statutory regulator's direction, a direction, which the defendant itself acknowledges it is bound to comply with, when it pleaded the following statement.

> *9) The Defendant says in respect of paragraph 11 of the Particulars of Claim that the OUR regulates, not only the Defendant, but all operators in the telecommunications industry.*

[57] In the circumstances, it is wholly untenable for the defendant to contend that it has complied with a regulatory directive which simply requires the removal of a charge by relying on the fact that it has reduced the quantum of that charge. It is submitted that this ground of defence wholly fails.

The Transit Fee has been permitted to remain by virtue of a clarification

[58] On 20th March 2002, the OUR wrote to the defendant in response to a letter from the defendant on 19th February, 2002, requesting clarification of Determination 3.4. The content of the OUR's letter has been proffered by the defendant as a defence to paragraphs 15 and 16 of the Particulars of Claim which assert respectively, that Determination 3.4 was issued and that the effect of the Determination was to direct the defendant to cease charging the transit fee

as of 1st March, 2002, and also to provide the OUR and interested parties with the proposal terms of the defendant's direct mobile to mobile interconnection by 28th February, 2002.

[59] It is submitted that this letter provides no defence to this claim for the following reasons:

(a) The OUR lacks the necessary jurisdiction to issue a clarification of the sort set out in the letter of 20th March, 2002. Even if the content of this clarification were otherwise acceptable, this medium and method cannot be used to alter a determination formally issued by the OUR. Determinations issued by the OUR are issued pursuant to the powers granted to that office in s.4 of the Act. S.4 in part reads:

(2) In making a decision in the exercise of its functions under this act the Office shall observe reasonable standards of procedural fairness, act in a timely fashion 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 person an opportunity to make submissions to and to e heard by the office;

(c) have regard to the evidence adduced at any such hearing and to their matters contained in any such submissions;

(d) give reasons in writing for each decision;

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

It is patent that the issue of a letter in the form of the letter of 20th March, 2002, could never qualify as satisfaction of the statutory pre-conditions set out in s.4 of the Act for the exercise of the OUR's decision making authority. All the more so where it is clear that this is not the standard method by which the OUR has operated in the past, and the claimant has denied in unchallenged evidence that it was ever in receipt of any part of this correspondence. Furthermore, the so called clarification fails to rely on any consultation whatsoever, and there is no evidence that the claimant or anyone else was given an opportunity to make submissions whether oral or otherwise in relation to this request for clarification, or to submit evidence for the consideration of the OUR in respect of this decision, or that reasons have been given for this decision, or that notice of the decision was ever given to the claimant in the prescribed manner, or indeed at all. In all, the conditions set out in s.4 of the Act have been wholly unsatisfied by the letter of 20th March, 2002.

Accordingly, the existence of the so-called clarification does not constitute a defence to the defendant's failure to comply with s.29.(4) and the OUR's Determination Notice 3.4 dated 7th February, 2002, as the clarification does not have the force of statutory authority capable of altering a legally issued determination pursuant to s.4 of the Act.

It should be noted *en passant,* that even the power to issue clarifications of the court's ruling is carefully and judiciously exercised. In instances where the ruling of court requires clarification, this is effected by a formal application heard and determined in the presence of the affected parties. Furthermore, the clarification if issued, is restricted solely to those portions of a ruling which admit of potential confusion, and would never attempt to introduce a new or radically differing result to a matter already disposed of. It is patently unacceptable therefore, for an inferior tribunal to employ a procedure for clarification which in addition to flying in the fact of its own statutory requirements, also strays so far afield from the transparency which the court itself employs to accomplish this end and the court is asked to reject the contention that the OUR could by the method employ legally clarify its earlier ruling.

(b) Even assuming that the OUR was empowered by the Act to issue a clarification in the manner and form of the letter of 20th March, 2002, it is submitted that the contents of this clarification provide no assistance to the defendant. The evidence of the OUR itself is instructive in this regard. Mr. Ansord Hewit, the Secretary of the OUR, in response to the question of what issues were being clarified stated as follows:

> *The issues we were clarifying. The determination has said that transit fee should be removed. Cable and Wireless has raised the issue that one, whether the transit be removed in respect of third party, which is connected via its fixed network. They also raised the issue whether it was intended that this transit fee should be removed if it is for instance that none has applied for direct mobile to mobile connection and where the party does not have an agreement with Cable and Wireless.*

Patently, therefore, the purpose of the clarification had nothing whatsoever to do with the circumstances of this claim because: i) the claim has nothing to do with third party transit such as between centennial Digital Jamaica Ltd. and Digicel, and ii) this was a case where as far as back as 11th December, 2002, the claimant had formally requested direct mobile to mobile interconnection, and had signified its willingness and ability to interconnect on this basis. For these reasons, it is submitted that the clarification provides no defence to the defendant in this action.

The Defendant has not refused to provide direct interconnection to its mobile network

[60] Paragraph 47 of the Particulars of Claim read:

> *The defendant has breached the terms of the ICA in that it has refused and/or neglected to permit direct interconnection with its mobile network in accordance with the Act and the determinations of the Office of Utilities*

Regulation and the parties' agreement to comply with the relevant statutory and other provisions.

[61] In response, the defendant asserted at paragraph 43 of the Defence:

The Defendant denies paragraph 47 of the Particulars of Claim and reiterates that it has not refused to provide direct mobile interconnection with the Claimant. Furthermore, the Defendant states that it is not in breach of the Act. The Defendant states that it has facilitated the negotiation process and has sought to reduce costs to the claimant by providing discounted transit rates.

[62] Throughout both the Defence and the evidence of the defendant, there is a continual return to the theme that the presence of good faith negotiations by the defendant coupled with the provision of a discounted transit charge, serves to provide a defence to the defendant's willful refusal to provide direct mobile to mobile interconnection or in *lieu* thereof to remove the transit charge which it was so ordered to effect by 1st March, 2002.

[63] It is submitted that the defendant's reliance on these averments is entirely misplaced. Firstly, the existence of these so called good faith negotiations if flatly denied. The evidence is replete with instances of the defendant's attempts to stall embarrass, and/or delay the process of direct mobile to mobile interconnection. Two notable examples will suffice.

[64] On 11th November, 2005, the defendant, in open defiance both of the statutory directive in s.29(2)© of the Act and the OUR ruling in Determination 3.4, submitted a proposal for direct mobile to mobile interconnection to the claimant demanding that the claimant pay the full costs of the joining service, as well as $0.15 per minute charge in addition to the normal termination rates.

[65] A comparison of s.29(2)(c) of the Act and the portions of the defendant's proposal in direct contravention of same is instructive.

THE ACT

s.29 (2) *A public voice carrier shall provide interconnection in accordance with the following principles -*

(c) interconnecting carriers shall be equally responsible for establishing interconnection and doing so as quickly as is reasonably practicable.

THE DEFENDANT'S PROPOSAL:

2. Direct connection to C&W J Mobile

(a) *Digicel will pay up front for all direct joining services costs inclusive of requisite terminals on C&WJ's premises in addition to all fibre and related civil works. C&WJ will provide the necessary quotations at such time as appropriate.*

(b) *Digicel (in addition to other direct connect licensees) will reimburse C&WJ for attendant switch, transmission and billing upgrades at a rate of J$,.15 per min in addition to normal termination rates (domestic & international) to C&WJ mobile.*

[66] There is but a single conclusion possible from this comparison. The defendant had no intention of complying with either the statutory directive or the OUR's determination. Bo so doing, it was guaranteeing itself the continuation of the state of the very state of affairs which the Act and the OUR sought to prevent, as it was abundantly clear that neither the claimant, no indeed any rational operator would agree to these conditions in the fact of the statutory and OUR

obligations placed on the defendant.

[67] The court should note the cunning use by the defendant of the reference to "*other direct connect licensees"*. If it was intended to indicate that its policy to the claimant was non-discriminatory, such an argument is similar to the schoolboy bully who contends that he should not be punished because he is careful to bully all who come within his reach. But it would also confirm the wholesale and outright willingness to disregard every statutory and regulatory control placed on the defendant.

[68] The proposal ended by starkly reasserting the continuance of the defendant's hegemonic and monopolistic stance by threatening the claimant with a return to higher rates of interconnection should the claimant demand as was its statutory right, direct mobile to mobile interconnection before February, 2006. The defendant's naked intentions t continue to flout the statutory obligations for interconnection on a basis of equity and shared costs could not have been made clearer than with the following words:

> *(c) Requirement for direct interconnection to C&WJ Mobile ahead of February 2006 for international or domestic would be considered a breach/termination of existing contract and of such all transit rates will revert to the approved rate of J$0.87/min.*

[69] On 23rd October, 2006 the defendant wrote to the claimant and stated *inter alia.*

> *C&WJ indicated that it would be rather difficult to define negotiations going forward as being conducted in good faith given the lawsuit aforementioned and the subsequent request from Digicel that the OUR intervene in the matter as a pre-contract dispute* …
>
> …
>
> *In light of the foregoing, C&WJ concludes that although it is willing to*

*provide interconnection to Digicel, continued negotiations do not appear to be prudent while the lawsuit is pending. Furthermore, the negotiations cannot be considered to be in good faith given Digicel's allegations in the suit that C&WJ's proposals in relation to direct interconnection are illegal and are referred to and considered by Digicel to be "**demands**" rather than commercial negotiations between the parties.*

[70] In other words, the defendant was refusing to honour is statutory obligations and the directions of the OUR because the claimant had a) exercised its right to file an action in respect of other claims against the defendant, and b) requested that the OUR intervene in the dispute arising from the defendant's continual refusal to provide direct mobile to mobile interconnection or in *lieu* thereof, to remove the fixed network transit fee.

[71] These examples make it abundantly clear that the defendant was never engaged in any process of good faith negotiations. However even if it be accepted for the sake of argument only that such was the case, the claimant stands on the position that such good faith negotiations are incapable of providing a defence to a breach of statutory duty.

The Claimant's Damages

[72] The dispute between these parties was referred to the OUR, the government's regulatory agency for the telecommunications industry in the Island. The OUR ruled in its Determination Notice dated February 7, 2002, requiring the defendant to remove the fixed lines transit charges as follows:

[73] To date, over 9 years after this determination, the defendant remains uncooperative and unresponsive in complying with its statutory and regulatory obligation to provide the claimant with direct mobile to mobile interconnection on terms of quality and continues to charge the claimant a fee for traversing its fixed network.

[74] As set out before, the claimant is entitled to damages for the defendant's egregious breach of statutory duty. The measure of these damages is primarily found by the calculation of the amounts improperly withheld by the claimant together with the appropriate amount of interest thereon.

[75] The taking of an account to determine restitutionary damages for breach of contract has been approved by the House of Lords. In *Attorney General v. Blake (Jonathon Cape Ltd. 3rd party),* the House ruled that there was no reason in principle why the court had in all circumstances to rule out an account of profits as a remedy for breach of contract. The majority judgment delivered by Lord Nichols of Birkenhead in discussing the methods and examining the authorities by which the courts have provided restitutionary damages for breach of contract, noted contained in the following:

> *These cases illustrate that circumstances do arise when the just response to a breach of contract is that the wrongdoer should not be permitted to retain any profit from the breach. In these cases the courts have reached the desired result by straining existing concepts. Professor Peter Birks has deplored the 'failure of jurisprudence when the law is forced into this kind of abusive instrumentalism' (see 'Profits of breach of contract' (1933) 109 LQR 518p 520). Some years ago Professor Dawson suggested there is no inherent reason why the technique of equity courts in land contracts should not be more widely employed, not by granting remedies as the by-product of a phantom 'trust' created by the contract, but as an alternative form of money judgment remedy. That well-known ailment of lawyers, a hardening of the categories, ought not to be an obstacle (see 'Restitution or damages' (1950) 20 Ohio L.J 175).*
>
> *My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression*

'restitutionary damages'. Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the *same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract. The state of the authorities encourages me to reach this conclusion, rather than the reverse. The law recognizes that damages area not always a sufficient remedy for breach of contract. This is the foundation of the court's jurisdiction to grant the remedies of specific performance and injunction. Even when awarding damages, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer. This applies to interference with property rights. Recently, the like approach has been adopted to breach of contract. Further, in certain circumstances an account of profits is ordered in preference to an award of damages. Sometimes the injured party is given the choice: either compensatory damages or an account of the wrongdoer's profits. Breach of confidence is an instance of this. If confidential information is wrongfully divulged in breach of a non-disclosure agreement, it would be nothing short of sophistry to say that an account of profits may be ordered in respect of the equitable wrong but not in respect of the breach of contract which governs the relationship between the parties. With the* established authorities going thus far, I consider it would be only a modest step for the law to recognize openly that, exceptionally, an account of profits may be the most appropriate remedy for breach of contract. It is not as though this step would contradict some recognized

principle applied consistently throughout the law to the grant or withholding of the remedy of an account of profits. No such principle is discernible.

[76] It is submitted that the circumstances in this action fall squarely within the rule suggested by the House of Lords. If general damages for breach of contract cannot be awarded, then the defendant would be permitted to profits from its improper withholding of a charge which the statutory regulator has directed it to cease levying. Disgorgement of profits by way of an account is the appropriate measure of the damages for breach of contract.

[77] The court is empowered also to award general damages *simpliciter for the* breach of statutory duty and the breach of the ICA. In his unchallenged witness statement, Mr. Jan Tjernell, General Counsel for the claimant, set out the damages and losses suffered by the claimant by virtue of the increased operating costs. These included loss and damage caused by the defendant's continued levy of the transit fee which has increased the claimant's network costs to provide interconnection services between its network and the defendant's mobile network. Further, that this damage is visible by way of reduced customer retention, increased churn or movement away from the claimant's network, and also reduced utilization of the claimant's services because of the extra costs.

[78] In *Aerial Advertising Co. v. Batchelors Peas Ltd. (Manchester)* Atkinson J., in a carefully worded judgment, held that general damages were recoverable for pecuniary loss in respect of a breach of contract. In his ruling, Atkinson examined earlier authorities which has been proffered as having established the opposite rule and concluded that in fact, no such rule had been established. The relevant portion of his judgment reads:

I come, then, to the claim for general damages and here a point of law is raised. There is only a claim for general damages in respect of pecuniary loss, and Mr. Roskill says that I cannot give general damages for

pecuniary loss in respect of breach of contract, and that I can give damages only by way of special damage for a breach of contract. For that argument Mr. Roskill relies upon Groom v Cocker. I fail myself to see any difference in principle between a claim for special damage and a claim for general damage. One, of course, has to be provided as completely as does the other. The only difference is that, where one is claiming special damage, the circumstances are such that one is able to put one's finger on a particular item of loss and say, "I can prove that I lost so much there, so much there, and so much there," whereas a claim for general damage means this: "We cannot prove particular items, but we can prove beyond all possible doubt that there has been pecuniary loss." Once that has been proved, I cannot myself see any difference in principle between special damage and general damage. When one reads Groom v Crocker, one sees that, so far from saying that there is a difficulty in recovering general damages, to my mind it says precisely the opposite. The relevant passage in the case is quite short. Groom v Crocker was decided so recently that I need not go through the facts. What Sir Wilfrid Greene MR said (and this is what is relied upon) is at p. 401:

It was said that, as the result of negligence on the part of the appellants, the respondent was subjected to mental suffering, that he was held up to public disapproval, that his reputation as a careful driver was destroyed, and that the jury were entitled to award damages in respect of these matters. It was said that the action was an action in tort, and not in contract, and that, even if it were an action in contract, such damages were recoverable. In my opinion, the cause of action is in contract, and not in tort.'

Sir Wilfrid Greene MR then goes on to say what the duty was, and proceeds, at p 402:

"No authority was cited to us which supports the proposition that, in an action based on breach of contract, damages can be recovered in

respect of the matters to which I have referred [which did not include pecuniary loss]. No pecuniary loss arose from them and no reasonable probability of pecuniary loss in the future could be shown."

Surely, if that means anything at all, it means that this is not a case of pecuniary loss, where, of course, damages could be given, but something quite different. Sir Wilfrid Green MR then says at p 402:

"Reliance was placed on Wilson v. United Counties Bank Ltd. In that case, bankers, who had been entrusted with the supervision of a trader's business, by their negligence caused his bankruptcy. In addition to damages for the loss occasioned to the bankrupt's estate, the jury awarded £7,500 damages for the injury to his credit and reputation, and it was held b the House of Lords that this award was good. The decision rested upon the special terms of the contract under which the bank "agreed to take all reasonable steps to maintain the plaintiff's credit and reputation. Lord Birkenhead, L.C., put the case in the same class as that of the case where a banker dishonours a cheque although the customer's account is in funds. In such cases, it is the commercial credit of the customer that is injured, and the inference arises that pecuniary loss will necessarily ensue."

[79] In summarizing the passage above, Atkinson stated:

I repeat that I do not regard that as an authority for the proposition ***795*** *that general damages are not recoverable for pecuniary loss.*

[80] It is submitted that the unchallenged evidence of Mr. Jan Tjernell is sufficient proof that the claimant has suffered pecuniary loss and damages as a consequence of the defendant's breach of contract.

[81] The claimant's damages under this hear are effectively unquantifiable. For example, it is well nigh impossible to determine how many customers will have set their face against calls to the claimant's network because of higher call charges consequent on the increased interconnection rates. Similarly, the defendant could not determine with accuracy the customers from its network who departed because the majority of their calls were made to the defendant's network and then recognized that the charges of the claimant included a component which the defendant's on-network customers do not pay.

[82] It is submitted however, that where damages are payable, the court is bound to make the best effort possible to determine these damages. Furthermore, damages in this action must reflect both the scale and magnitude of the actual monetary loss suffered by the claimant as well as the advantage obtained by the defendant. Certainly, there must be some discernible relationship between the damages awarded for breach of statutory duty and breach of contract, and the financial value to the defendant of these breaches.

[83] It is further submitted that the assessment of damages for breach of statutory duty and breach of contract should be guided by principles appropriate for the award of actionable trespass. The courts have for some time accepted that a restitutionary approach to the assessment of damages can be adopted in such claims where the claimant has suffered no quantifiable loss. Where as in this case, the claimant's has suffered damages which are not easily ascertainable, it is submitted that this principle should apply *a fortiori*, and the court may usefully use as the measure of damages the benefit which the defendant obtained from the wrongful act.

[84] In *Penarth Dock Engineering Co. Ltd. v. Pounds* the defendant trespassed on the claimant's dock by failing to remove their pontoon. There was no question of the claimants suffering an actual loss, nor even any gain by letting out the dock to the third party. Lord Denning stated:

The test of the measure of damages is not what the plaintiffs have lost, but what benefit the defendant has obtained by having the use of the berth".

[85] In the latter case of *Swordheath Properties Ltd. Tabet,* damages for trespass by licensees of a tenant who remained in occupation of the rented premises after the same was vacated by the tenant, thereby bringing their license to an end, was assessed by reference to the ordinary letting value of the property. In *Robert Evans and Marjorie Evans v. Cable & Wireless Jamaica Ltd,* Harrison, J.A., cited these authorities and the general principle with approval.

[86] The claim for the amounts withheld is a continuing one and therefore properly calculable by the taking of an account. The defendant readily admitted that it was able to calculate the amount withheld with precision. In *Swordheath Properties Ltd. v Tabet*, the court without more, indicated that it was perfectly proper to obtain information as to the damages post judgment.:

In the present case, therefore, it appears to me that this appeal falls to be allowed and that the plaintiffs ought to have, not merely judgment for possession, but also damages for trespass for whatever would have been the appropriate amount (on which, no doubt, we can have information from counsel as being the proper letting value of the property from 5 July 1976 to the date of the judgment in the West London County Court, (emphasis added)

[87] By parity of reasoning, the amount withheld in the instant case must be calculated post judgment, and it is submitted that the most efficient and reasonable method for this to be done is by way of a Registrar's account. Indeed, it is actually unlikely that notwithstanding this order granted, the parties would actually require the taking of this account as it is common ground that the record keeping between the parties enables the determination of the amount

withheld with accuracy.

[88] It is the claimant's position that no less an amount than 25% of the amount improperly withheld by the defendant should be awarded as damages for breach of statutory duty and breach of contract. The amount payable serves no only as compensation to the claimant for the loss of opportunity in having been deprived of valuable income by its chief competitor, but also to redress the level of unjust enrichment which the defendant profited from during the period of withholding of the transit fee.

[89] Accordingly, the claimant contends that damages should be awarded in its favour as follows:

(a) *Amounts withheld*

1/3/2002 – 28/2/2006	-	J$155,838,721.00
1/3/2006 and continuing	-	calculable by an account to be taken by the Registrar of the Supreme Court

(b) Damages for breach of statutory duty and breach of contract

A sum equivalent to 25 per centum of the principal amount found in (a) above.

[90] Furthermore, pursuant to clause 9.4 of the ICA, interest is payable on all sums unpaid for a period of 30 days or more at the base lending rate of the Bank of Nova Scotia from time to time in force plus 2%. The amounts withheld by the defendant clearly fall within the aegis of this clause, and the court is therefore asked to order accordingly. For convenience and simplicity, the court may consider a form of order directing interest to be calculated by the Registrar of the Supreme Court on a sum in accordance with clause 9.4 of the ICA.

[91] Interest is payable by virtue of the court's statutory in respect of awards for

damages and the claimant therefore requests that in regards to any award under [90] that interest be awarded at the commercial rate of 15 per centum per annum, or such other rate as in the court's estimation is appropriate for a commercial transaction. If so desired, the court is entitled to deduce the applicable commercial transaction. If so desired, the court is entitled to deduce the applicable commercial interest rate post judgment for this head of damages by reference to the Bank of Jamaica's Statistical Digest, as this practice has already been approved by the Court of Appeal.

[92] In *British Caribbean Insurance Co. Ltd. v. Perrier,* Carey J.A., having earlier pointed out that since the rationale of the award of interest was *restitution in integrum,* the rate of interest in commercial cases should be the rate at which the plaintiff can borrow money, had this further to say:

> *This leads me to venture the rate which a judge should award in what may be described as commercial cases. It seems to me clear that the rate awarded must be a realistic rate if the award is to serve its purpose. The Judge, in my view, should be provided with evidence to enable him to make that realistic award. In the case just cited, evidence was in fact led by the Plaintiff but I can see no objection to documentary material being properly placed before the judge to enable him to ascertain and assess an appropriate rate. If, as I suggested in Long Yong (Pte) v. Forbes Manufacturing & Marketing Ltd. Ltd. [1986] 40 WIR 229 that it is desirable that a claim for interest should be included in the prayer, then that would remind the parties that evidence can be adduced at the trial. In summary, the position stand thus:*
>
> *(i) awards should include an order for the defendant to pay interest;*

(ii) the rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant; and

(iii) the plaintiff is entitled to adduce evidence as to the rate at which such money could be borrowed.

Having regard to the evidence led before the learned judge viz, the contents of the statistical digest published by the Bank of Jamaica, he was entitled to fix the rate at which he did. His approach was consonant with my understanding of the law. In the result, I would dismiss the appeal with costs to the respondents.

[93] It is therefore clear that if necessary the court can be referred to the Bank of Jamaica's Statistical Digest for information on the applicable commercial rate of interest.

Orders sought

[94] Accordingly, the claimant seeks the following judgment from the court:

(a) A declaration that the defendant is in breach of s.29 of the Telecommunications Act, 2000, in that it has failed to provide direct interconnection between the claimant's mobile network and the defendant's mobile network as required by the Act;

(b) A declaration that the defendant is in breach of the approved terms of its Reference Interconnect Offer in that it has failed to remove the transit charge for interconnection between the claimant's mobile net work and the defendant's mobile network.

(c) A declaration that the defendant is in breach of the approved terms of its Interconnection Agreement with the claimant dated the 18th day of April, Reference Interconnect Offer in that it has failed to provide direct interconnection between the claimant's mobile network and the defendant's mobile network.

(d) An account of and payment of all transit charges withheld by the claimant from the 1st day of March, 2002, until the date of payment of the said sum;

(e) General damages for breach of the defendant's statutory duty in that the defendant has failed to permit direct interconnection of the claimant's mobile network with the defendant's mobile network in contravention of its duty pursuant to s.29 of the Act and damages for breach of the Interconnection Agreement between the claimant and the defendant in that it has failed to comply with the specific terms of clause 29.1 of the interconnection agreement, in a amount equivalent to 25% of the amount found on the taking of the count in (d) herein:

(f) Interest on the amount awarded under (d) herein calculated in the absence of agreement between the parties by the registrar of the Supreme Court, at the base lending rate of the Bank of Novia Scotia from time to time in force plus 2% from and including the days following the withholding of each portion of the amount withheld until the date of repayment in full;

(g) Interest on the amount awarded under (e) herein at a rate no less than 115 per centum per annum from the date of judgment until payment thereof;

(h) Costs and Attorneys-at-law costs;

(i) Consequential orders as may be appropriate to ensure the execution and enforcement of this judgment.

DEFENDANT'S SUBMISSIONS

Facts and Issues on the Statements of Case:-

1. It is submitted that the claim against the Defendant is wholly unmeritorious as the 1.Claimant has failed to establish any liability, prima facie or otherwise, on the part of the Defendant.

2. The Particulars of Claim filed 30th March claims inter alia declarations and consequential orders for damages for alleged breaches on the part of the Defendant of section 29 of the *Telecommunication Act*, 2000 on the purported basis that the Defendant failed to provide direct interconnection between the Claimant's mobile network and the Defendant's mobile network as stipulated by the Act; that the Defendant failed to remove transit charges incurred by the Claimant for interconnection between the two mobile networks; as well as consequential orders for damages for breach of the approved terms of its Reference Interconnection Offer ("RIO") by reason of its failure to provide direct interconnection between the mobile networks of both entities.

3. The Defendant contends that pursuant to section 29 of the *Telecommunication Act,* 2000 it signed an Interconnection Agreement with the Claimant on 1st April 2001 which Agreement allowed for connectivity between the Claimant's mobile network and the Defendant's fixed network. By reason of this Agreement the Claimant's mobile customers are able to connect with the Defendant's fixed line customers and in addition the Interconnection Agreement facilitates calls from the Claimant's mobile customers to the Defendant's mobile customers through a transit service across the Defendant's fixed network. Accordingly the

Defendant asserts that it has thus satisfied the requirements of the Act as to permitting interconnection, and is accordingly not in breach of the statute.

4. The Claimant had thereafter requested **direct** interconnection to the Defendant's **mobile network** and in this regard in 2001 the Claimant and the Defendant commenced good faith negotiations and discussions towards achieving a commercial agreement for direct mobile-to-mobile interconnection. Contrary to the Claimant's assertion that the Defendant has refused to provide interconnection, the Defendant maintains that it has provided interconnection (although not required by statute) and that negotiations in this regard have ensued between representatives of the respective parties towards arriving at a possible agreement as to direct mobile interconnection.

5. The Office of Utilities Regulations ("the OUR") in its Determination issued on 2nd September 2004 declared all mobile operators dominant in the termination of calls on their network. Thus the Claimant had been declared dominant in respect of call termination on its mobile network. The Claimant however requested a Reconsideration of the Determination in accordance with the statutory provisions. The OUR reconfirmed its determination of 2nd September 2004 on 1st May 2007 in a document titled, "Reconsideration of Offices Decision on Assessment of Dominance in Mobile Call Determination". The Claimant appealed the decision to the Telecommunications Appeal Tribunal (TAT) and as a consequence, the determination on mobile dominance was stayed pending the outcome of the appeal.

6. The effect of the Claimant's challenge in 2004 to the OUR's determination on mobile dominance has meant that regulation of mobile interconnection was stalled and therefore the terms and conditions for direct mobile-to-mobile interconnection remain subject to commercial arrangements between the intended parties. The Defendant has therefore not refused to interconnect with the Claimant and in fact had entered into good faith

negotiations with the Claimant for a proposed Mobile Interconnection Agreement. Also of relevance is the fact that on 30th May 2005 the Claimant executed a Bulk Transit Discount Agreement with the Defendant from June 2005 gave the Claimant a 60% volume discount based on an agreed traffic threshold on the transit charges which had been approved by the OUR pending the finalization of the negotiations between the parties for an agreement to permit direct interconnection to the Defendant's mobile network.

7. This Agreement was initially for a period of 9 months and continued from month to month until termination by either party but to date the Bulk Transit Discount Agreement has not been terminated.

8. Additionally a Determination Notice was issued by the OUR on 7th February 2002 titled Document TEL 2002/01 which prompted the Defendant to seek clarification of Determination 3.4 by the Defendant's letter dated 19th February 2002 and the OUR respondent to clarify the aforementioned Determination by its letter of 20th March 2002 which stated inter alia, that:

"Firstly, the Office is in no way instructing C&WJ to refrain from charging applicable transit rates for traffic between CDJ and Digicel. The Determination Notice deals specifically with traffic between Digicel and C&WJ mobile and CDJ and C&WJ mobile. Digicel and CDJ may choose to connect directly with each other's network. Alternatively, as is currently the case they may continue to purchase transit service from C&WJ's fixed network. **Secondly, the Office's Termination Notice of February 2001 provides for mobile operators to have the option of either direct interconnection to C&WJ's mobile network or to purchase transit service from C&WJ. This means that where a carrier chooses not to make a mobile connection a transit fee would continue to be applicable."**

9. The Office then summarized and stated further that:-

"**Transit service will continue to be part of the RIO as an alternative to a direct mobile to mobile connection"**

10. The letter from the Defendant to the OUR requesting clarification of the Determination Notice is **tab 4** in the Agreed Bundle of Documents and the letter from the OUR to the Defendant dated 20t March 2002 is **tab 5** in the Agreed Bundle of Documents.

11. It is submitted further that it is clear on the documentary evidence that contrary to the Claimant's assertion that the transit charges levied by the Defendant were "illegally retained" and/or "illegally charged", this is not the case as the OUR's clarification of Determination 3.4 TEL 2002/01 dated 20th March 2002 clearly states that transit charges and services will continue to be an approved part of the RIO process as an alternative to direct mobile-to-mobile connection. Further and in any event the Claimant agreed to the imposition of transit charges by the Defendant pending the conclusion of a commercial direct mobile-t-mobile interconnection agreement, when it signed the Bulk Transit Discount Charges Agreement which has continued to remain in effect up until now.

12. Further the Claimant's allegation at paragraph 30 of its Particulars of Claim that it entered into the said Bulk Transit Discount Charges Agreement under duress has been succinctly refuted by the Defendant at paragraph 29 of its Defence when it unequivocally denied the allegation that the Claimant entered into the Agreement under duress and stated that:

"The Defendant avers and says that the Claimant having publicly

Claimed to be the 'bigger, better, network' could not be subject to execution of a contract under duress. That moreover, the Defendant has a fully operational legal department with both local and overseas Attorneys and that the Defendant is also represented by external Counsel capable of providing ample legal advice on the Agreement prior to its execution which the Claimant acknowledges was a viable commercial option."

13. In relation to the additional 15 cents per minute incremental charge to current mobile termination rates the Defendant says that this charge is a legitimate charge to recover costs to be incurred by the Defendant to purchase and install additional switching interfaces, transmission equipment, billing hardware and software to upgrade associated systems to provide the service requested by the Claimant and the said charge is not in violation of the OUR's determination under review.

14. It is submitted that the crux of the Claimant's claim to the effect that the Defendant has refused to provide direct interconnection between the mobile networks of both entities is not borne out by the documentary evidence or the course of dealings between the parties. To the contrary, the Defendant submits that the documentary evidence commencing with the parties. To the contrary, the Defendant submits that the documentary evidence commencing with the Claimant's letter of 26th March 2003 wherein the Claimant admitted that, "*discussions have been taking place between our Companies for direct interconnection to the C&WJ mobile network,'* demonstrates that the parties were engaged at all material times in commercial negotiations towards arriving at the timers and conditions of interconnection between the mobile networks of both entities

15. Subsequent to the execution of the Bulk Transit Discount Agreement on 30th May 2005 a meeting was held on 3rd November 2005 between representatives of the Defendant being Mr. Lawrence McNaughton and Mr. Rodney Davis, then the President of the Defendant and Mr. Ian Marwood and Mr. David Hall, then the Chief Executive Officer for the Claimant in a further attempt to come to an agreement in relation to direct interconnection between the two mobile services. On the following day, 4th November 2005 Mr. Marwood forwarded an e-mail correspondence confirming the discussions of the day before. The exchange of e-mail correspondence commencing with the e-mail correspondence of 4th November 2005 from Mr. Marwood to Mr. McNaughton and Mr. Davis is **tab 20** in the Agreed Bundle of Documents and confirms conclusively that a meeting did take place and that the Defendant was to respond with a further proposal for direct interconnection with its mobile network by the end of that week.

16. Consequent on that initial meeting Mr. McNaughton sent to the Claimant a proposal dated 11th November 2005 which he had prepared together with Mr. Derrick Nelson of the Defendant's carrier services which presented various options including direct mobile interconnection as well as international and domestic transits to the Defendant's mobile network. A copy of the proposal made to the Claimant dated 11th November 2005 is **tab 19.** The proposal of 11th November 2005 also included inter alia the requirement that the Claimant undertake to pay for the Joining Services costs.

17. In response to this proposal, the Claimant's Mr. David Hall corresponded with the Defendant on 5th December 2005 detailing the Claimant's objection to the proposals made by the Defendant and making a counter proposal. The principal objection was based on the Defendant's requirement that the Claimant pay the full Joining Services cost. Mr.

Lawrence Davis, the then Vice President of the Carrier Billing of the Defendant responded by letter of 22nd December 2005 to indicate inter alia that the Defendant at no time had refused to provide direct interconnection to its mobile network and reminded Mr. Hall that pursuant to previous negotiations the Claimant had agreed to stand the full cost of the Joining Services.

18. The parties subsequently resumed negotiations commencing with a further meeting held on 4th January 2006. At the meeting of 4th January 2006, Mr. Ian Marwood accepted the Defendant's proposal for mobile interconnection and on behalf of the Claimant agreed that the Claimant would fund the full cost of the Joining Service to interconnect with the Defendant's mobile network. Further, at that meeting M. McNaughton advised the Claimant's representatives that an additional 15 cents per minute charge to the mobile termination rate would be imposed to cover additional charges to be incurred by the Defendant to defray costs incurred to purchase and install additional switching interfaces transmission equipment, billing hardware and software to effect operational systems changes which must be recovered by monthly recurring charges. This additional incremental charge of 15 cents per minute was also agreed in principle by Mr. Marwood who subsequently on 5th January 2006 sent an e-mail correspondence with a summary of the matters discussed at that meeting. The e-mail correspondence of 5th January 2006 from Mr. Marwood to Mr. Derrick Nelson inter alia is tab 23 in the Agreed Bundle of Documents.

19. Importantly, the e-mail correspondence of 5th January 2006 detailed inter alia the Claimant's understanding that the cost for the Joining Service would be Us$85,000.00 and that additional charges such as incremental costs for providing mobile-to-mobile services would also be applicable.

20. Subsequent to the e-mail correspondence of 5th January 2006, the cost of the physical Joining Service as well as the incremental charges to be added to interconnection in respect of the existing mobile termination charge were confirmed. However, the parties were unable to reach a resolution when the Defendant received a letter from Digicel dated 18th January 2006 which purported to reject the Defendant's proposals and issued an ultimatum giving the Defendant a final opportunity to comply with the Claimant's counter-proposal. The said letter also indicated a change of position when instead of confirming its agreement to pay the full joining costs, the letter purported to state that the Claimant would pay 50% of the justifiable joining costs.

21. Mr. McNaughton responded to the Claimant's letter by his letter of 7th February 2006 which inter alia reminded the Claimant that contrary to its assertion that the discussions were not, '*a substitute for bona fide negotiations*' expressed surprise that the Claimant had not been treating the lengthy discussions as to the terms and conditions of interconnection as bona fide negotiations. Mr. McNaughton expressed the view that the discussions being held towards amicably finalizing the terms and conditions of interconnection were part of the process of good faith commercial negotiations. The said letter also sought to remind the Claimant of the June 2005 volume discount agreement on transit charges and confirmed that in the interim the Defendant's Mr. Derrick Nelson as well as the Claimant's Ian Marwood had been engaged in negotiations during the course of which the Defendant had made a proposal as to the option of direct mobile interconnection as against international and/or domestic transits to the Defendant's mobile network. The latter pointed out that bona fide negotiations resumed with the meeting held on 4th January 2006. The latter also pointed out the contradictory stances taken by the Claimant when it had previously agreed to stand the full cost of the Joining Service later confirmed by the Claimant's representatives at the 4th

January 2006 meeting and which contradiction is aptly illustrated in Mr. Hall's letter of 18th January 2006 when he stated that, '*at no time has Digicel ever agreed to withstand the full joining cost'* and then when he stated that the contrary that, *'Digicel may have been prepared to* undertake the full costs' indicating clearly the inconsistent positions adopted by the Claimant during the course of negotiations.

22. The said letter of 7th February 2006 ended by stating the Defendant's continued willingness to embark on further discussions and invited the Claimant to return to the negotiating table with the hope that a productive resolution of the matter as to the terms and conditions of mobile-to-mobile interconnection could be achieved.

23. Instead of responding favourably to the invitation issued by the Defendant the within Claim Form and Particulars of Claim were issued on 30th March 2006.

24. The Defendant contends that:

(a) In the absence of a regulatory regime for dominant mobile Carriers established by the OUR, direct mobile interconnection between the mobile networks of the Claimant and the Defendant is to be determined by the parties reaching and concluding a commercial agreement.

(b) Notwithstanding the Defendant's best efforts no agreement has not yet been reached with the Claimant.

(c) As there is interconnection between the carriers as evidenced by the present Interconnection Agreement, the

(d) Defendant is therefore not in breach of the *Telecommunication Act* 2000. The Defendant is therefore entitled to charge the Claimant transit rates in accordance with the determination of the OUR or as otherwise agreed between the Claimant and the Defendant and accordingly, the Defendant is not liable to the Claimant for refund of any sum in respect of transit charges incurred and paid for and to be incurred.

(I) Arising from those contentions the following issues of fact and law.

(i) Whether the Defendant is obliged or compelled to enter into an agreement for direct mobile interconnection with the Claimant having regard to the fact that both entities have been unable to agree to terms and conditions for a suitable commercial agreement as to direct mobile-to-mobile interconnection.

(ii) The effect of the challenge by the Claimant to the determination and reconsideration of the OUR in relation to mobile dominance and whether the Defendant has complied with the terms of the *Telecommunication Act 2000*

(iii) Whether the Defendant is entitled to charge the Claimant transit rates in accordance with the Determination of the OUR or as otherwise agreed with the Claimant and accordingly, whether the Defendant is liable to the Claimant for any sum in respect of transit charges or otherwise.

Analysis of Evidence on Examination in Chief and Cross Examination:-

25. It is submitted that the Defendant's contention that the Claimant has failed to establish even a prima facie case against it is amply supported by an

analysis of the evidence given on behalf of the Defendant. The evidence-in-chief of Mr. Lawrence McNaughton, Executive Vice President Carrier Services for the Defendant contained in his Witness Statement filed 27th August 2009 establishes conclusively:

(a) That the Interconnection Agreement between the Claimant and Defendant executed 28th April 2001 allows for connectivity between the Claimants mobile network and the Defendant's fixed network and the Interconnection Agreement also facilitates calls from the Claimant's mobile customers to the Defendant's mobile customers, that is mobile-to-mobile interconnection through a transit service facility offered by the Defendant in respect of its fixed network.

(b) Interconnection between the Defendant's mobile network and any carrier offering mobile services is governed by the Reference Interconnection Offer ('RIO') approved by the OUR which sets the terms and conditions and rates for interconnection.

(c) Consequent on the challenge mounted by the Claimant in 2004 to the OUR's determination on mobile dominance regulation of mobile interconnection has been stalled and accordingly the terms for direct mobile-to-mobile interconnection remain subject to the commercial negotiations between intending parties.

(d) Pending the finalization of a mobile Interconnection Agreement the Claimant's mobile customers are able to connect with the Defendant's mobile customers through the existing fixed network. The agreement governing transit service is contained in the Interconnection Agreement at section 1.12 which deals with the Public's Switched to Telephone Network ("PSTN") transit service.

The said transit charges were ultimately approved by the OUR by letter dated 20th March 2002. It clarified Determination Notice 3,4 document TEL 2002/01 which made reference to transit charges and specifically stated that, "… *The Office's Determination Notice of February 2001 provides for mobile operators to have the option of either direct interconnection to C&WJ's mobile network or to purchase transit service from C&WJ. This means that where a carrier chooses not to make a mobile to mobile connection, a transit fee would continue to continue to be applicable … transit service will continue to be part of the RIO as an alternative to* direct *mobile to mobile connection*." Further, the OUR's most recent approval of the transit service offered by the Defendant was November 2004 when it issued Determination Notice 3.3, titled "*Transit Service: stating that "The Charges in that category (Part 4) of RIO 5A are approved but with the provision that where an interconnection seeker is willing and able to provide direct interconnection with C&WJ's mobile network but C&WJ is unwilling and unable to do thus necessitating transit if the fixed network the charges shall not apply."* By that Determination Notice the current PSTN Domestic Transit Rate as set out in RIO 5A is approximately 57 cents per minute for a one minute call averaged across all time bands.

(e) The Claimant executed the Bulk Transit Discount Agreement of the Defendant giving the Claimant a **60% volume discount** based on an agreed traffic threshold on the transit charges previously approved by the OUR pending the finalization of negotiations between the parties for an agreement to permit direct mobile-to-mobile interconnection between the mobile networks of the two entities.

(f) A review of the history of the matter reveals that:

i. the parties have been in commercial negotiations from as early as November 2002 when the Claimant requested a meeting with the Defendant's representatives to discuss direct interconnection to the Defendant's mobile network in light of the OUR's Determination TEL. s20022/01;

ii the Defendant entered into the requested discussions and that notwithstanding by letter from the Claimant dated 26th March 2003 to the Defendant there was an attempt on the part of the Claimant to allege that the Defendant was responsible for their being no concluded agreement;

iii this was responded to by Mr. McNaughton on 31st March 2003 when he pointed that information had been requested from the Claimant in relation to determination rates and the Defendant had received no definitive response;

iv. by letter of 3rd February 2004 the Claimant corresponded with the Defendant demanding the refund of interconnection charges in excess of JA$82,000,000.00 which the Defendant maintains was properly charged in accordance with the Interconnection Agreement;

v. accordingly by letter dated 10th February 2004 the Defendant responded to advise that there was no basis for the refund of such sums;

vi. a meeting was held on 3rd November 2005 between Mr. Rodney Davis, the then President of the Defendant and Messrs. Ian Marwood and David Hall, Officers of the Claimant and Mr. McNaughton in a further attempt to come

to an agreement as to the terms and conditions of direct mobile-to-mobile interconnection;

vii this followed from an e-mail correspondence from Mr. Ian Marwood of 4th November 2005 confirming the discussions of the meeting before;

viii the Defendant's Mr. McMaughton corresponded with the Claimant forwarding a proposal dated 11th November 2005 which he prepared along with Derrick Nelson;

ix on 15th November 2005 an e-mail from Mr. Ian Marwood was sent to the Defendant rejecting the proposals of the Defendant dated 11th November 2005;

x on 16th November 2005 Rodney Davis responded to the e-mail correspondence from Mr. Ian Marwood and ask the Claimant to make specific recommendations with which they would be comfortable;

xi by letter of 5th December 2006 the Claimant's David Hall correspondence with the Defendant detailing the Claimant's objection to the Defendant's proposals;

xii by letter of 22nd December 2005 the Defendant responded to state inter alia that it at not at any time refused to provide direct interconnection with its mobile network and reminding that in accordance with previous negotiations the Claimant had agreed to stand the full costs of joining service and that the reason for the delay in finalizing the agreement was due

to the challenge made by the Claimant to the OUR's determination on the issue of mobile dominance;

xiii thereafter the parties resumed negotiations commencing with a meeting held on 4th January 2006. At that time Mr. Marwood accepted the proposal for mobile interconnection offered by the Defendant on behalf of the Clamant and also agreed to fund the full cost of the Joining Service to the Defendant's mobile network. Additionally the Claimant's representatives were advised that a 15 cent per minute charge to the current mobile determination rate would be imposed by the Defendant to cover additional costs be incurred by the Defendant in equipment, etc. and installation charges which was also agreed to by Mr. Marwood who by e-mail correspondence of 5th January 2006 sent a summary of the discussions at that meeting.

xiv a meeting was again held with representatives of the two entities and on 18th January 2006 an e-mail correspondence was sent to Mr. Marwood confirming the costs of the physical Joining Service as well as the incremental charge to be added to the existing termination charges;

xv no resolution was reached when by letter of 18th January 2006 in response to the Defendant's letter of 22nd December 2005 the Claimant rejected the Defendant's proposals on the matter issuing an ultimatum giving the Defendant one final opportunity to comply with the Claimant's demand;

xvi by letter of 7th February 2006 Mr. McNaughton responded to the Claimant confirming that they had been conducting bona

fide negotiations with the Claimant notwithstanding its demands and that at all material times the Defendant remained willing and able to continue and conclude discussions with a view to arriving at an agreement as to interconnection between the mobile networks of the two entities; and finally notwithstanding the commencement of this action, representatives of the two entities met on 4th October 2006 to discuss a possible solution which meeting was confirmed by its letter of 23rd October 2006 when the Defendant corresponded with the Claimant however those discussions proved unsuccessful.

26. Mr. McNaughton's evidence-in-chief contained in his Witness Statement was further strengthened in oral evidence-in-chief and also in cross examination. In his viva voce evidence-in-chief he indicated that the transit charges were not illegal in circumstances where there is no regulation for the competing mobile networks and the OUR is not in a position to set rates and that at all material times the parties were involved in commercial negotiations and commercial proposals and counter proposals were exchanged. He also stated categorically that at no time has the Defendant refused to provide mobile-to-mobile interconnection and the proposals made during the negotiations with senior representatives of the Claimant saw their acceptance of the Defendant's proposals as to the payment of the full costs of the joining service and the 15 cents incremental costs to upgrade facilities. He confirmed further that the Claimant went as far as purchasing joining services which saw project teams and time schedules being established until project was overturned by the Claimant's Mr. David Hall.

40. In relation to paragraph 30(g) that the Defendant was entitled to transit charges as long as they were able to, the evidence in this regard is to be found on page 179 of the transcript where the evidence was as follows:

Q: You agree, from your perspective, you says it should not be charges?

A: We say the transit should be charged.

Q: You say you are entitled to charge it?

A: We are entitled to charge it as long as we are willing and able to offer a direct and we feel confident that we have done … in fact done so and the situation that this be then that's what applies to the commercial negotiation and we have".

41. In relation to paragraph 30(h) to the effect that the transit service was expressly provided for in the Interconnection Agreement and also in the Tariff Schedule the evidence is to be located at pages 182 to 183 of the transcript which is as follows:

Q: Is there any where in the interconnection agreement, which you can point to which gives you the right to charge you the transit fee?

A: I would have to go to the transit service approved by the OUR …

Q: The transit schedule you talking?

A: The tariff schedule …

A: Sorry. I said transit inadvertently, so the tariff schedule is there and it is approved by the OUR and we have gone beyond that and we have agreed a discount on top of that to which Digicel is benefitting from.

Q: They are paying 60% instead of a … so they are paying 40%.

A: No. They are paying 40% of the charge that OUR approves.

Q: I am putting it to you that the OUR approved of this charge an approval of that charge to Digicel mobile?

A: I would have to disagree with that, sir.

Q: Where in RIO 4?

A: I am just amplifying the charge where it says the transit charge is applicable as long as Cable & Wireless is willing and able to provide a direct connection to its mobile on request from another mobile."

42. Paragraph 30 (i) has already being addressed in the evidence which we have received so far and in relation to paragraph 30(j) concerning Mr. McNaughton's firm belief that an agreement would have been arrived at in 2005 but for the intervention of Mr. David Hall, the CEO of Digicel and that evidence is to be found at pages 185 to 186 of the transcript when Mr. McNaughton answered a question to the following effect:

"A: We said … we did not say we were not … we did not refuse and we are still willing and able to continue discussion. In fact, you would have seen us saying and we feel that if it was not for, it was not for the intervention of Mr. Hall back then, we might have …

Q: Who rubbished the agreement?

A: He had a different view on it …

Q: I am similarly suggesting to you that Determination 3.3 applies in the circumstances and even on this current Determination 3.3 not authorized to charge the transit service as apart of PLMN?

A: And I will disagree that we are willing and able and as I mentioned before, we may have come and signed agreement back in 2005, if this was not for the intervention of Mr. Hall".

Legal Analysis – Whether Defendant in Breach of the Telecommunications Act

51. Section 67 of the Telecommunication Act, 2000 provides that a person who engages in conduct which constitutes*:*

a. A contravention of any obligations or prohibitions specified in the relevant provisions of this Act … is liable in damages for any loss caused and/or any other person by such conduct"

The cause of action against the Defendant is framed on the claim for a declaration that the Defendant is in *breach of section 29 of the Telecommunication Act, 2000* in that it has allegedly failed to provide direct interconnection between the Claimant's mobile network and the Defendant's mobile network and the Claimant is therefore entitled to consequential damages for the alleged breach of the Defendant's statutory obligations and as set out under section 29 of the Act. Section 29 of the Act provides inter alia, that:

(A) Each carrier shall upon request in accordance with this

Part, permit interconnection of its public voice network with the public voice networks of any other carrier for the provisions of voice services.

(B) Public voice carrier shall provide interconnection in accordance with the following principles –

(i) Any-to-any connectivity shall be granted in such manner as to enable customers of each public voice network to complete calls to customers of another public voice network or to obtain services from such other network;

(ii) End-to-end operability shall be maintained in order to facilitate the provisions of services by interconnecting carrier to the customer notwithstanding that the customer is directly connected to a different network;

(iii) Interconnecting carriers shall be equally responsible for establishing interconnecting as doing so as is quickly as practically reasonable.

(iv) … The Office may, either on its own initiative in assessing the Interconnection Agreement or in resolving a dispute between the operators make a determination of the terms and conditions of the call determination including charges.

(v) When making a determination of an operator's call determination charges, the Office shall have regard to the principle of cost orientation, so, however, that is the operator is non dominant then the Office may also reciprocity approaches …"

52. Also relevant is section 30 of the Act that provides that without prejudice to section 29:

> *"… A dominant public voice carrier shall provide interconnection in relation to a public voice network …"*

And section 28 which provides that:

> *"… The Office will determine which voice carriers to be classified as dominant public carriers for the purposes of this Act …"*

Also relevant are sections 31 and 32 of the Act. Section 31 provides that:

> *"The terms and conditions relative to the provision of the interconnection services provided to each carrier shall be determined inter alia in accordance with the relevant RIO or where that does not apply by agreement between the interconnection seeker and the interconnection provider."*

Section 32 provides that; dominant carriers shall, and any other carrier may, lodge with the OUR a proposed RIO setting out terms and conditions upon which other carriers may interconnect with the public voice network of that dominant or other carriers for the provision of voice services; such RIO to be submitted within a specified time after the date of determination of dominance.

53. It is submitted that within the context of that statutory framework governing interconnection between public voice carriers, the following is to be noted and applied.

54. In accordance with section 29 of the Act the Defendant and the Claimant entered into an Interconnection Agreement on 1st April 2001 which facilitates connectivity between the Claimant's mobile network and the Defendant's fixed line network thus allowing the Claimant's mobile customers to call the Defendant's fixed line customers and mobile to mobile interconnectivity is facilitated through transit service provided by the Defendant on its fixed network. Regulation of mobile interconnection was stayed consequent on the Claimant's challenge in 2004 to the OUR's determination on mobile dominance which means that direct mobile to mobile interconnection between the networks of both entities is not subject to regulation in accordance with section 30 of the Act until the establishment of the regulatory regime; but rather the terms and conditions for direct mobile to mobile interconnection services are to be determined in accordance with section 31(b) of the Act which is by commercial agreement between the interconnection seeker and the interconnection provider in this case the Claimant and the Defendant respectively.

55. The exchange of correspondence indicates as already noted in these submissions that at all material times the Defendant has not resisted the issue of Interconnection with its mobile network and has in fact been willing and ready to interconnect subject to appropriate terms and conditions being agreed. Therefore the Defendant has not breached section 29 of the Act in respect of interconnection with its mobile network as at present the issue of connectivity between both networks is not subject to regulation due to the fact that regulation of mobile interconnection has been stalled consequent on the Claimant's challenge to the OUR's determination of mobile dominance. Therefore section 30 of the Act cannot be triggered to regulate the interconnection as this issue is in limbo.

56. Further, the Claimant has not established that:

a. It is entitled to the declarations sought in the Particulars of Claim to the effect that the Defendant is in breach of that approve terms of its RIO in that it has failed to provide direct interconnection with its mobile network;

b. the imposition of transit charges of interconnection between the Claimant's mobile network and the Defendant's mobile network is "Unlawful" and/or "illegal".

57. It is submitted that the Claimants contentions in this regard cannot be sustained for the reason that:

a. When the Defendant submitted to the OUR its RIO and thereafter commenced negotiations in respect of the proposed Mobile Interconnection Agreement, the OUR gave its approval of RIO 5 which also included approval of the transit charges. That is to say, the transit charges were approved by the OUR in its approval of RIO 5.

b. The OUR in its clarification letter dated 20th March 2002 concerning Determination Notice 3.4 in respect of the said transit charges and when the OUR confirmed its approval of same and is stated that, *"… The Offices' Determination Notice of February 2001 provides for mobile operators* to *have the option of either direct interconnection to C&WJ's mobile network or to purchase transit service from C&WJ. This means that were a carrier chooses not to make a mobile-to-mobile connection a transit fee continue to be applicable … transit service will continue to be part of the RIO as an alternative to direct mobile-to-mobile connection."*

c. In its most recent approval of the transit charges OUR confirmed in Determination 3.3 on the RIO 5 and Tariff Schedule 5(a), that:

> *"The charges in this category (Part 4) of RIO 5(a) are approved but with the provisions that where an interconnection seeker is willing and able to provide direct interconnection with C&WJ's mobile network but C&WJ is unwilling and unable to thus necessitating transit of the fixed network the charges shall not apply."*

d. The documentary evidence consistently demonstrates that the Defendant had always remained willing and able to provide direct interconnection to the Claimant.

e. Further and in any event as has been detailed in these Submissions during the course of commercial negotiations between the parties executed the volume discount agreement pending the finalization of an interconnect mobile agreement between the two networks.

58. It is submitted that in the premise the Defendant has complied with its obligations under the *Telecommunication Act*, 2000. Further, the Defendant has established that it is entitled to charge the Claimant transit rates in accordance with the determination of the OUR and its subsequent clarification in relation to transit charges and as per the volume discount agreement governing the transit charges payable by the Claimant to the Defendant in respect of interconnection with the Defendant's mobile network.

59. It is further submitted that the Defendant is not obliged to enter into an agreement with the Claimant for direct mobile interconnection until the parties conclude and agree the terms and conditions to form the basis of a binding commercial agreement.

60. It is therefore submitted that on this issue at best what the parties achieved was an agreement to agree to a final agreement which as will be explained below does not create binding legal obligations recognized in contract law.

"Agreement to Agree" – Not Binding Agreement in Contract Law

61. It is submitted that there are a number of English authorities some of which are set out in the following legal analysis which are authority from the well recognized principle of contract law that an agreement between two parties to enter into an agreement where critical terms of the contract have not agreed to is not a contract at all. The House of Lords in an early decision in May and Butcher Limited v, The King [1929] UKHL 2 is the *locus* classicus for this proposition.

62. The facts in summary are that consequent on the aftermath of World War 1 a Disposals Boards was set up to sell surplus stock which had formerly been required for the prosecution of the war. The appellants who were purchasers of construction equipment and tents , had engaged in a course of dealings with the Board which commenced with an arrangement whereby there was agreement for the sale of goods and an agreement that the price for the goods should be subsequently fixed between the parties and an arbitration agreement was inserted in the event of disputes. There was a subsequent change of the person responsible for the conduct of the operations of the Board and consequent on that there was a change in the method of delivery of goods to purchasers including the appellants.

63. A dispute arose when the proposals made by the appellants for purchase of goods were not acceptable to the Board and the parties were unable to come to an agreement with the result that the Disposals Board considered themselves no longer bound by the agreement, negotiations having failed and the Board declining to deliver any more goods under the attempted bargain. Lord Buckmaster who delivered the main opinion of the House of Lords indicated that one of the issues rose for determination was:

> *"Whether or not the terms of the contract were sufficiently defined to constitute a legal binding contract between the parties. The Crown says that the price was never agreed. The suppliants say first, that if it was not agreed, it would be a reasonable price."*

64. During the course of his opinion Lord Buckmaster concluded as follows:

> *"In my opinion there never was a concluded contract between the parties. It has long been a well recognized principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all. It is of course perfectly possible for two people to contract that they will sign a document which contains all the relevant terms, but it is not open to them to agree that they will in the future agree upon a matter which is vital to the arrangement between them and has not yet been determined."*

65. Viscount Dunedin was also of the same opinion as Lord Buckmaster and his dictum on the issue is instructive. Viscount Dunedin stated as follows:

"This case arises upon a question of sale, but in my view the principles which we are applying are not confined to sale, but are the general principles of the law of contract.. To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties. In the system of law in which I was brought up, that was expressed by one of those brocards of which perhaps we have been too fond, but which often expresss very neatly what is wanted: "Certum est quod certum reddi potest" Therefore, you may very well agree that a certain part of the contract of sale, such as price, may be settled by someone else. As a matter of the general law of contract all the essentials have to be settled. What are the essentials may vary according to the particular contract under consideration. We are dealing with sale, and undoubtedly price is one of the essentials of sale, and if it is left still agreed between the parties, then there is no contract. It may be left to the determination of a certain person, and if it was so left and that person either would not or could not act, there would be no contract because the price was to be settled in a certain way and it has become impossible to settle it in that way, and therefore there is no settlement."

66. Lord Warrington of Clyffe concurred with their Lordships and concluded the judgment of the House of state as follows:

"The decision of this case depends upon the application of a well known and elementary principle of the law of contract, which is that, unless the essential terms of the contract are agreed upon, there is

no binding and enforceable obligation. In the present case we have a document which purports to be an agreement for the sale by one party to the other party of certain specified goods at a price to be hereafter agreed between them. If that price is thereafter agreed there is a binding contract within the principle to which I have alluded; each of the essential terms of the contract has been agreed. If the parties fail to arrive at an agreement, then the price has not be ascertained in the way in which the parties stipulated that it should be ascertained, and there is therefore no binding agreement.

It is said that this case is to be treated on the same footing as if there had been no fixing of the price; as if the contract had been silent as to the price and the law may then imply a reasonable price; but in the present case the facts preclude the application of any such principle. To date that would not be to imply something about which the parties have been silent it would be to insert in the contract a stipulation contrary to that for which they have bargained to give them, not the result of their own agreement, …"

67. The decision of the House of Lords in *May and* Butcher *Limited* v. *The King* is relevant to the fact of the instant matter because the course of dealings between the appellants and the Disposals Board which involved the exchange of proposals and counter proposals as to the method of sale of the goods leading to the Board's final decision to reject the appellant's proposal and to consider themselves no longer bound by the contract, is factually similar to the instant case. Here too there has been an exchange of proposals and counterproposals but no conclusive agreement as to the terms and conditions of the joining services charges, and who should bear the costs of same, thereby resulting in there being no binding agreement in place save for the Bulk Transit Discount Agreement.

68. There are also two other English Court of Appeal decisions which are particularly relevant to the instant matter are *Baird Textile Holdings* Limited v. Marks & Spencer Plc [2001] EWCA Civ. 274 and BJ Aviation Limited v. Pool Aviation Limited [2002] EWCA Civ. 163.

69. The facts in the *Marks & Spencer Plc* case were briefly that the appellant had been a principal supplier of garments to Marks & Spencer Plc for thirty (30) years when that relationship was terminated without notice which prompted the appellant Baird to commence proceedings against Marks &Spencer Plc contending that it was precluded by contract and estoppels from determining such arrangements without reasonable notice. Marks & Spencer Plc in return applied under CPR Rule 24.2 for summary judgment against Baird on the ground that it had no reasonable prospect for succeeding in the claim. The Judge at first instance dismissed the claim in contract but directed that it proceeded to trial on the basis of the estoppels. Both parties appealed and Baird's appeal was dismissed and Marks & Spencer's Plc appeal was allowed by the Court of Appeal.

70. The relationship between Marks & Spencer Plc and its suppliers including the appellant was described by one of the witnesses on its behalf as being:

> "*the very heart of the way we did business with our suppliers and a fundamental part of that philosophy was that M&S was going to carry on doing business with the manufacturer season after season, year after year."*
> *(per the Vice Chancellor quoting the Chairman of Marks & Spencer Plc Sir Richard Greenbury at paragraph 3 of the Internet Report*).

71. Another witness for Marks & Spencer Plc described the principle of partnership as being tantamount to it being symbolic. The core of the

case for the appellant was that in establishing and maintaining its relationship with Marks & Spencer PLc there was an implied promise that the appellant would supply Marks & Spencer Plc with garments on an annual and seasonal basis; it would allow Marks & Spencer Plc be closely involved in the design and manufacturer of the garments to be supplied; it would deal with Marks & Spencer Plc in good faith; and that the relationship would continue long term and would be terminated upon the giving of reasonable notice all having regard to the objective of the relationship. (per the Vice Chancellor at paragraph 6 of the Internet Report).

72. The commercial relationship was demonstrated by the close relations between senior executives of the two companies, consultations as to strategy sales designed technology and quality; the opportunity by the appellant of managers selected by Marks & Spencer Plc to monitor relationships between them and to provide information and inter alia; the acceptance by the appellant of Marks & Spencer Plc requirements as to standards of production and approval of subcontractors; as well as the provision to Marks & Spencer Plc of confidential information. (summary of Vice Chancellor's analysis at paragraph 7 of the Internet Report).

73. The appellant had also alleged that Marks & Spencer Plc had deliberately abstained from conducting any express contract with the appellant either to regulate their relationship and respective rights and obligations because it was considered that Marks & Spencer Plc could thereby achieve greater flexibility in its dealings with the appellant than could be achieved under a detailed contract and the absence of such contract was accepted by the appellant on the basis that Marks & Spencer Plc ought to have known that based on the course of dealings between the parties there existed a relationship between the two companies which could continue long term and be determinable only on the giving of reasonable

notice and under which the parties had reciprocal rights and obligations as detailed in the claim.

74. Those are the facts which provided the foundation for the claim for profits for three (3) years in excess of £38,000,000.00 claimed not only as damages but for breach of contract. The Court of Appeal upheld the trial judge's judgment and statement of the applicable principles to the effect that:

> (1) A court will only imply a contract by reason of the conduct of the parties if it is necessary to do so. It will be fatal to the implication of a contract that the parties would or night have acted as they did without any such contract. In other words, it must be possible to infer a common intention to be bound by a contract which has legal effect. If there is no such intent then the claim would fail;
>
> (2) For contracts, to be enforceable, must be sufficiently certain to enable the courts to give effect to the parties' intentions rather than to give effect to a contract which the court has had to write for them. On the other hand the Court will endeavour, where possible, to construe the obligations in a way which gives effect to the parties' bargain and on this head of the claim in contract, he was satisfied that the appellant's case of in favour of implied contract could not succeed (summary of the Vice Chancellor's dictum at paragraphs 13 and 14 of the Internet Report).

75. Both the trial judge and the Court of Appeal relied on the decision of "*The Aramis"* [1989] 1 Ll. Law Rep. 213 which was referred to in the following terms at paragraph 18 of the judgment of the Vice Chancellor as follows::

> "*The Aramis … concerned the question whether a contract could be implied between the transferee of a bill of lading to whom the goods*

had been delivered and the carrier. Prior to the Carriage of Goods by Sea 1992 the implication of such a contract was necessary if the transferee and the carrier were to have rights enforceable between themselves in respect of, for example, damage to the goods …"

76. Bingham LJ. In *"The Aramis"* considered the authorities as some length to see how the implication of contracts in this field had grown and developed. He cited with approval for the Judgment of May LJ. In *"The Elli"* [1985] 1Ll. Law Rep. 107, 115, that:

> *"… No such contract should be implied on the facts of any given case unless it is necessary to do so: necessary, that is to say, to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."*

77. Bingham LJ. Accepted that the authorities showed that, "*a contract will* only be implied when it is necessary to do so". In expressing his own view Bingham LJ, said (at page 224):

> *"… it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract."*

78. At paragraph 30 of the Internet Report, the Vice Chancellor expressed his agreement with the conclusion of the trial judge in the following terms:

> *"I agree with the conclusion of the judge. The alleged obligation on M&S to acquire garments from Baird is insufficiently certain to found any contractual obligation because there are no objective criteria by which the court could assess what would be reasonable either as to quantity or price. This is not a case in which, the parties having evidently sought to make a contract, the court seeks to uphold its validity by construing the terms to produce certainty. Rather it is a case in which the lack of certainty confirms the absence of any clear evidence of an intention to create legal relations. The allegation in paragraph 9.28 also confirms the lack of intention to create legal relations for if there had been the requisite certainty because of the objective criteria then to that extent there would have been a detailed contract and a loss of flexibility. It cannot be said, let alone with confidence, that the conduct of the parties is more consistent with the existence of the contract sought to be implied than with its absence. The implication of the alleged contract is not necessary to give business reality to the commercial relationship between M&S and Baird. In agreement with the judge. I do not think that Baird has a real prospect of success on its claim in contract."*

79. The Judgment of Mance LJ on the issue of contract is instructive. Mance LJ at paragraph 65 considered the close interactive relationship between the parties and rejected the view that the closeness of their commercial cooperation in the past led to contractual certainty and at paragraph 68 he rejected the notion of an implied duty of good faith when he stated that:

"The presence in the suggested contractual formulation of implied duties of good faith is an additional barrier in the way of the conclusion for which Baird contends, in view of English law's general refusal to recognize any duty of this nature as an implied contractual term." (paragraph 68 of the Internet Report).

80. And on the issue of contract law Mance LJ. Concluded at paragraph 76 in the following terms:

"It is evident that Baird felt, quite rightly, that it had achieved a long and very close relationship, an informal business "partnership", with M&S, and that it could, as a practical matter, rely on this and on M & S's management's general goodwill and good intentions. But managements, economic conditions and intentions may all change, and businessmen must be taken to be aware that, without specific contractual protection, their business may suffer in consequence. I do not think that the law should be ready to seek to fetter business relationships, even – and perhaps especially – those as long as close as the present, with its own view of what might represent appropriate business conduct, when the parties have not chosen, or have not been willing or able, to do so in any identifiable legal fashion or terms themselves." (paragraph 76 of the Internet Report).

81. As *in Baird Textile Holdings Limited v. Marks & Spencer Plc* (supra) to the extent that the Claimant in the instant matter asserts that by reason of the Defendant's statutory obligation to interconnect under section 29 of the Act it ought to enter into an agreement with the Claimant, the failure to Enter into legal relations precludes the Court from accepting that there is an alleged obligation on the part of the Defendant to remove its transit charges and enter a binding contract based on terms demanded by the

Claimant and is sufficiently uncertain to found any contractual obligations as there is an absence of objective criteria by which this Court can assess what would be reasonable as to the terms and conditions of a direct mobile to mobile interconnection agreement. That is to say just as the appellant in the *Marks & Spencer* case sought to have the Court impose contractual obligations on Marks & Spencer Plc, the Claimant in the instant matter also seeks to compel the Defendant, in the absence of regulation by the OUR, by way of a Court Order, to enter into an interconnection agreement without regard to the terms and conditions of such agreement which the Defendant would find acceptable.

82. The cases clearly state that the Court cannot do so or impose commercial obligations on parties who do not wish to be contractually bound by such obligations.

83. The Defendant also relies on the decision in *BJ Aviation Ltd. v. Pool Aviation Ltd*. (supra) which provided a useful analysis of the principles to be derived from previous authorities which have had to consider problems arising in contract law in a case where parties have entered into an arrangement which although it has the appearance of a bargain leaves nothing to be agreed. In *BJ Aviation Ltd.* Lord Justice Chadwick at paragraphs 18-24 distilled the principles derived from an earlier Court of Appeal decision in *Mamidoil-Jetoil Greek Petroleum Co. SA v. Okta Crude Oil Refinery AD* [2001] EWCA Civ. 406 reported at [2001] 2 Lloyd's Rep. 76 when Mr. Lord Justice Rix was to said to have stated at paragraph 9 of that Judgment the following fie propositions summarized by Chadwick LJ. as follows:

> *"First each case must be decided on its own facts and on the construction of the words used in the particular agreement. Decisions on other words, in other agreements, construed against*

the background of other facts, are not determinative and may not be of any real assistance.

Second, if on the true construction of the words which they have used in the circumstances in which they have used them, the parties must be taken to have intended to leave some essential matter, such as price or rent, to be agreed between them in the future – on the basis that either will remain free to agree or disagree about that matter – there is no bargain which the courts can enforce.

Third, in such a case, there is no obligation on the parties to negotiate in good faith about the matter which remains to be agreed between them – see Walford v Miles [1992] AC 128, at page 138G.

Fourth, where the court is satisfied that the parties intended that their bargain should be enforceable, it will strive to give effect to that intention by construing the words which they have used in a way which does not leave the matter to be agreed in the future incapable of being determined in the absence of future agreement. In order to achieve that result the court may feel able to imply a term in the original bargain that the price or rent, or other matte to be agreed, shall be a "fair" price, or a "market" price, or a "reasonable" price; or by quantifying whatever matter it is that has to be agreed by some equivalent epithet … So, on the true construction of the words which they have used, the court is driven to conclusion that they must be taken to have intended that the matter should be left to their future agreement on the basis that either is to remain free to agree or disagree about that matter as his own perceived interest dictates there is no place for an implied term

that, in the absence of agreement, the matter shall be determined by some objective criteria of fairness or reasonableness.

Fifth, if the court concludes that the true intention of the parties was that the matter to be agreed in the future is capable of being determined, in the absence of future agreement, by some objective criteria of fairness or reasonableness, then the bargain does not fail because the parties have provided no machinery for such determination, or because the machinery which they have provided breaks down. In those circumstances the court will provide its own machinery for determining what needs to be determined – where appropriate by ordering an inquiry…"

84. It is submitted, that the five propositions detailed in the *BJ Aviation Ltd* decision apply with equal force to a Court's consideration of the conduct and course of dealings between the parties as it does to the construction of words in a document. There is therefore no bargain to uphold nor any obligation statutory (in the absence of regulation by the OUR) or contractually to be imposed on the Defendant to enter into an agreement for mobile interconnection until the parties have resolved mutually satisfactory terms and conditions of as to how the interconnection is to work in the absence of regulatory intervention by the OUR. For the foregoing reasons the Claimant has not established either a breach of statutory obligation imposed on the part of the Defendant or breach of any agreement between them as to mobile interconnection.

85. The principle that an alleged contract is in effective or unenforceable in law because it is too vague or because it constitutes an agreement to agree or agreement to negotiate is well established and remains an important principle. Further authority for this principle is found in the House of Lords decisions in *Walford v Miles* [1992] 2 A.C. 128 where the

House Lords had to consider whether the sale by the defendants or a Photographic processing business constituted an agreement to negotiate exclusively with the plaintiffs in circumstances where the agreement was made during the course of subject to contract negotiations and whether this was enforceable.

86. The House of Lords held that the particular agreement in questin dated 17th March, 1987 lacked certainty and was unenforceable as a bare agreement to negotiate. The opinion of the House of Lords was delivered by Lord Ackner who at page 136 of the Report (paragraphs G to H) cited with approval the dictum of Lord Denning M.R. in the case of Fairbairn Ltd. v. *Tolani Brothers (Hotels) Ltd*. [1975] 1 W.L.R. 297 where the Lord Denning M.R. was said to have stated at pages 301-302 as follows:

> "*If the law does not recognize a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognize a contract to negotiate. The reason is because it is too uncertain to have any binding force … It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law … I think we must apply the general principle that where there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract."*

87. The ratio decidendi of the decision is found at page 138 (paragraphs B to H, in particular paragraph G) where Lord Ackner stated that:

> *"A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no*

obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly a bare agreement to negotiate has no legal content."

88. On the fact in ***Walford v Miles*** it is to be remembered that the negotiations between the parties concerned the sale of a company when on 17th March, 1987 the 1st defendant orally agreed to deal with the 1st plaintiff exclusively and to terminate any negotiations then current with the defendants and any other competing purchasers provided that the 1st plaintiff furnish within three days a comfort letter from the plaintiff's bankers confirming that the necessary financial resources were available to complete the purchase. That condition was complied with on the following day and it was not disputed that the discussion on 17th March evidenced by a letter from the 1st plaintiff to the defendant's solicitors was subject to contract. The defendants ended negotiations which they had being conducting with a third party but later on 27th March, 1987 they decided not to proceed with the negotiations to sell to the plaintiffs and the shares in the company and the property were eventually sold to a third party.

89. The plaintiffs succeeded at first instance in an action for damages for breach of the oral agreement of 17th March, 1987 and for misrepresentation, however, on appeal by the defendants the Court of Appeal allowed the appeal save to the extent for award of damages for misrepresentation holding that the agreement was merely an agreement to negotiate.

90. The facts in ***Walford v Miles*** are not far away from the fundamental premise under pinning the facts in the instant case in that the so-called agreement in the instant matter constitutes a bare agreement to negotiate

and is unenforceable for the same reason that the House of Lords found the oral agreement in *Walford v Miles* to be unenforceable.

91. More recently in an English High Court (Commercial Division) decision in 2011 in the matter of *Georgi Velichkov Barbudev v. Eurocom Cable Management Bulgaria EOOD, Warburg Pincus International LLC and F.N. Cable Holdings B.V.* [2011] EWHC 1560 (Comm) Mr. Justice Blair had to adjudicate a claim arising out of the acquisition of a Bulgarian Cable Television and Internet business by the 1st defendant which was then owned by the 3rd defendant which was a member of a private equity group.

92. The claimant who founded the business claimed that the group failed to honour a side letter which he claimed promised him a 10% share in the combined business formed by the acquisition and the central issue in the case was whether the side letter created a binding contract. The claimant contended that it die whereas as the defendants asserted that it was a non-binding agreement to agree which was unenforceable.

93. In dismissing the claimant's application his Lordship reviewed a number of authorities including his reliance on *Walford v Miles* (supra) and at paragraphs 89, 90, 91, 96, 97, 98 and 103 he set out the relevant aspects of the law as are applicable to the instant matter as follows:

> *"I have set out the terms of the Side Letter above. The first and most important issue in the case is whether it constituted a legally enforceable contract. In their challenge the defendants distinguished between three questions – whether the Side Letter was intended to create legal relations – whether it an 'agreement to agree', and whether it was a sufficiently complete and certain contractual agreement on each of which, they submitted, they were*

entitled to succeed. These are, no doubt in principle, distinct questions, but at least in this case, they are hard to disentangle from each other. The ultimate issue is whether, as the claimant put it in his closing submissions, the parties reached an enforceable interim agreement, or whether as the defendants say, this was no more than an ';agreement to agree', with the terms necessary for an enforceable agreement to be worked out by negotiations. [para. 89]

The issue is one that not uncommonly arises in different guises in commercial transactions. Parties may reach a binding agreement as to essentials, on the basis that other terms are to be agreed later. Or a letter of intent, however, described, may simply mark a point in their negotiations or, as in the case of a letter of comfort, be provided on the understanding that it is not to be legally binding. Sometimes the issue turns on a single document, sometimes on a series of documents. The agreement may have been acted upon, or it may remain unperformed. Within certain established principles. English law adapts a pragmatic approach to such issues. The parties are to be regarded, to quote Bingham J in a well known passage in Pagan Spa v Feed Products Ltd. [1987] 2 Ll. Rep. 601 at 611, 'as masters of their contractual fate. It is their intentions which matter and to which the courts must strive to give effect'. Where their agreement is reduced to writing, it is to the document that the court must look to ascertain their intentions, construed against the factual matrix … [para: 90]

Intention to create legal relations

In deciding whether parties have agreed to create legal relations, the approach appears from RTS Flexible Systems Limited v Molkerei Alois Muller GmbH & Co. KG [2010] 1 WLR 753, in which Lord Clarke, giving the judgment of the Supreme Court said at [45]

"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement." [para: 91]

In my opinion, the most compelling point made by the defendants on this issue is that as a matter of construction, the language of the section headed 'investment Agreement' shows that the Side Letter was not intended to be legally binding, and that only a concluded ISA was to be legally enforceable. As Teare J. put it in Dhanani v Crasnianski [2011] EWHC 926 (Comm) at [75], 'the circumstances that an agreement is no more than [an] agreement to negotiate and agree may show objectively that the parties to it cannot objectively have intended it to be legally binding, notwithstanding that it had certain characteristics which otherwise might have envinced an intention to agree, for example, that it was signed by each party'. I cannot myself see that agreement can be intended to create legal relations if it is unenforceable in its entirety. But this point depends on whether the defendants are correct on their second and third grounds of challenge, namely whether the Side Letter was only 'agreement', with insufficient certainty to give rise to a binding

contract. My conclusions on intent to create legal relations issue therefore depend on my conclusions on those issues (which are themselves linked). [para. 96]

Agreement to agree

There is no dispute as to the applicable principles. As was established Walford v Miles [1992] 2 AC 128, an 'agreement to agree' is legally unenforceable. The question has often arisen in the context of an agreement by parties to negotiate in good faith, which some legal systems recognize as binding. But in English law, the rule applies with full force. As it was put by Edwin Peel in Contract Formation and Parties (ed Burrows and Peel, OUP 2010) at page 50; "an agreement to negotiate in good faith is unenforceable and is no more enforceable when it is couched in terms of an agreement to use best or reasonable endeavours to agree. When the parties have entered into an agreement which is otherwise enforceable, it will not become enforceable simply because the parties have agreed to negotiate any outstanding terms, but the agreement to negotiate is not itself enforceable. Such an agreement may be 'enforceable' where the parties have set out objective criteria, or machinery for resolving any disagreement, but the reality is that the agreement to negotiate is then irrelevant and the court simply completes the agreement by reference to such objective criteria or the machinery stipulated. In sum,. For all the emphasis in some cases that Walford v Miles .. only involved a 'bare' agreement to negotiate, the fact remains that no agreement to negotiate in good faith is enforceable as a matter of English law." [para: 97]

The underlying rationale for the rule (in the context of an express obligation to negotiate in good faith) was summarized by Longmore LJ in Petroleo Brasileiro SA [2005] EWCA Civ 891 at [116]:

"The traditional objections to enforcing an obligation to negotiate in good faith are (1) that the obligation is an 'agreement to agree' and thus too uncertain to enforce, (2) that it is difficult, if not impossible, to say whether, if negotiations are brought to an end, the termination is brought in good faith, and (3) that, since it can never be known whether good faith negotiations would have produced an agreement at all or what the terms of any agreement would have been if it would have been reached, it is impossible to assess any loss caused by breach of the obligation" … [para. 98]

The matter must be determined (for reasons I have given above) upon the construction of the terms of the Side Letter itself. It is plain, in my view, that the agreement between the parties was to the effect that the claimant was to have the opportunity to invest on terms to be agreed which would be set out in an investment on terms to be agreed which would be set out in an investment and shareholders' agreement which the defendants agreed to negotiate with the claimant in good faith. That, in my judgment, constitutes an 'agreement to agree', which is unenforceable on the principles set out above …" [para. 103]

Conclusion

94. The foregoing authorities establish conclusively that in the English common law, as is applicable in our jurisdiction, an agreement to agree or to continue negotiations in good faith, is not a binding agreement enforceable at law. Further, by reason of the foregoing authorities when applied to the facts of the instant matter it is submitted in conclusion that

there is no contractual breach or statutory breach on the part of the Defendant which would entitle the Claimant to succeed. We reiterate our earlier submission that there is no bargain to uphold nor any statutory obligation in light of the absence of regulation by the OUR imposing on the Defendant an obligation to enter into an agreement for direct mobile interconnection unless the parties have resolved mutually satisfactory terms and conditions as to how that interconnection is to work. For the foregoing reasons the Claimant has not established either a breach of statutory obligation or a breach of any agreement between them as to direct mobile interconnection and accordingly, its claim should be dismissed with costs to the Defendant.

Court

[6] This court was probably naïve in thinking that after the heat of battle and upon reflection i.e reading of the transcripts, the Claimant would have conceded.

[7] The Claimant admitted that the OUR is responsible for the Regulation of all parties to any agreement dealing with interconnection of licensed Telecommunications Providers.

[8] To this end Claimant adduced evidence from the OUR in an effort to substantiate their claim. The evidence of the OUR did not substantiate the claim. On the contrary it eroded that claim.

[9] The Defendant could well have relied on submissions at the close of Claimant's case. Instead they adduced evidence which further ended the claim.

[10] On a totality of the evidence this court finds that Claimant has not proved its case and will dismiss the claim with costs to the Defendants to be agreed or taxed.

Order

1. Claim dismissed
2. Costs to Defendants to be agreed or taxed.