EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV179 of 2012

IN THE MATTER OF THE TELECOMMUNICATIONS ACT, 2006
OF THE LAWS OF THE VIRGIN ISLANDS

AND IN THE MATTER OF AN APPLICATION BY CABLE & WIRELESS (BVI) LIMITED FOR AN ADMINISTRATIVE ORDER BY WAY OF JUDICIAL REVIEW MARGIN SQUEEZE PROCEEDINGS

BETWEEN:

CABLE & WIRELESS (BVI) LIMITED ("LIME BVI")

Claimant

and

THE TELECOMMUNICATIONS REGULATORY COMMISSION ("TRC")

Respondent

Appearances:

Ms. Kassie Smith QC and with her Mr. Callum McNeil for the Claimant
Mr. Brian Kennelly and with him Ms. Sinead Harris for the Respondent

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2015: December 14-15
2016: July 22nd

JUDGMENT

[1] **BYER J.:** This claim was commenced by way of Fixed Date Claim form filed on the 13thday of July 2012, amended on the 5th May 2015 and re-amended on the 20thNovember 2015 for Judicial Review against the decision of the

Telecommunications Regulatory Commission ("the TRC") dated 1st June 2012. The Claimant sought the following relief:

i. a Declaration that the Respondent acted *ultra vires* the Telecommunications Act, 2006 ("the Act") in making the decision set out in its notice dated 1 June 2012 relating to the investigations into the practices of Digicel (BVI) and LIME (BVI) as regards calls made from the British Virgin Islands (the "BVI") to other islands within the Caribbean region ("the Decision");

ii. Judicial Review, specifically an Order of *Certiorari,* quashing the Decision;

iii. Such other relief as the Court deems fit; and

iv. Costs.

[2] The Claimant sought the Court's intervention on six grounds set out in the Claimant's Re-Amended Fixed Date Claim form under the broad heads of ***ultra vires***/illegality (set out in Grounds 11(a)-(e)) and failure to take into account relevant consideration and or irrationality (Ground 13).

[3] The sole issues for the Court to determine were whether the Respondent's decision was indeed unlawful on the basis of the arguments proffered by the Claimant.

[4] After careful consideration of the vigorously argued submissions of both Learned Counsels and the evidence that was led before the Court, the Court finds that the Respondent's decision was *ultra vires* the Act which warrants the setting aside of the decision. As such the remedies sought are granted. The findings of this decision are set out below.

Introduction

[5] The Claimant, LIME (BVI), is a company incorporated under the laws of the British Virgin Islands ("BVI") and was, at all material times, the holder of a licence under the Act for the operation of a telecommunications network, providing telecommunications services in the BVI. The Claimant operates under the umbrella of the Cable & Wireless Communications plc, whom have a regional presence in the Caribbean.[1]

[6] The Respondent is a regulatory body established under the provisions of the Act. Its functions are set out in section 6, and include being responsible for the regulation of licensees and for ensuring fair competition among licensees and all other operators of telecommunications networks or providers of telecommunications services in the BVI.

[7] The genesis of these proceedings stemmed from a written complaint by Caribbean Cellular Telephone Limited ("CCT") dated 14th July 2009. CCT claimed that the Claimant (by certain "All Talk Calling Plans") was charging average retail prices to its mobile customers for calls to LIME affiliates in other Caribbean jurisdictions which were below the wholesale charges available to CCT from those LIME mobile network operators.

[8] CCT claimed that this severely impacted the viability of their business and in essence handicapped their ability to effectively compete with regard toimplementing competitive pricing with the Respondent.

[1] See Sanction Notice Annex 2 at page 28 paragraph 3.

[9] The Respondent extensively investigated the matter. The Claimant was able to present its case at an oral hearing and through written representations.[2] After considering the Claimant's submissions, the recommendation of the investigation team and with the benefit of external and independent legal and economic advice, the Board of the Respondent issued their Decision (including Supplement as Index 1) on 1st June 2012.

[10] Based on the findings of the Respondent's investigation they found that the Claimant's All Talk Calling Plans imposed a margin squeeze on their fellow competitor CCT during the period January 2009 to August 2010 which, had it continued, would likely have had anti-competitive effects contrary to the public interest and would have been detrimental to consumers in the BVI in the long term.[3] The Respondent took enforcement action against the Claimant on the basis of sections 6(d)[4] and 75(1)(a)(iii) of the Act. Further the Respondent requested that the Claimant desist from re-offering in the BVI the All Talk Calling Plans to the extent that they contributed to the margin squeeze identified in the Decision, and fined the Claimant the sum of USD$493,665 by reason of its anti-competitive conduct pursuant to sections 75(2)(g) and 75(2)(b) respectively.[5]

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[2] See the Decision paragraph 4. The TRC gave LIME (BVI) notice of its concerns in Sanction Notices dated 17th June 2011 and 4th October 2011. LIME (BVI) responded by letter dated 11th August 2011 and 14th October 2011 respectively. LIME (BVI) had an oral hearing before the Board of the TRC on 15th August 2011.

[3] Telecommunications Regulatory Commission, Decision regarding LIME BVI LIMITED's anti-competitive behaviour relating to mobile voice calls to specific Caribbean destinations (**"the Decision"**); paragraph 5: Certificate of Exhibit to Affidavit of Sean Augustefiled on 26th June, 2012, page 1.

[4] Section 6(d) of the Act provides that:
"the Commission shall...be responsible for the regulation of licensees and authorization holders and for ensuring fair competition among licensees and all other operators of telecommunications networks or providers of telecommunications services".

[5] The Decision, paragraph 6.

[11] The Respondent in applying section 75(1)(a)(iii) found that carrying on ***"business in a manner that is detrimental to the public interest including in an anti-competitive manner"***included participating in a "margin squeeze". The Respondent in their Decision adopted the Organisation of Economic Co-operation and Development ("OECD") definition of a "margin squeeze" which is defined as follows:

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

[12] In investigating whether a margin squeeze existed, the Respondent adopted a well established margin squeeze test in economics known as "the equally efficient operator test". On this test, the Respondent found that there was a margin squeeze for the relevant period between the relevant average retail price paid by the Claimant's customers to make calls to other LIME affiliate numbers (fixed and mobile) in the Caribbean ($0.03pm) and the average wholesale price charged to the Claimant to terminate calls to other LIME affiliates in the Caribbean ($0.164pm) and other LIME affiliate fix numbers in the Caribbean ($0.0865). Thus, the wholesale charge for termination was over five times the retail price to make the call to the terminating mobile network and nearly three times the retail prices to make the call to the terminating fixed network.

[13] On the basis of the facts set out in the Decision, the Claimant was found to have incurred average monthly losses of ($28,905) for the relevant period. The margin squeeze was found to have ceased when the Claimant began to earn low but

positive revenues on these calls after August 2010. The Respondent found that the effect of this conduct would have had significant commercial implications for CCT because CCT's ability to offer a comparable Caribbean plan meant that it could not compete on the broader market for mobile subscription in the BVI on an equal basis with the Respondent.

[14] The Respondent found that ***"continuation of the margin squeeze may be expected to contribute to CCT's declining market share of subscribers, falling prepaid subscribers, falling prepaid revenues and increasing losses...Over time, it is realistic to suppose that CCT would be forced to exit the market or would be absorbed into a competitor's operations, leaving two mobile network operators in the BVI market".*** The Respondent further found that competition and ultimately consumers would be harmed by the reduction of the number of competitors in the market.

[15] On 26 June 2012, the Claimant applied by *ex parte* Notice of Application to the Court for leave to apply for judicial review of the Decision. At a without notice hearing on 28 June 2012, the Claimant obtained leave to apply for judicial review on all grounds and a declaration that the grant of leave to make a claim for judicial review would operate as a stay of the Decision.[6]

[16] The Claimant through their own conduct experienced some delay in bringing their matter to trial. There were notably instances of breaches of the Civil Procedure Rules by the Claimant. Ellis J in her judgment dated 9 August 2013 (on the Commission's application to set aside the grant of leave and the stay), found that the Claimant deliberately failed in its duty of full and frank disclosure and its duty of

[6] Original grounds of judicial review were subsequently amended in Amended Fixed Date Claim form filed 5th June, 2015 and the Re-Amended Fixed Date Claim Form filed 20th November, 2015.

candour to the Court and set aside the stay (save in respect of the penalty which directed the Claimant to pay the Respondent's fine of USD$ 493,665 within 30 days).[7] Ellis J set aside but re-granted leave because the learned judge found that the grounds of review were arguable and there was a public interest in hearing the case. Costs of the application were reserved to the substantive hearing.

[17] The trial of the matter was heard on 14 and 15 December 2015. Issues of costs were reserved until after the determination of the substantive hearing.

Issues to be Decided

[18] The parties by the Statement of Agreed Facts and Issues filed the 17th November 2015 agreed the issues for the Court to decide are confined to:

a. Whether, in making the Decision, the Respondent acted *ultra vires* in respect to grounds 11(a)- 11(e) set out in the Claimant's Re-Amended Fixed Date Claim form; as follows:

    a) *ex ante/ex post* regulation
    b) no determination of anti-competitive behaviour
    c) past conduct
    d) conduct/persons outside the BVI
    e) failure to follow correct regulatory process

b. Whether, in making the Decision, the Respondent failed to take into account relevant considerations and/or acted irrationally in respect to ground 13 set out in the Claimant's Re-Amended Fixed Date Claim form as set out hereunder.

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[7] Cable & Wireless BVI Limited v The Telecommunications Regulatory Commission BVIHCV179/2012 at paragraphs 92-94.

> The TRC failed to consider properly or at all the following elements which were essential to establish the alleged anti-competitive margin squeeze: market definition, dominance; exclusionary effect; recoupment.

Court's Analysis and Finding

[19] The Claimant has levied a number of criticisms against the Respondent for what can be described as breaches in the application of section 75(1)(a)(iii) and failings in respect to its determination of the alleged margin squeeze. The case at bar largely turns on statutory interpretation, a chief focus beingthe consideration of the conditions in which section 75(1)(a)(iii) can or cannot be engaged with regard to the complained of behaviour.

[20] It of course cannot be disputed that the Respondent as the BVI's telecommunications regulator has a legal obligation to give effect to the statute. It must deal with its powers, duties, both mandatory and discretionary in accordance with the principles offairness. If the Respondent has failed to do so the Decision would be rendered unlawful and the Court would thereby have grounds to intervene.

[21] It must be noted that the purpose and scope of judicial review is well established. In the Application of Jules Bernard[8]Ibrahim JA stated:

> ***"The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but the decision process itself. 'It is important to remember that in every case that the purpose [of the remedy of judicial review]is to ensure that the individual is given fair treatment by the authority to which it has been***

[8] Civil Appeal No 13 of 1993 Trinidad and Tobago.

***subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual Judges for that of the authority constituted by law to decide the matter in question.'(Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155 at p 1160)."

[22] The onus is therefore on the Claimant, in judicial review proceedings, to prove its case that the Respondent's decision is unlawful on the basis of the evidence before the Court and not for the Respondent to do so.[9]The Court in turn must exercise its jurisdiction in light of the applicable legal principles of such a review.[10]

[23] Further it must also be firmly in the forefront of the Court's and the parties' mind that judicial review remedies are discretionary. The Court may in its discretion refuse to intervene to grant a remedy even if the Applicant can prove unlawful administration.[11]It is with these principles in mind this Court must address its mind to the case at bar.

[24] It was indeed with interest that this Court was reminded with regularity of the decision of this Court in the case of ***Digicel BVI v Telecommunications Regulatory Commission***[12]to either support or distinguish their submissions. The ***Digicel*** proceedingsarose from a similar complaint levied by CCT on the impact of the Caribbean calling plans that had been introduced to the BVI by Digicel with regard to their inability to compete with the same in the local market. In that matter the Respondent also found that Digicel had acted in a manner that was anti competitive and required them like the Claimant herein to discontinue the plan and fined for the complained of behaviour.

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[9] Gary Nelson para 124 citing Michael Fordham in the text Judicial Review Handbook, at page 428, paragraph 42.1.
[10] Rawlins J.A in the Hugh Wildman and The Judicial and Legal Services Commission of The Eastern Caribbean States- Civil Appeal No. 9 of 2006.
[11]In the Application of Chandresh SharmaCivil Appeal No 115 of 2003 Trinidad and Tobagoas perNelson JA.
[12] Claim No BVIHC 214 of 2012.

[25] Learned Counsel for the Claimant asked this Court however despite raising relatively similar complaints with regard to the Respondent's response to the Claimant's complained ofbehaviour, invited this Court to look at the matter with fresh eyes.

[26] Indeed it is appreciated by this Court that ***Digicel*** is persuasive rather than binding authority on this court.Accordingly this Court states categorically that it will not be bound by the terms of the ***Digicel*** judgment unless it is in agreement with the analysis and considerations contained therein and will address the matters at hand as raised by the Claimant in the case at bar afresh.

[27] Counsel on both sides presented several points of arguments in regard to the issues as agreed between the parties therefore this Court's analysis will address those in turn.For ease of reference therefore this Court will consider the grounds as they were pleaded in the Fixed Date Claim Form.

Grounds 11(a) *Ex ante/ex post* regulation, **(b)**no prior determination of anti-competitive behaviourand**(e)**failure to follow correct regulatory process

[28] As a matter of convenience, I will deal with grounds 11(a), (b) and (e) together although Counsel for the Claimant requested that they be dealt with separately this Court finds that they are in fact interrelated. However, the Court appreciates that these are separate grounds of judicial review and have been considered by the Court as such.

[29] The central argument advanced by the Claimant under these grounds is that the Respondent is **only** empowered by the Act to take regulatory action against a

licensee/authorization holder for anti-competitive behaviour pursuant to sections 26 and/or 29 of the Act.

[30] The Respondent made a conscious decision not to apply section 26 and/or section 29 for the purpose of their *ex post* investigation or for enforcement action as they determined it was not necessary to do so.[13]Instead the Respondent opted to take enforcement action pursuant to section 75(1)(a)(iii).

[31] The Claimant argued that this decision was ultra vires on the basis that:

i. the Act imposes *ex ante* regulation (forward looking controls) which the Respondent breached by pursuing an *ex post* regulation process;

ii. a determination of dominance must first be carried out pursuant to section 26 including a public consultation in order to make a finding of anti-competitive behaviour; and

iii. aclear procedure for a finding of anti-competitivebehaviour is set out in section 26 and or section 29 which the Respondent failed to follow.

[32] It is agreed that the Act is the only means by which the Respondent can act. Lord Diplock in ***Council of Civil Service Unions v Minister for Civil Service***[14]stated that the decision maker ***"must understand correctly the law that regulates his decision-making power and must give effect to it."*** The Respondent as the Territory's telecommunications regulator is charged with enforcement of the legislation. Essential to this role is the interpretation of the empowering statue and any other relevant instrument that impacts upon its statutory function and duties. The Court is asked to determine whether the Respondent exceeded its legal

[13] Sanction Notice paragraph 2.11.
[14][1985] AC 374.

power or authority conferred by the Act.This determination hinges on the construction of the Act itself.The question then follows what is the purpose of sections 26, 29 and 75(1)(a)(iii) within the context of the Act.

[33] Section 26(3) of the Act empowers the Respondent to determine a public supplier dominant with respect to a relevant market. It states:

> ***the Commission may determine that a public supplier is dominant with respect to a telecommunications network or a telecommunications service where, individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors and users and, for such determination, the Commission shall take into account the following factors:***
>
> a) ***the relevant market;***
> b) ***technology and market trends;***
> c) ***the market share of the public supplier;***
> d) ***the power of the public supplier to introduce and sustain a material price increase independently of competitors;***
> e) ***the degree of differentiation among networks and services in the market; and***
> f) ***any other matters that the Commission deems relevant***

[34] Section 26(6) provides that before such finding of dominance may be made for the purposes of section 26, the Commission **must** conduct *inter alia* a public consultation.

[35] Section 26(4) of the Act provides that where the Commission determines that a public supplier is dominant in any market, it shall include additional terms and conditions in the licence***"for the purpose of regulating tariffs, protecting the interest of users and other licensees including the provision of adequate facilities and interconnection and access services, and of ensuring fair competition among licensees as it considers appropriate."***

[36] Section 29(2) of the Act provides that "**[t]*he Commission may establish price regulation regimes to promote efficiency and sustainable competition and maximize consumer benefits, which shall be specified in the Telecommunications Code, for setting, reviewing and approving prices*".** These are limited to the circumstances specified in section 29(2)(a) to (c), which include "***anti-competitive pricing or acts of unfair competition***".

[37] Section 75(1)(a)(iii) provides that

> ***"The Commission may take enforcement action against a licensee or authorization holder if,...(a) in the opinion of the Commission, the licensee or authorization holder:...(iii) is carrying on or is likely to carry on business in a manner that is detrimental to the public interest, including an anti-competitive manner, or detrimental to the interest of clients, creditors or investors..."***

[38] The legal authorities are quite clear that where the words of the statute are plain and unambiguous the Court is bound to construe them in their ordinary sense, even though it may lead to an absurdity or manifest injustice.[15]

[39] The foundation of the Claimant's ***ultra vires*** submissions is the assertion that the Act sets out an *ex ante* regulatory regime by virtue of section 26. This interpretation of the Act runs through further submissions advanced by the Claimant to this Court. Certainly, Counsel for the Claimant flagged the *ex ante* submission as a main point of distinction between the arguments raised in the**Digicel** case and those in the present case.[16] On the Claimant's case this is a key point and in their submission is the only correct manner in which the statute could be interpreted to give true meaning to the Act as a whole.

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[15]See: Abley v Dale (1851) Jarvis CJ.
[16] Claimant's written submissions paragraph 41.

[40] Counsel for the Claimant emphasized that the Act must thereforebe appreciated as *ex ante* legislation which does not provide for anex *post*regime.

[41] The Claimant submitted that if the legislature intended the Act to create an *ex post* regime it would have most likely have made specific provision for that. They sought to rely on the manner in which other jurisdictions including the United Kingdom and the European Union had done so by either specific wording using express language prohibiting anti competitive behaviour, defining it and imposing a clear process to address it or by separate pieces of legislation for this submission.[17]The Claimant argued that it is therefore clear that the Legislators only intended that there would be regulation of future or current behavior of the providers for which the Respondents would be responsible and that section 75 (1)(a)(iii) makes that clear by the very tense that is used within its terms.

[42] Further, the Claimant advanced the position that the Respondent by using section 75(1)(a)(iii) in this manner sought to impose *ex post* regulation where it did not exist, in their words ***"through the back door"***.

[43] If anti-competitive conduct is not defined from the outset, the Claimant submitted, then this must constitute a breach of natural justice. The licensee would have no means to know what actions would constitute a breach and the Respondent could from one day to the next, one situation to the next address offending behavior as they saw fit.

[44] Following from this *ex ante* argument the Claimant asserted that the Respondent therefore had wrongly applied section 75(1)(a)(iii) of the Act. The Claimant maintained their position that sections 26 and/or section 29 were the appropriate

[17] See: Article 102 of the Treaty on the Functioning of the European Union ("TFEU"); Section 18 of the Competition Act 1998 (UK); section 18 of the Jamaican Fair Trading Commission *Staff Opinion on the Competitive Dynamics of Call Termination Provision* of 23 June 2010.

sections to be applied with their clearly mandated procedure. They further submitted, that any reliance on section 75(1)(a)(iii) had to have been dependent on sections 26 and/or section 29, that is, these sections have to be read together. In other words "*anti-competitive*" conduct has to be defined, determined and regulated pursuant to sections 26 and/or 29. It was pellucid they argued to this Court, that the reference to anti-competitive behaviour in section 75(1)(a)(iii) had to therefore be based on an initial substantive determination under section 26.

[45] Despite the Claimant's cogent arguments, in this regard the Court does not find favour with this argument as proffered.Indeed in this Court's mind, the language of the provisions does not support the interpretation being pressed by the Claimant; the words are clear and unambiguous.

[46] It is clear to this Court that the use of *ex ante* regulation under section 26 is specific to a finding of dominance. It is also clear that it is in the Respondent's discretion as to whether a finding of dominance is necessary. If a finding of dominance is so necessary for the purposes of section 26 then it is mandatory to follow the procedure set out.

[47] The Claimant's reliance on the **Telecommunication Regulatory Commission Virgin Islands' Market Review,final statement of 2 December 2010,** asevidence that the legislature intended an *ex ante* regimedid assist the submission that the inherent intention of the legislature was to create a regime of ex ante regulation. Thusin particular the TRC Market Analysis Report statedwith reference to the powers under section 26 that ***"where the TRC finds a public supplier dominant, it is empowered by the Act to apply ex ante regulation."***[18]

[18] Page 3 paragraph 2.2.

What is gleaned from the wording of the report and the wording of the Act itself, is that the purpose of section 26 and 29 is to promote competition in the BVI telecommunications sector through forward - looking controls. This is an entirely different function from enabling enforcement action.

[48] In the present terms of the Act it is not possible to breach sections 26 and or 29. Section 75 of the Act is the only section that makes provision for enforcement. If the Respondent determines that any of the provisions of section 75(1) are breached then they may take enforcement action pursuant to section 75(2). This Court therefore finds that there is no connection expressly or impliedly between sections 75(1)(a)(iii) or sections 26 and 29.

[49] It therefore follows that there is no obligation for the Respondent to engage sections 26 and 29 in their application of section 75(1)(a)(iii). Section 75(1)(a)(iii) is a free-standing enforcement provision, which allows the Respondent to make an independent determination of anti-competitivebehaviourin accordance to the standards and meaning ascribed to it within the industry.The fact that there is no mandatory requirement or no reference to a finding of anti-competitivebehaviour via section 26 and 29 in section 75(1)(a)(iii) the Court can only infer that there was no intention of the legislature to make the sections interdependent. One must look at the statutory construction in its entirety and not in isolation.

[50] The legislature has given the Respondent the ***option*** to impose *ex ante* regulation in respect to their duty to encourage fair competition in the BVI. In doing so it has not restrained the Respondent to strict *ex ante* regulation in all respects of their duties and functions.

[51] This Court is therefore of the opinion that the Respondent did not have to rely on the procedures set down as a matter of strict adherence, on the terms of sections

26 and 29, there being no necessity to invoke those procedures in order to consider whether enforcement action was applicable in any onefact scenario.The Court therefore finds that there was no need to consider the provisions of sections 26 and 29 in a consideration of section 75(1)(a)(iii).However what the Court must now consider is whether in the fact scenario of this case and as argued before it, whether in fact having determined sections 26 and 29 procedure for enforcement ordinarily under section 75(1)(a)(iii) were not applicable whether the Respondent was however entitled to rely on section 75(1)(a)(iii) to undertake the regulation of past conduct of the Claimant.

Ground 11(c): Past Conduct

[52] Learned Counsel for the Claimant, contended that the Respondent's Decision is an unlawful attempt to take enforcement against past conduct when the Act only empowers the Respondent to take enforcement against present and future conduct. Therefore it is *ultra vires* the Act.

[53] Section 75(1)(a)(iii) states that enforcement action can be taken against a licensee who **"is *carrying on or is likely to carry on*business *detrimental to the public interest, including in an anti-competitive manner...".*** (Emphasis mine) It is clear from the words and text of the Decision that it is limited to the Claimant's ***"conduct which took place between January 2009 and August 2010"***, which ***"conduct has now ceased"***. TheDecision identified this as the relevant period to which the margin squeeze occurred and to which the Decision applied.

[54] The Claimant asserted that the words of section 75(1)(a)(iii) must be read in their strict sense as they reflect the legislature's deliberate intent to only cover present

and future conduct, thus the use of present and future tense. The Claimant urged that the wording of the Act is clear and must be construed in its plain meaning.

[55] The Respondent in their rebuttal made three substantial points. Firstly, the Respondent argued that the Claimant's strict literal interpretation is inconsistent with the purpose of the section 75(1)(a)(iii) and cannot be what the legislature intended. The Respondent sought to argue that any suggestion that the section cannot cover past conduct served to limit its enforcement power and would frustrate the intention of the legislation.

[56] Secondly, the Respondent maintained that section 75(1)(a)(iii) is the only appropriate provision for the breach and it provides for the regulation of anti competitive conduct without the necessity of engaging the process provided under sections 26 and 29.Further the Respondent argued the Claimant's interpretation would lead to absurd consequences. In that presently, entities who committed the wrong doing could escape punishment if they curtailed the conduct before the issuance of any decision. This they argued, would make a mockery of the entire system if past conduct that had already amounted to driving competitors from the market could not be adequately punished.

[57] Lastly, the Respondent claimed in the alternative the section is capable of covering future conduct. That being said they submitted to this Court that the Decision made a finding that by the very nature of the anti-competitive conduct complained of, it was entirely susceptible to being revived at any time,as the margin squeeze as identified by the Respondent is dependent on costs and revenues. The Respondent in fact suggested there was a possibility that the conduct had already revived since the Decision.

[58] It would appear to this Court that this entire issue revolves around the grammatical meaning as opposed to legal meaning of the context of the Act.

[59] **Bennion on Statutory Interpretation 5th ed.** states:

> ***"The starting point in statutory interpretation must always be the ordinary linguistic meaning of the words used. Legal considerations apart, this meaning may be clear, ambiguous or obscure."***[19]

[60] In this context there is no ambiguity with the words used. The Respondent has not argued that there is any ambiguity present in the wording of section 75(1)(a)(iii). The words as read are indeed clear and speak exclusively in the present and future tense. In contrast the Claimant pointed out that section 75(1)(a)(i) of the statue is written in past tense this is to say that if the legislature intended the past conduct to be included they could have expressly provided for the same.

[61] The Respondent argued, and the Court accepts, that there are instances in common law jurisdictions were tenses have been interpreted to cover more than the obvious period. The Respondent relied on section 18 of the UK Competition Act and section 2 of the US Sherman Act to illustrate this point. Both sections were drafted in present tense but as argued by the Respondent, are deemed to cover past conduct as well.

[62] Section 18 of the UK Competition Act 1998 (which prohibits abuse of dominance) provides that "*...**any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom***".

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[19]page 444.

[63] While section 2 of the US Sherman Act provides that ***"every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony"***.

[64] Further the Respondent relied on the case of ***Pernod Ricard SA and another v Office of Fair Trading***[20] to support their argument. In that case the Competition Appeal Tribunal held that the words *"is or"* where to be implied immediately before the words *"has been"*[21] for the purposesof section 46(3)(a) and (b) of the UK's Competition Act 1998. The Court held:

> **" ...we think it would be artificial to construe the words "has been" in section 46(3) of the Act in a narrow literal sense, so as strictly to limit the OFT's powers, and the rights of appeal to the Tribunal, only to matters arising in the past. Parliament, we think, must be presumed to have known that cases of the kind referred to above would be likely to occur, not least because that is and always has been commonplace of the existing system under Community law on which the 1998 Act is modeled."**

[65] While this case certainly demonstrates a more generous finding by the Court it is not conclusive of the BVI's legal position. The only real consideration for this Court, looking at the facts of the case and the context of the Act at hand, is what is the meaning of section 75(1)(a)(iii).This also requires the Court to ask what the legislative intention here was. The Court can only conclude that the legislative intention was clearly to cover present and future conduct.It does not in this Court's opinion lend itself to an over generous reading to cover past conduct.

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[20] [2004] CAT 10 (10 June 2004).
[21] Supra paragraph 185.

[66] The Court therefore is in agreement with the Claimant's submission that the Decision was and could only have been limited solely to offending conduct which ceased before the Decision was issued. Any reference to revival of the conduct is irrelevant as a result, in fact the Respondent by their own admission made it clear that there is no evidence of the anti-competitive margin squeeze after August 2010.[22]Any suggestion that the margin squeeze may have still been alive is therefore inappropriate and cannot be made without the benefit of anindependent investigation into the matter.

[67] The Court has nothing to do with whether the legislature by the use of its words has committed an absurdity. In cases where onthe wording of the Act alternative interpretations are possible, if one interpretation leads to an absurdity and the other does not, the Court will conclude the legislature did not intend the absurdity and adopt the other interpretation.[23] This is not the case here.

[68] The provisions of the Act have to be read in its clear meaning. It is not open to the Respondent to read into the statute as a matter of convenience what is not there. The Court can certainly understand the difficulty of the regulator in this position as it does leave the Respondent in a somewhat weakened position with regard to the reach of its enforcement powers. However, the remedy for this is legislative amendment and not excessive statutory interpretation. It is not the place of the Respondent to do so and it certainly is not the role of the Court, particularly in judicial review proceedings to exceed the confines of the statute.

[69] Thus as stated by Byron CJ as he then was in the case of ***The Attorney General v Barbuda Council***[24]adopting the words of Sir Vincent Floissac in ***Charles***

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[22] See paragraph 39 of Decision.
[23] R v City of London Court Judge & Payne[1892] CA.
[24] Civil Appeal No. 7/2001 at para 10

Savarin v John Williams[25] it was clear that in the rules of statutory interpretation it is necessary that "....*the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which the word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that as may be necessary to make it concordant with the statutory context. In this regard the statutory context comprises every word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention*"

[70] In the case at bar I have to therefore agree with the submissions of the Claimant that generally the tenor of the Act lends itself to *ex ante* regulation of operators. Even though this Court found that there was no need to rely or invoke those provisions before the utilization of the enforcement provisions, it is in agreement that those provisions in sections 26 and 29 set out procedure where *ex ante* regulatory action is contemplated.

[71] That being said, the Court is of the opinion that the Respondent has thus exceeded its statutory powers in seeking to use this provision to enforce against past conduct and I find that the Respondent in this regard acted *ultra vires* the Act.I therefore find that the Claimant is successful on this ground and this action of the Respondent warrants the Decision being set aside.

Ground 11(d): Persons outside the jurisdiction

[72] The Claimant also challenged the Respondent on the ground that the Respondent acted *ultra vires* its powers under the Act in it wrongly purported to take enforcement action against the Claimant for acting in an "anti competitive manner"

[25] [1995]51 WIR 75 at 79

under section 75(1)(a)(iii) on the basis of an alleged margin squeeze involving upstream conduct (i.e. the provision of termination services for calls on the networks of LIME affiliates elsewhere in the Caribbean) which took place outside BVI and/or was engaged in by persons outside the BVI.

[73] The crux of the Claimant's argument was that there was no conduct that was perpetrated by LIME BVI that warranted the finding of their having created a margin squeeze that amounted to anti competitive behaviour.

[74] The Claimants submitted that in order for a margin squeeze to be created it was required that there must be the existence of an integrated provider who participates in the upstream market (the provision of the wholesale prices that are available for all providers who need to buy call termination on that network) and also in the downstream market or the retail market for those mobile services.

[75] The Claimants submitted that the Respondent had no legal basis to seek to penalize LIME BVI for acts of an affiliate that was based outside of the jurisdiction. It was in fact these affiliates that were responsible for the setting of the prices in the whole sale or upstream market, not LIME BVI.

[76] There can be no dispute that the Respondent under the tenets of the Act are only empowered to regulate and take enforcement action against its licensees and authorization holders under the Act. Therefore by natural extension this jurisdiction does not and cannot extend to entities outside this scope.

[77] The Respondent's decision clearly stated that only the Claimant's conduct was relevant to the Decision.[26] In paragraph 2 of the Decision, the Respondent identified the "relevant conduct" as follows:

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

[78] However,it appears that the Respondent in coming to their findings took the action of the affiliates of LIME BVI that actually set the wholesale prices, into account to come to the determination that the Claimants by their actions had created a margin squeeze. By its very definition margin squeeze as defined by the OECD and relied on by the Respondent required an integrated provider, that is, a provider who participated in the upstream or whole sale market and also in the downstream or retail market. However it was clear that the Claimant only set the retail price and their affiliates set the wholesale price.[27] Therefore an essential element of the margin squeeze has not been made out. Moreover, the entirety of the necessary conduct was not within the Respondent's jurisdiction.

[79] The Respondent in their decision claimed that the Claimant ***"sold to CCT wholesale termination services on its affiliates' networks on behalf of those networks"***[28] The Claimant asserted that they acted as an agent for their affiliates,but they argued that this business arrangement was not sufficient grounds for the Respondent to take enforcement action against them in this

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[26]paragraph 25.
[27]See: Affidavit of Derrick Nelson filed on 2nd December 2015, paragraph 11 "...***Carrier Services set the Wholesale Rate, but LIME (BVI) sets its own retail rates. Carrier Services hasno input into the decisions made concerning retail prices to customers.***" Also paragraphs 13 and 14.
[28]Paragraph 25.

respect. The Claimant further asserted that the Respondent have mischaracterized the relationship. The Respondent had therefore applied an error of factwhich rendered the Decision unlawful.

[80] The Respondentacknowledged that they were authorized to look at the actions of the Claimant only for the purposes of enforcement action. The Respondent submitted that the Decision was based on the conduct of the Claimant as they set out in paragraph 2 of the Decision. The Respondent's findings therefore seemed to have been based on a determination that the conduct of the Claimant amounted to being anti competitive by virtue of their retail price fixing.

[81] The Respondentcategorically denied that the Decision was therefore intended to be binding on any other entity than LIME BVI but admitted that they had taken the conduct of the Claimant's affiliates into consideration in respect to what wholesale prices were available to CCT and what they could or not compete against.

[82] The Respondent denied that there had in fact been any strict adherence to the margin squeeze test in any event, as it amounted to no more than an economic rule and not a legal rule. It did not and could not therefore form the legal basis of the Decision, indeed the enforcement provisions of the Act, by section 75 did. In the Respondent's view it was sufficient that CCT was being put under economic strain by the retail prices set by the Claimant, without more.

[83] Indeed is it recognized that a parallel issue arose in the***Digicel***[29] matter. In that case this Court found that " ...***the entirety of what and how the Claimant operated within the jurisdiction of the British Virgin Islands would have been***

[29] Digicel BVI paragraphs 106 to 107.

relevant to give the back drop. Specifically with the regard to the cost to the Claimant for call termination on their own network as opposed to the cost for their competitors for the same service. 107 . The fact that the Claimant was not responsible for the setting of the retail and whole sale prices cannot be an answer to the criticism when it is in reality the factual matrix as to what occurred. That is that they benefitted from the whole sale prices being set by their affiliates while their competitors did not".

[84] This Court finds that the same factual matrix occurred here. The Respondent in taking an over view of the effects of the anti competitive behaviour sought to look at the reality as to how the Claimant was able to offer the retail rates it did at a rate substantially lower than the rates at which CCT was required to purchase.

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

Ground 13: Relevant considerations/irrationality

[86] The Claimant also challenged the Respondent on the basis that the Respondent failed to take into account relevant considerations and/or acted irrationally by failing to consider properly or at all certain elements which they contended were essential to establish the alleged anti-competitive margin squeeze, those being market definition, finding of dominance, exclusionary effect of the margin squeeze and the doctrine of recoupment.

[87] It is important to note that under this ground the Claimant refers to two distinct heads of judicial review: failure to take relevant considerations into account and irrationality. While they do often overlap the tests are different.

[88] The general approach of the courts in cases where the decision maker has adiscretion is to intervene only where the discretion is deemed "*Wednesbury unreasonable or irrational*".

[89] In the seminal case of ***Associated Provincial Picture House Ltd. v Wednesbury Corporation***[30]Lord Green MR stated ***'A person entrusted with discretion must...direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably."***

[90] The test for irrationality is notoriously strict as it requires a lapse in the decision making process and the conclusion reached that is in the realm of the outrageous[31]or something overwhelming.[32]

[91] The Claimant sought to impugn the Respondent's findings on the basis of :

a) Market definition: The Respondent failed properly or at all to define the relevant upstream and downstream market(s).The Claimant argued that this

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[30] [1947] 2ALL ER 680.

[31]Council of Civil Service Unions v Minister for the Civil Service[1983] UKHL 6 Lord Diplock*"...a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it."* Page 410G

[32]Nottinghamshire County Council v Secretary of State for the Environment (1986) Law Reports, HOL, 240, at 241 the House of Lords held that it required exceptional circumstances such as bad faith or improper motive.

was an essential consideration in order to establish margin squeeze.A finding which needed to be fact specific to the BVI and the case at hand. Instead the Respondent relied on the Ofcomdefinition, an adapted UK approach.[33]The Respondent's main assertion was that a strict market definition was not necessary to take enforcement action under section 75(1)(a)(iii) of the Act. However, in relying on the Ofcom definition they relied on international best practice. Having done so, the Respondent thus determined it was sufficient to define each market for the termination of calls to LIME networks.

b) Dominance: The Respondent failed to establish market power/or dominance on the relevant upstream and downstream market(s) on the part of the relevant persons and or licensees. The Claimant further argued that the Respondent was obligated to make a finding of dominance which was essential to establish a proper margin squeeze. The Respondent countered by arguing that LIME, in its capacity as an international telecommunications operator already enjoys a monopoly for voice call services. The Respondent depended on this as 'probative value" of the Claimant's position.[34]

c) Exclusionary effect: the Respondent failed to establish that the alleged margin squeeze was capable of having an exclusionary effect in the relevant downstream market(s) to the detriment of CCT. The Respondent also failed to establish a casual link between the Claimant's behaviour and the potential exit of the CCT from the market place. The OECD definition of margin squeeze required that the integrated provider's conduct drive out their rival.The Claimant argued that their conduct could not be considered a primary threat to

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[33] See: Paragraph 28 of the Decision; Ofcom, Wholesale mobile voice call termination Market Review, Volume 2-Main consultation, 1 April 2010; Supplement page 5

[34] See: Stagecoach Group plc. V Competition Commission [2010] CAT 14; Mahon v Air New Zealand [1984] AC 808.

CCT in this respect, in fact, the conduct of Digicel was a primary cause and therefore it was not appropriate for the Respondent to make the finding that it did. The Respondent in response submitted that there is no way to predict a competitor's exit from the market. But the Respondent was taking precautionary steps in an effort to eliminate anti-competitive threats to a vulnerable CCT.

d) Recoupment: the Respondent failed to establish that the Claimant would have been successfully able to later recoup the loss caused to it by the alleged margin squeeze. The Claimant essentially argued that the Respondent should have taken the US law approach and considered the doctrine of recoupment which provides that not only must there be an actual ability to exclude the competition but that further that that dominant undertaking would be able to raise its prices to recoup any losses that may have been suffered during the price squeeze period. The Respondent determined that this was not relevant and further that it would limit the Respondent's use of section 75(1)(a)(iii).

[92] All of the above considerations were previously flagged by the Claimant as relevant considerations to the Respondent during the period of the investigatory process.

[93] On the evidence it appears that the Respondent during its deliberations gave some thought to the considerations presented to them but chose not the adopt the Claimant's approach or simply not to proceed with the consideration on the basis that they felt that it was not relevant to the section 75(1)(a)(iii) enforcement provision and the facts of the case at bar.

[94] The Respondent is the expert regulator in a specialized area. The Court is not in a position to question the correctness of the decision on its merits. The Court can look at the statute and confirm that in applying section 75(1)(a)(iii) there was no requirement to make a determination of market definition, dominance, exclusionary effect or recoupment for the purposes of this section. With regard to the latter two there is no mention of these considerations in the BVI legislation at all.As a matter of fact, recoupment is admittedly as a United States legal concept which does not automatically apply to the BVI. These are not express considerations to be taken into account by the Respondent. If the Respondent so chooses to take them into consideration there must do so in regard to their specialized expertise in the sector and within the context of the BVI's regulatory environment.

[95] The Court in its supervisory jurisdiction is concerned with whether the decision of the decision maker fell within "***...the range of reasonable views open to the decision maker...***" [35]

[96] Counsel for the Claimant respectfully recognized the Respondent as the delegated regulator and decision maker. In their submissions they reminded the Court that while this is the case,decisions of the Respondent are nonetheless open to judicial review. While the Respondent is empowered to take enforcement action in the public interest it has a duty to take into account relevant considerations.

[97] The Claimant relied on the case of ***Tesco Stores Limited v Secretary of State for the Environment and others***[36] which held that the Court is entitled to decide what is a relevant consideration is and upon a finding that the decision maker

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[35]Secretary of State for Education and Science v Tameside Metropolitan Borough Council cited with approval by Small-Davis J in Jared Adams v Commission of Police AXAHCV 2009/89 unreported.
[36][1995] 1 WLR 759.

failed to take a relevant consideration into account may set the decision aside. The decision maker has the discretion as to how much weight to attribute to the decision and the Court would not intervene unless the decision can be said to be unreasonable in the Wednesbury sense.

[98] The Claimant also relied on ***R v Broadcasting Complaints Commission ex p Owen***[37] which is authority for the proposition that the decision maker must properly direct themselves according to law and they must act by reference to relevant and not irrelevant considerations.

[99] What is clear from the case law, is that the decision maker has an obligation to take into account relevant matters and to disregard irrelevant matters. In doing so, his actions must be scrutinized whether they can be considered irrational or not . That is, that the decision is so "***outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question would have arrived at it"***[38].

[100] Therefore In carrying out this obligation the decision maker is entitled to apportion the required weight of a matter to this decision making process. As such the decision maker must properly direct himself in the law and must at all times give effect to the process for which they are empowered.

[101] If a decision by the decision maker is impugned, the Court has the authority to determine what is a relevant consideration. Both the Court and decision maker must look to the basis that underpins the obligation of the decision maker in any given situation.

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[37][1985] QB 1153.
[38]Civil Services Unions v Minister of the Civil Service [1985]AC 374 at pages 410-411

[102] However, this discretion and role of the decision maker is such that the Court should only intervene in the must obvious and extreme of circumstances.

[103] Additionally the Court is entirely cognizant that this decision maker, the Respondent in this case, is the expert regulator, the body given the power by the Legislature to make these kinds of decisions. Therefore it must also be bourne in mind that the threshold is high to find that any such decision maker has acted irrationally. In the case of ***Digicel(Jamaica) Ltd v Office of Utilities Regulation***[39]Mangatal J said succinctly "***it is well known that the threshold for irrationality is quite high because courts are not set up to review the merits of the competent authority's decision...69...it is not the function of the court in anything other than a clear case to second guess their decisions or to have their decisions under a microscope"***

[104] In the instant case, the Respondent was tasked with the determination as to the effect the All Talk plans had on the complainant CCT. In undertaking that exercise it was open to the Respondent to consider and thereafter dismiss or accept the submissions of the Claimant making its case. Thus considerations asset before it must be left to the decision maker and their decision can only be impugned if " ***the decision maker wrongly takes the view that some consideration is irrelevant and therefore has no regard for it....he must be required to think again.***"[40]

[105] There is no evidence before the Court that the decision maker was unreasonable in his decision making or did not take into account relevant considerations. What this Court is satisfied of is that it is apparent that the Respondent in their decision had addressed its mind to the issues raised by the Claimant but chose not to rely

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[39] [2012]JMSC Civ 91
[40] Tesco Stores op Cit at 764.

interference of the court. It is for that decision maker ultimately a question of the weight to be ascribed thereto.

[106] This Court therefore finds that the Respondent did not fail to consider relevant matters nor was there any irrationality in failing to consider the four grounds upon which they felt they were aggrieved. This Court is not satisfied that this Decision was one that was not open to the Respondent to make.

[107] **Conclusion**

The Order of the Court is as follows: -

(1) The declaration that the Respondent acted *ultra vires* the Telecommunications Act, 2006 ("the Act") in making the decision set out in its notice dated 1 June 2012 relating to the investigations into the practices of Digicel(BVI) and LIME (BVI) as regards calls made from the British Virgin Islands (the "BVI") to other islands within the Caribbean region ("the Decision") is granted;

(2) The order of certiorari quashing the Decision is granted;

(3) Costs are reserved and therefore the Parties will submit written submissions as to costs within 21 days of delivery of this judgment.The decision on costs will be issued thereafter in writing without further hearing.

I thank Counsel on both sides for their very helpful submissions and assistance.

Nicola Byer

High Court Judge