IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M. 81/2000

R V OFFICE OF UTILITIES REGULATION EX PARTE WORLD TELENET INTERNATIONAL LIMITED

Mrs. Pamela Benka-Coker, Q.C. and Harold Brady
instructed by Brady & Co. for the Applicants
Hugh Small Q.C. and Donovan Jackson instructed
by Nunes, Scholefield DeLeon & Co. for the
Respondent
Ms. Hilary Phillips, Q.C. and Ms Minette Palmer
Instructed by Grant, Stewart, Phillips & Co.
for the Third Party, Cable & Wireless Jamaica
Limited.

Heard: October 30, 31; November 1,2,3,6,7,8,9 and December 18 2000

CLARKE, J

The applicants challenge by way of judicial review the decision of the Office of Utilities Regulation ("the Office") specifying terms and conditions for disconnection of telecommunications services to them by Cable & Wireless Jamaica Limited ("Cable & Wireless") pursuant to section 51 of the Telecommunications Act. The section provides as follows:

> "A carrier or service provider may on application to the Office and on such terms and conditions as the Office may specify

(a) discontinue the provision of specified services to any person; or

(b) disconnect any facility from that carrier's facility or another facility used to provide that service provide's specified services,

if that carrier or service provider believes on reasonable grounds, that the person who owns or operates that facility or the person to whom those specified services are provided, is engaging in bypass operations or in conduct in respect of international services that is prohibited or regulated by the international services rules."

Pursuant to section 4 of the Telecommunications Act, which came into operation on March 1, 2000, the Office became the regulator for the telecommunications industry in Jamaica. Although section 8 of the Office of Utilities Regulation Act, 1995, provides that "[t]he Office may upon its own motion or upon complaint by any person, hold an enquiry into the operations of any utility undertaking operated by an approved organization, "it was the Minister and not the Office that was the regulator of telecommunications prior to March 1, 2000. Indeed, under the repealed Telephone Act under which Cable & Wireless held 1988 licences as telecommunications carrier, the Minister was named as the regulator. And so, prior to March 1, 2000 the relationship between Cable & Wireless and the applicants was governed by terms and conditions approved by the

Minister on December 10, 1985 and by a lease circuit agreement dated June 30, 1999 in which the applicants agreed to carry or facilitate voice over internet protocal (VOIP} and also agreed that dial-up access would be by one-way dial.

The following chronology of events provides the factual context in which the applicants' challenge is made. On April 30, 1999 Cable & Wireless complains to the Minister in his capacity as regulator under the 1988 licences that bypass operators are causing Cable & Wireless losses in revenue. The Minister asks the Office to investigate and advise.

On May 7, 1989 the Office provides the Minister with a written report of its assessment of Cable & Wireless' allegation of bypass.

On June 30, 1999 the applicants sign the said agreement with Cable & Wireless for leased circuit.

On November 2, 1999 Cable & Wireless serves notice on the applicants of its intention to terminate service on local access or dial-up lines on November 13, 1999.

On November 12, 1999 the applicants obtain an **ex parte** injunction restraining Cable & Wireless from acting on the notice.

Then, with the coming into force of the Telecommunications Act on March 1, 2000 by-pass operations are prohibited. The Act defines bypass

operations as "operations that circumvent the international network of a licensed international voice carrier in the provision of international voice services'': section 2(1).

On June 20, 2000 the **ex parte** injunction is discharged by Harris, J, who, in my opinion, correctly rules that section 51 of the Act (rehearsed above) is applicable.

Cable & Wireless by letter of July 11, 2000 with enclosures as stated therein applies to the Office pursuant to section 51 to specify terms and conditions under which Cable & Wireless can discontinue the provision of services to the applicants, alleging as follows:

> "The Complaint
>
> "WTI" has been and continues to be engaged in bypass operations contrary to the provisions of the Telecommunications Act ("the Act).
>
> The evidence is summarised in a report that outlines the activities constituting the breache(es) and the investigative action(s) taken by CWJ to confirm WTI's conduct.
>
> The evidence includes complaints received from CWJ's customers concerning poor quality of overseas calls that were later proven to have been delivered via WTI's bypass network.
>
> In addition, the billing data of "WTI" when analysed supports the conclusion that WTI is conducting bypass operations. The analysis done by Robert Shaw, Network Fraud Control Manager, is set out in the attached Case History and Summary of World Telenet International Limited Bypass Activities and on diskette enclosed herewith titled "WTI" Bypass Information". CWJ is of the belief

that the evidence constitutes reasonable grounds for disconnection or discontinuance of service under Section 51 of the Act. CWJ relies on the sworn affidavit of Mr. Victor A. Lowe in the Court proceedings brought by WTI against CWJ.

In Suit No. C.L. W. 184 of 1999 World Telenet International Ltd. v Cable & Wireless Jamaica Ltd. Mr. Victor Lowe in his affidavit filed and sworn to on November 11, 1999 admitted to the provision of voice over internet. The admission is contained at paragraph 3 and a copy of the affidavit is attached.

On June, 20, 2000 The Honourable Mrs. Justice Hazel Harris refused WTI's application for an extension of an interim injunction previously granted and ruled "The Defendant (CWJ} is obliged to proceed under the Telecommunications Act and in particular must act in accordance with the provisions of section 51 ...".

The Parties

The complaint is made by Cable &Wireless Jamaica Limited against World Telenet International Limited of Shop 29, Island Life Mall, 6 St. Lucia Avenue, Kingston 5, telephone 906-2352-3, fax 906-2351. The Managing Director is Mr. Victor A. Lowe.

The Remedy

Pursuant to Section 51 of the Act, CWJ intends to discontinue the provision of services to "WTI" subject to the conditions, if any, imposed by the office in exercise of its powers under Section 51 of the Act.

Yours faithfully,

Sgd. Minette Palmer
Vice-President, Regulatory Affairs"

By letter dated 28th July, 2000, the Office informs the applicants of the allegations of Cable & Wireless and requires a response within 3 days. The letter reads as follows:

"Mr. Victor Lowe
Chief Executor Officer
World Telenet International
c/o Suit 29
6 St. Lucia Avenue
Kingston 5

Dear Sir,

Re: Allegations of "Bypass Operations" by Cable & Wireless Jamaica Limited Application to the OUR under Section 51 of the Telecommunications Act

We write to advise that Cable & Wireless Jamaica (C&WJ) Limited has made a complaint to the Office of Utilities Regulation (OUR) alleging that bypass operations are being carried out by your company. OUR has a general duty to investigate possible breaches of the Telecommunications Act 2000 and we require you to respond to these allegations within three (3) days hereof.

Please find enclosed copies of documentation on which C&WJ relies in support of the said allegations.

Yours sincerely,

Sgd. Debra Newland
Senior Legal Counsel"

Additional information on which Cable & Wireless relies in respect of its application to the Office is contained in two diskettes. The Office sends those disketts to the applicants on July 31, 2000.

By letter dated 31 July, 2000 the applicants through their attorneys-at-law (Brady & Co.) apply to the Office and agree to respond within 3 days (excluding the public holiday of August 1, 2000) viz by 4 August, 2000. Then by letter dated August 2, 2000 the applicants through their attorneys-at-law deny the allegations made by Cable & Wireless and through them add the following:

> "Our client is a provider of Internet access services utilizing a leased international line supplied by Cable & Wireless Jamaica Limited. According to our instructions the call volumes and customer complaints are not proof absolute of bypass activities as defined by the Telecommunications Act 2000. The call volume indicated by Cable & Wireless Jamaica Limited resulted from legitimate internet activities carried on by our Client. Therefore we are instructed to request a hearing of the matter when our client have opportunity to test the veracity of Cable will & Wireless Jamaica Limited allegations and when our client will have the opportunity of presenting evidence to demonstrate that its Internet activities are no 'bypass' activities as defined by the law.
>
> We look forward to having dates set for such hearing as a matter of urgency, to prevent any precipitous action contemplated by Cable & Wireless Jamaica Limited"
>
> (Emphasis supplied)

As is stated by Brady & Co. in their letter of August 4, 2000 to the Office a meeting is convened on that day at the Office, following the Cable & Wireless complaint that the applicants are engaged in bypass activities. Present at the meeting are Ms Deborah Newland the senior legal officer for the Office and two senior officers of the applicants, Victor Lowe and Winston Gooden together with their attorneys-at-law, Mrs. Pamela Benka-Coker, Q.C. and Mr. Harold Brady.

It is to be observed that from July 28, 2000 the Office made it plain to the applicants that the application by Cable & Wireless for disconnection was made pursuant to section 51 of the Telecommunications Act. It is again made plain at the meeting that the application was made under that section. No hearing however, takes place at the meeting, for the stance counsel for the applicants adopts at the meeting is that –

> "unless and until regulations and rules are promulgated and put in place the [Office] is impotent to carry out any investigation in order to determine whether or not WTI is engaged in bypass activities, or specify terms and conditions pursuant to section 51".

That stance is maintained by Brady & Co. in their letter of August 4 which concludes resolutely thus:

> "In light of the foregoing any further steps in this matter adverse to our client will be met by the appropriate action".

I have no doubt that a "hearing was not had at the meeting on August 4 because the attorneys-at-law for the applicants effectively withdrew their client's request for one.

Was that position which betrayed a complete **volte-face** to that which was eagerly adopted by the applicants through their attorneys-at-law in their letter of July 31 justified or warranted? The short answer is that this reversal of positions was wholly unjustified. The Telecommunications Act does not require the Office to make rules or regulations to conduct hearings under section 51 into allegations of bypass operations. Nor does the Act contemplate that rules or regulations be made for that purpose. "Bypass operations" is, as already noted, clearly defined by section 2(1) of the Act and engaging in bypass operations is a summary offence: see section 9. On the other hand while it is true that engaging in conduct in respect of international services [as defined by section 2 (1)] prohibited by international services rules, may be the subject of an application under section 51, obviously no hearing into such alleged conduct can be had unless rules are made which prohibit or regulate such conduct. That is why the Act recognises the need for international service rules and, accordingly, empowers the Office to make rules proscribing or regulating certain types of conduct in respect of international services: see section 50.

Let me now return to the chronology of events. By letter dated August 9, 2000 the Office replies to Brady & Co.'s letter of August 4. The Office acknowledges what it characterizes as the applicants' decision to withdraw their request for a hearing, and awaits service of the Supreme Court order in respect of the applicants' application before Harris J for extension of injunctive relief. The application is, in the result, not granted as the learned judge rules that the matter is by now governed by section 51 of the Telecommunications Act. The Office then warns that if no orders are being contravened it will proceed to issue terms and conditions for disconnection to Cable & Wireless pursuant to section 51. And in a letter of even date Brady & Co restates that the Office is impotent to hold a hearing.

On August 10, 2000 terms and conditions for disconnection of the provision of specified services to the applicants are issued to Cable & Wireless by the Office, specifying **inter alia** that Cable & Wireless is permitted to do one-way bar only. The full terms and conditions are as follows:

> "Terms and Conditions for Disconnection
> (Under s.51 of the Telecommunications Act 2000)
>
> In carrying out the action to disconnect the provision of specified services, Cable & Wireless Jamaica Ltd hereinafter referred to as ('CWJ') shall comply with the following terms and conditions:-

CWJ must provide a written notice setting out the date and nature of the action to discontinue the provision of specified services. The notice must specify each line to be served on World Telenet International Ltd (hereinafter referred to as (WTI) during normal business hours at is registered office, at least 24 hours (not including weekends or public holidays) prior to such action.

Action by CWJ to discontinue the provision of specified Services must be limited only to those of WTI's telephone lines to which the evidence of bypass operations directly relates. Action to discontinue the provision of specified services shall take the form of barring outgoing calls from WTI's lines listed above (i.e. providing one-way dial} which will allow incoming calls to such lines.

After a period of ninety [90] days following the date of action by CWJ to discontinue the provision of specified services, the OUR may direct CWJ to recommence the provision of specified services on signing of undertaking by WTI to CWJ. The purpose of such undertakings shall be to assist in the identification or prevention of any future bypass operations by WTI. After ninety [90] days period WTI may make an application to the OUR, requesting that that OUR, requesting that the OUR should direct CWJ to recommence the provision of specified services. In its application, WTI may suggest undertakings that it considers appropriate. Within seven [7] days following the receipt of an application, the OUR shall inform CWJ of its contents and give CWJ the opportunity to suggest undertakings that it considers appropriate.

Issued by:
The Office of Utilities Regulation

Sgd Winston C. Hay
Director General"

The following day (August 11) Cable & Wireless serves on the applicants 24 hours notice together with the aforesaid terms and conditions.

Three days later (August 14) the applicants obtain **ex parte** an order from Ellis, J for leave to apply for orders of certiorari and prohibition. The learned judge also ordered that a copy of the **ex parte** order and attachments be served on Cable & ?Wireless as well as on the Office. The grounds upon which the prerogative orders are sought in this motion before me are as follows:

> "1. The Office of Utilities Regulation in specifying the said terms and conditions has acted **ultra vires** the Telecommunications Act.
>
> 2. In granting the said terms and conditions the Office Of Utilities Regulation has acted in breach of natural justice".

As the first ground flows from the second ground I will take the second ground first. Is that ground substantiated?

The first issue raised by Mrs. Pamela Benka-Coker, Q.C. on behalf of the applicants before this Court concerns whether the copious procedure laid down in section 4(2) of the Telecommunications Act must necessarily apply in respect of any determination or decision by the Office pursuant to section 51.

Section 4(2) provides:

> "In making a decision in the exercise of its functions under the Act the Office shall observe reasonable standards of procedural fairness, act in a timely fashion and observe the rules of natural justice, and, without prejudice to the generality of the foregoing the Office shall –
>
> (a) consult in good faith with persons who are or are likely to be affected by the decision;
>
> (b) give to such persons an opportunity to make submissions to and to be heard by the Office;
> (c) have regard to the evidence Adduced at any such hearing and to the matter contained in any such submissions;
>
> (d) give reasons in writing for such decision;
>
> (e) give notice of each decision in the prescribed manner''.

Mrs. Benka-Coker submits that the provisions of the entire subsection, both the general and particular parts, are mandatory.

Section 51 gives no specific directions regarding the procedure to be followed in respect of an application under that section. It is common ground, however, that the general provision expressed in the first part of section 4(2) restates natural justice principles. They are, as Mrs. Benka-Coker submits, applicable to the decision the Office is required to make in exercising its functions under section 51. So, in making a decision specifying terms and conditions for disconnection the Office must "observe

reasonable standards of procedural fairness, act in a timely fashion and observe the rules of natural justice".

Mrs. Benka-Coker has gone further by contending:

> (1) that compliance by the decision-maker (the Office) with the provisions of (a) to (e) of the subsection is also a pre-condition for taking the decision in question; and
>
> (2) that such a decision must be preceded by a fully fledged hearing with most of the characteristics of a judicial trial. She submits that the use of the word, "shall" in the second part of the subsection as well as in the general part means that compliance with the provisions (a) to (e) is imperative.

On the other hand, Mr. Hugh Small, Q.C. submits on behalf of the Office that those provisions are only directory of how the rules of natural justice are to be applied in relation to the exercise of decision making functions under the Act. That submission is, in my judgment, demonstrably sound.

Undoubtedly, statutory words requiring things to be done as a condition of making a decision especially when the form of words requires that something "shall" be done, raise an inference that the requirement is mandatory and therefore that failure to do the required act(s) renders the decision unlawful: see De Smith Woolf and Howell, Judicial Review of

Administrative Action, Fifth Edition at t-058 where the law is in my opinion correctly stated. Has the presumption that the provisions (a) to (e) of section 4(2) are mandatory been rebutted?

To answer this, I agree entirely with Mr. Small that the scope of the statute must be looked at as a whole. Its purpose must be considered and an assessment made of the importance of the provisions in question, due regard being given to their significance as a protection of individual rights where applicable. And as Ms Hilary Phillips, Q.C. points out on behalf of the third party, Cable & Wireless, the Act establishes an elaborate regulatory network and imposes on the Office as regulator a diverse array of duties, powers, functions and obligations to ensure the provision and orderly operation of telecommunications services in Jamaica. The performance of each duty, function or obligation requires the Office to make different decisions at different stages (see for example sections 5, 14, 18, 35, 39(5), 42(2), 44(4), 63, 64(4) and 65 of the Act) although it must be understood that not every function will involve the making of a decision: see section 4(1).

There are, as Ms Phillips submits, three decision-making situations in which the Office is involved under the Act. The first concerns decisions resulting from an application to the Office by one party, the determination of which will when executed affect third parties, such as customers of the

applicant. An example of this is the application by Cable & Wireless under section 51. The second has to do with referrals of disputes to the Office, where both parties are bound by the determination of the disputed issues. For example, under section 34 either party to a pre-contract dispute as defined by that section may refer such a dispute to the Office for resolution by arbitration. The third situation relates to matters initiated by the Office itself in the exercise of its rule-making, consultative or disciplinary powers: see sections 44(4), 42(2), 63(4) and (5) and 65.

Section 4(2) must, therefore, as was submitted on behalf of the Office and Cable & Wireless, be construed purposively, that is to say, the subsection must be rendered and applied in accordance with the purpose and circumstances of each decision-making activity under the statue's several different provisions. Looking at the Act as a whole, I am of the view that Parliament could not have intended that persons likely to be aggrieved by the Office's decision in each situation identified above could require the Office to abide by the provisions of section 4(2) in the manner suggested by the applicants. And, indeed, Parliament could not have intended that an oral hearing would be appropriate to every occasion of decision-making. It is plain that Parliament has, by the several provisions of the Act, made the content of fair procedures flexible, ranging from mere consultation upwards

through an entitlement to make written representations, to make oral representations, to a fully fledged hearing at the other extreme with most of the characteristics a judicial trial. See DeSmith, Woolf & Jowel at 9-002 op.cit. While the rights to procedural fairness has a statutory source in this case, "the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial has to make a decision which will affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates". **Lloyd v McMahon** [1987] A.C. 625 at 703, per Lord Bridge.

Section 4(2) requires that the Office observe "reasonable standards of procedural fairness, act in a timely fashion and observe the rules of natural justice ..." So in each of the aforesaid situations the Office must in discharging its function under the Act apply the principle of reasonableness and must establish practices and procedures that are necessary to ensure that the principles of natural justice are observed in a manner appropriate to the existing circumstances. As Ms Phillips put it in argument "[t]he standards to be observed are qualified by section 4(2) as 'reasonable' in order to allow

the Regulator to preserve substance over form. Any interpretation of section 4(2) must give meaning to the presentation of the over-arching reach of the general provision, so that [the provisions of (a) to (e) of the subsection] can only be regarded as a finer articulation of the principles adverted to in the general provision and must therefore be interpreted within the context of being reasonable".

In my judgment, none of the provisions of (a) to (e) of the subsection is applicable in situations where it is unreasonable and inappropriate to require its observance. Section 51 is predicated on the requirement for action "in a timely fashion" while reasonable standards of procedural propriety or fairness are observed. For example, Parliament could not have intended that the Office must hold a hearing as defined by the applicants or that the Office must give reasons in writing for each decision. Under section 51 the role of the Office is a limited one. Its role is limited to imposing terms and conditions for disconnection only where it has determined that the carrier (or service provider) has reasonable grounds for believing that the customer is engaging in bypass operations. To perform that role it must assess not only the application and the evidentiary material in support but also the responses or representations, if any, of the customer. It is not correct that the Office's approval is required. Indeed, an application to the

Office under the section does not involve the laying of "charges" and a confrontation between "accuser" and 'accused' and a finding of guilt, before terms and conditions can be imposed. In all the circumstances there could not have been, in my judgment, any reasonable expectation by the applicants that an oral hearing with most of the features of a judicial trial or enquiry would be held. The Office must act expeditiously and clearly it would not be reasonable for the Office to apply section 4(2) in such a way that the objective of section 51 is frustrated as regards the carrier's (or service provider's) right to withdraw service to the customer once the rules of natural justice and a reasonable standard of procedural fairness are observed in the decision to specify terms and conditions for disconnection.

The next broad submission by Mrs.Benka-Coker on the natural justice point focuses on whether or not the applicants were given a reasonable opportunity to present their case. She argues that the question must be answered in the negative. Even if the meeting of August 4 was convened for a hearing, the applicants were not given fair notice of the case made against them and would not have had sufficient time to prepare their answer to the allegations.

With that contention I cannot agree. The applicants were, in my judgment, given fair notice of the case made against them and did have a

reasonable opportunity of presenting their case. On the evidence before me there is no doubt that the applicants had the technical ability of responding quickly to the allegations and I have not the slightest hesitation in finding that any dilatory conduct by them could possibly have led to significant loss of revenue to Cable & Wireless.

Some salient facts may now be rehearsed. The Office received on July 11 an application from Cable & Wireless for discontinuance of service to the applicants, alleging that the applicants were engaged in bypass operations. Cable & Wireless relied on detailed and comprehensive evidence contained in documentation and in two high density floppy diskettes submitted to the Office. I have no doubt that copies of the documentation and the two diskettes were received by July 31 by Brady & Co on behalf of the applicants. That same day the Office received correspondence from Brady & Co requesting an opportunity to take instructions and promising to respond by August 4. On August 2 the Office received correspondence from Brady & Co denying the allegations made against the applicants and requesting an opportunity to present evidence to demonstrate that internet activities are not bypass operation as defined by the Act.

There can be no doubt whatever that a meeting was convened by the Office with the full agreement of the applicants for August 4 to afford the applicants an opportunity to respond to the allegations. So, Mr. Harold Brady of Brady & Co, Mrs. Pamela Benka-Coker, Q.C. and two senior executives of the applicants attended the meeting presumably to respond to the allegations. They, however, refused to embrace the opportunity to respond. Instead, I find that what transpired at the meeting is given in the following account set forth in paragraphs 11 and 12 of Deborah Newland's affidavit sworn to on September 29, 2000:

> "On August 4, 2000, I was advised by Mrs. Benka-Coker, Q.C. that contrary to Mr. Harold Brady's letter dated August 2, 2000 ... no evidence would be presented in relation to the matter as they were taking the position that there were no rules or regulations in place which would allow the Respondent to conduct a hearing. I advised that the Respondent was bound by the rules of natural justice and that consequently –
>
> (a) any allegations made against a person would be presented to that person along with the evidence being relied on and,
>
> (b) the person against whom the allegations were made would be given an opportunity to respond.
>
> I enquired whether the Applicant still intended to present the evidence referred to in Mr. Brady's letter ... Counsel indicated that the Applicant would not present any evidence as they were relying on the above stated position. The meeting was adjourned shortly thereafter".

So it is abundantly clear that but for the position taken by the applicants' legal representatives a hearing in terms of (a) and (b) of paragraph 11 of Ms Newland's affidavit would have taken place at the meeting of August 4. As has been demonstrated in this judgment the stance taken by the applicants' legal representatives was untenable. They were wrong in law when they in effect advised the applicants to withdraw from the meeting. The absence of a hearing was not due to any fault on the part of the Office. Rather, because of the fault of their legal representatives to whom they had entrusted the conduct of their case, the applicants were deprived of the opportunity to be heard. They cannot now complain (unless their final arguments before me concerning bias and inadequate disclosure have merit) that they are the victims of procedural impropriety or that natural justice has been denied to them: see **R v Secretary of State for the Home Department ex parte Al-Mehdawi** [1990] 1 A.C. 876, 898 A to F per Lord Bridge of Harwich.

The final issues raised by Mrs. Benka-Coker on which there was considerable argument and citation of authority concern whether or not the circumstances in which the decision was made show:

(a) That there was a duty on the part of the Office to disclose to

to the applicants the contents of the advice given to it by Mr. Courtney Jackson, a major participant in the decision taken by the Office, so as to enable the applicants to challenge his findings prior to the taking of any decision by the Office specifying the said terms and conditions.

(b) That the Office should have disclosed to the applicants, prior to any such decision, that Courtney Jackson had been employed to Cable & Wireless at some point in his professional career.

Mrs. Benka-Coker submits that both questions should be answered in the affirmative. In the first place the applicants were not aware of Courtney Jackson's role which was in the result pivotal to the decision. They were unaware that he was the person at the Office who analysed and evaluated the evidence submitted by Cable & Wireless and it was on his recommendation that the Office relied. The applicants have never been supplied with a copy of his findings and were only made aware of them **ex post facto** by the affidavit sworn to by Mr. Jackson on September 29, 2000. Since the Office as the regulatory body enjoined expressly by statute to promote the interests of customers while having due regard to the interests of carriers or service providers, a high degree of fairness and candour was required by the Office

in this instance. In support of her submissions Mrs. Benka-Coker relied heavily on the case of **R v Secretary of State for Health ex parte U. S. Tobacco International Inc.** [1992] 1 Q.B 353; [1992] 1 All E.R. 212.

There, based on the advice of a committee of experts set up by the government of the United Kingdom to advise on the carcinogenicity of consumer products, the Secretary of State for Health made regulations banning the sale of oral snuff. Before making the regulations the Secretary of State refused to disclose to the applicants who were the sole manufacturers of oral snuff the text of the Committee's advice. The Divisional Court held on an application for judicial review of the Secretary of State's decision to make the regulations, that certiorari would go to quash the regulations, for the Secretary of State was in breach of his (statutory) duty to consult, by refusing to reveal the contents of the independent report. The "high degree of fairness and candour" that was required to be shown to the applicants was based upon the "catastrophic" effect of the ban on the applicants' financial interests.

That requirement must, in my judgment, be understood in the context of a report independent of the Minister in which fairness demands that the applicants be given an opportunity to confront the evidence provided by external witnesses. That case contrasts with a situation where a Minister is

in general under no obligation to disclose to objectors or to give them an opportunity of commenting on advice, expect or otherwise, which he receives from his ministry or department in the course of making up his mind. As Taylor, L.J observed in the cited case:

> "One can understand and respect the need for ministers to preserve confidentiality as to the in-house advice they receive on administrative and political issues from their civil service staff. But here the advice was from a body of independent experts set up to advise the Secretary of State on scientific matters".

The U.S Tobacco International case is very different from the case before me, for here the analysis, appraisal and findings relied on by the Office were those of an integral member of the senior staff of the Office itself. He was at all material times a Deputy Director General of the Office, itself the very decision-maker.

Accordingly, I hold that before it made its decision the Office was under no duty to disclose to the applicants the advice given to it by Courtney Jackson.

Finally, Mrs. Benka-Coker submits that in order to meet not only the need to prevent the distorting influence of bias but also the need to ensure that there was no risk or real damage of bias the Office ought to have

disclosed to the applicants Courtney Jackson's earlier employment with Cable & Wireless.

The whole question to be determined here is whether or not, as Mr. Small puts it, past employment of an officer in a utility that is regulated by the Office disables that officer from participating in the functions, duties or activities of the Office in relation to that utility under the Office of Utilities Regulations Act or any other legislation. Parliament has by specific curtailment laid down the disabilities that prevent anyone from holding an appointment in the posts that constitute the Office: see section 3 of the Office of Utilities Regulation Act and Clause 1 to 4 of the Second Schedule thereto

Now, it is common ground that at all material times Mr. Jackson was a Deputy Director General of the Office He is a trained engineer and holds two Masters of Science degrees, one in electrical engineering and the other in systems engineering. He has 16 years experience in the field of telecommunications. From 1986 to 1989 he worked as an executive engineering analyst with Jamaica Telephone Company Limited a predecessor of Cable & Wireless. He worked abroad in the field of telecommunications from 1989 until his employment by the Office since April 3, 2000. So, after his employment with Jamaica Telephone Company

Limited he gained more than 10 years working experience abroad until his employment by the Office. He was at all material times the person at the Office with the technical capacity to analyse the Cable & Wireless application together with any response from the applicants herein.

The past employment by itself of Mr. Jackson with Jamaica Telephone Company Limited cannot, in my view, raise the reality or appearance of bias on the part of Mr. Jackson or the Office. Having examined the affidavits and the circumstances of the case before me I find that there is no evidence that would justify the application against the Office of the principles to protect against bias. Besides there being no evidence or circumstance to suggest a lack of impartiality, there is no evidential or legal basis to justify me to conclude that a risk or real danger or possibility of bias on the part of Mr. Jackson or the Office occurred in this case. **(see R v Gough** [1993] A.C. 646; **Locabail (U.K.) Ltd v Bayfield and Another** (conjoined appeals) [2000] 1 All E.R. 65. In my judgment, there was no real danger of bias on Mr. Jackson's part that he or the Office may have unfairly regarded with favour or disfavour the case or position of Cable & Wireless or the applicants. There plainly was in all the circumstances no basis for concluding that some illegitimate or extraneous consideration may have

influenced the decision specifying terms and conditions for disconnection under the Telecommunications Act.

In the result, in specifying the said terms and conditions the Office has not cited **ultra vires** the Telecommunications Act. In making its decision it duly observed the rules of natural justice and acted with procedural propriety. The application for the prerogative orders of certiorari and prohibition is accordingly refused.

Cable & Wireless, as already noted was served with copies of the order granting leave to apply for the aforesaid orders together with affidavits and exhibits thereto. There is no question that it acted lawfully and within the confines of the Telecommunications Act and pursuant to the directive issued by the Office as regulator to effect a one-way bar only.

The applicants are to pay the Office's costs which are to be taxed, if not agreed.