EMTEL LTD v THE INFORMATION AND COMMUNICATION TECHNOLOGIES AUTHORITY & ORS

2017 SCJ 294

Record No: 1/253/00

THE SUPREME COURT OF MAURITIUS

In the matter of:

Emtel Ltd

Plaintiff

v.

1. **The Information and Communication Technologies Authority**
2. **Mauritius Telecom Ltd**
3. **Cellplus Mobile Communications Ltd**
4. **The Ministry of Telecommunications**

Defendants

JUDGMENT

1. The present claim for damages for unfair competition under article 1382 of the Code civil arises from an alleged breach of licence conditions. Damages are claimed from the four defendants jointly and *in solido,* or in the alternative any one or more of them, and if more than one, then those persons jointly and *in solido,* or in the further alternative, singly any one or more of them.

2. The claim was entered on 2 June 2000. However, the actual trial took place in May and June 2016 over a period of seven weeks. All the parties have had recourse to the relevant and material correspondence exchanged among them during the claim period which runs from 1996 to 2002, thus enabling the Court to have a good and complete view and understanding of the facts and circumstances leading to and surrounding the present claim despite the significant lapse of time between the events which gave rise to the claim and the actual hearing of it. Some 753 documents including expert reports have been produced by the plaintiff company; they are **Documents P1 to P753**. **Documents D1 - 1 to D1 - 59** are produced by defendant no 1, **Documents D2 - 1 to D2 - 34** by defendant no 2 and **Documents D3 - 1 to D3 - 59** by defendant no 3.

3. The plaintiff company, Emtel Limited (Emtel) is a joint venture in cellular mobile radio telephony between the Mauritian company Currimjee Jeewanjee & Co Ltd and European and American partners.

4. The defendant no 1 (ICTA) is the regulatory authority for the telecommunications sector established under section 4 of the Information and Communication Technologies Act 2001 (the 2001 Act). It is the successor to the Mauritius Telecommunication Authority (MTA) which was established under section 4 of the Telecommunications Act 1998 (the 1998 Act). The MTA itself succeeded to the Telecommunication Authority (TA) which was established under the Telecommunication Act 1988 (the 1988 Act).

5. At the time of the events giving rise to the claim and of the entry of the claim, the regulator was the Telecommunication Authority (TA). On 11 July 2011, a plea was raised *in limine litis* on behalf of ICTA. The plea was to the effect that ICTA should be put out of cause since it cannot be held liable in law in respect of facts disclosed *ex facie* the amended statement of claim and which took place before it came into existence in 2001. The plea was overruled. I also ruled that pursuant to the transitional provisions under section 29(1) of the 1998 Act and section 51(1) of the 2001 Act, ICTA should be held liable for the tortious acts, if any, of the two regulatory bodies which preceded it.

6. The defendant no 2 (MT) is a company incorporated in Mauritius in 1992. Prior to 1985, telecommunication services in Mauritius were run and provided (i) in so far as overseas telecommunications were concerned, by Cable and Wireless Limited, and (ii) in so far as inland telecommunications were concerned, by the Government of Mauritius (Government) through the Department of Telecommunications (DoT). On 1 January 1985, a wholly state owned company under the name of the Overseas Telecommunication Services Co Ltd (OTS) took over the assets and operations of Cable and Wireless Ltd in Mauritius. In 1988, Government formed another wholly state owned company under the name of The Mauritius Telecommunication Services Ltd (MTS) to which the undertaking of DoT was transferred by the Telecommunication (Transfer) Act 1988. The MTS also acquired the assets and liabilities of the OTS. In 1992, MT, the newly formed company took over the operations, assets and liabilities of MTS and became then the sole provider of (i) land line services within Mauritius and (ii) international communications to and from Mauritius.

7. The defendant no 3, Cellplus was incorporated on 14 March 1996. On 5 September 1996, it was granted a licence by the TA to operate a GSM (Global System for Mobile Telecommunications) Cellular Mobile Telephone Service.

8. The defendant no 4 (the Ministry) has overall responsibility for information technology and telecommunications.

THE "*FAUTE*" AS ALLEGED IN THE STATEMENT OF CLAIM (SOC)

9. The alleged "*faute*" of the regulatory authority is set out at paragraphs 15.3, 15.4 and 16 which for ease of reference, are reproduced below:

"15.3 Emtel further avers that the Telecommunication Authority has failed and neglected to exercise, and/or refrained from exercising, its statutory powers to ensure that the conditions of the licence issued to Cellplus as set out in the press communiqué referred to in paragraph 8.3 above, were complied with.

15.4 Emtel lastly avers that the Telecommunication Authority has failed in, and neglected, its duty to protect, and/or refrained from protecting, Emtel from unfair competition by Cellplus and Mauritius Telecom.

16 Emtel avers that such bias on the part of the Telecommunication Authority towards Mauritius Telecom and/or the tolerance shown by the Telecommunication Authority of the tortious act of Mauritius Telecom and Cellplus amount to a "faute", a dereliction of duty and/or tortious bias."

The alleged "*faute*" of MT and Cellplus is set out at paragraphs 17 and 18

"17. Emtel further avers that the actions of Mauritius Telecom, the concerted actions of Mauritius Telecom and Cellplus and the abuse of the dominant position of Mauritius Telecom to destroy and/or harm Emtel constitute "faute" and are tortious.

17.1 Such torts have been committed in concert with and/or with the tolerance of the Telecommunication Authority."

18. Emtel has suffered considerable loss from those tortious acts and doings and in particular from –

(a) the Telecommunication Authority's failure to ensure, in accordance with the directions of the Ministerial Committee, that the objects pursued by it, the Telecommunication Authority, and the conditions imposed by it on the grant of a licence of Cellplus, as set out in paragraph 7 of the press release referred to in paragraph 8.3 of the present Statement of Claim, were duly complied with;

(b) the cross-subsidisation procured by Mauritius Telecom to Cellplus;

(c) Cellplus' use of, and benefiting from, the cross-subsidisation procured by Mauritius Telecom;

(d) Mauritius Telecom's abuse of its dominant position in the market;

each of the above defaults, as well as the combined effect of the above defaults, being that Cellplus has been enabled to compete unfairly with Emtel, as a consequence of which Emtel has suffered damage and prejudice presently amounting to Rs 1,100,000,000 (one billion and one hundred million rupees) and is bound to suffer future losses."

The alleged "*faute"* of the Ministry is set out at paragraph 19

"19. The fourth Defendant, the Minister and/or the fourth Defendant's employees and/or the fourth Defendant's agents and/or other preposes have failed to ensure that the fourth Defendant's direction to the Telecommunication Authority be complied with and have thus tolerated

(i) the abuse by Mauritius Telecom of its dominant position and

(ii) the failure of the Telecommunication Authority to comply with the policy which Government had adopted and in the context of which, and upon which condition, Cellplus was allowed to be licensed at all.

In the premises, the fourth Defendant is liable for the damage caused to Emtel by the aforesaid acts and omissions, including those of the Minister and/or of its employees and/or of its agents and/or of its other preposes."

THE LAUNCHING OF CELLULAR MOBILE TELEPHONY IN MAURITIUS

10. Emtel was the first mobile telephone operator in Mauritius. Mr Bashir A Currimjee, its managing director recalled in court the launching of the first cellular mobile service in Mauritius. On 9 March 1987, Mr Currimjee on behalf of Currimjee Jeewanjee and Company Limited applied to the then Minister of Energy and Internal Communications for approval for the establishment and operation of a Cellular Mobile Telephone System by a company to be incorporated under the name Emtel Ltd **(Document P4)**. Cellular mobile telephone systems had at that time been introduced only in a few countries and the technology was very much a novelty and expensive.

11. On 3 July 1987, Emtel Limited was incorporated. The initial shareholders were Currimjee Jeewanjee Properties Limited and Currimjee Jeewanjee and Company Limited. Subsequently the initial shareholders formed a joint venture with Comvik International AB, a Swedish company providing telecommunications services in Sweden and Milicom Inc. USA.

12. For the setting up and operation of the cellular mobile system, it was essential for it to be connected to the fixed land lines of which Government through the DoT, owned the totality. By a letter dated 26 August 1987 and addressed to Mr Currimjee, Government authorised Emtel to install and operate under licence a Cellular Mobile Telephone System subject to terms and conditions set out in the letter **(Document P8)**.

THE OPERATOR'S LICENCE GRANTED TO EMTEL

13. On 23 May 1988, the DoT granted to Emtel a first licence to operate a cellular mobile telephone system. At the relevant time, Comvik International AB had developed the ACS system which was in use in Sweden and Hong Kong. The TACS system which was already available, was considered by Emtel to be expensive for a small country like Mauritius. However, by August 1988, Emtel was informed by its foreign partners that prices for TACS had gone down. Emtel then decided to switch from ACS to TACS, which is an analogue technology.

14. On 19 May 1989, the TA issued a second licence to Emtel to supersede the one issued by the DoT on 23 May 1988. **(Document P37 and Document D1.13).**

15. Under clause 1 of the second licence, Emtel is licensed (a) to establish and operate a public Cellular Mobile Telephone Service and (b) to possess, establish, use and maintain such radio communication apparatus as described in the Schedule and (c) to import, deal in, sell,

install and maintain such apparatus or material as may be necessary in connection with the service.

16. Under clause 2 of the licence, Emtel is granted exclusivity for the operation of the Service for an initial period of seven years as from 1 January 1989. According to Mr Currimjee, the exclusivity period which was to expire on 31 December 1995, was granted to Emtel in recognition of its pioneering initiative and efforts in the industry.

17. Clauses 5 and 8 are also relevant and material to the present case.

Clause 5 of the licence reads as follows:

"*The licensee will, as from the 1st July 1992, pay charges to the Telecommunications Authority, reckoning on the gross proceeds from all calls made by and to the subscribers as follows:-*

(a) for the first year, 15% of gross proceeds ;

(b) for the remaining years and beyond, 25% of gross proceeds.

These proceeds should be payable not later than three months after the end of each financial year (that is, on 30 September of each year.)"

18. Clause 8 is to the effect that "*the licensee will conclude an agreement with the Public Operator, operating the national telecommunications network, and a copy of such agreement shall be submitted to the Authority).* No set date was fixed as to the conclusion of such agreement.

19. The First Schedule to the licence gives a description of the Cellular Mobile Radio Telephone Service covered by the licence. Paragraph 1 reads as follows:

"1. The public cellular Mobile Radio Telephone Service is a service which provides for mobile radio telephones rented or owned by its subscribers to have both-way access to other mobile radio telephone subscribers to the service and to the public switched telephone network provided by the Mauritius Telecommunication Services Ltd and to the international switching centre provided by Overseas Telecommunications Services Co Ltd."

20. The Public Operator referred to in Clause 8 above is the MTS, which as stated above, took over the undertaking of the DoT in 1988 and which merged with OTS to form MT in 1992.

To provide the service set out in the First Schedule of its licence, Emtel had to lease lines from MTS, the fixed line operator and be connected through Pulse Cord Modulator (PCM) links which were owned by MTS. The purpose therefore of the Interconnection Agreement (IA) referred to under clause 8 of Emtel's licence was to set out among other matters, the charges to be paid by Emtel to MTS and after 1992 to MT for the use of the latter's network.

21. Under the Third Schedule, the TA approved the following fees to be charged by Emtel to the subscribers

(a) A non- recurrent installation and connection fee of Rs 600.00.
(b) A monthly access fee of Rs 335.00.
(c) A call charge of Rs 5.00 per minute for both incoming and outgoing communications.

THE BASICS OF CONNECTIVITY

22. How does Emtel's mobile network connect to MT's fixed line network? **Document P745** sets out the call flow for a fixed network call, for a mobile to a fixed network call and for a mobile to a mobile network call. When calling from a fixed line telephone to another fixed line telephone, a signal goes from the first fixed line telephone through a copper wire line to the fixed line exchange of MT and then from the fixed line exchange of MT through another copper wire line to connect to the party being called.

23. When calling a fixed line telephone from a mobile terminal, a signal is transmitted from the mobile handset to Emtel's nearest base station via radio waves. The base station then picks up the signal and transmits it to Emtel's mobile exchange by means of leased lines or micro wave links. The signal then travels from Emtel's mobile exchange to MT's fixed line exchange through Interconnect PCM links and finally, from MT's fixed line exchange to the fixed line telephone via a copper wire.

24. When one mobile user calls another mobile number, a signal is transmitted from the first mobile handset via radio waves to Emtel's nearest base station. From Emtel's base station, the signal is transmitted to Emtel's mobile exchange by means of leased lines or microwave links. The signal will then go from Emtel's Mobile Exchange to the base station which is closest to the party called by leased lines or microwave links and finally from the base station to the mobile handset of the party being called via radio waves.

25. It is noteworthy that the Emtel Mobile Exchange also called the Switch and the Public Switched Telephone Network (PSTN) of MT are both found in Rose Hill at a distance of 300 metres from each other. Mr Currimjee stated in Court that Emtel placed its Switch near to that of the fixed lines provider to facilitate connectivity.

26. Under the Second Schedule of its licence, Emtel was authorized to set up cellular base stations also called cell sites at ten specified sites with specified frequencies in MHz. Emtel was also authorized to set up a private radio network to link its mobile telephone switching centre at Rose Hill with five named base stations **(Document P37)**.

THE TELECOMMUNICATION ACT 1988

27. On 27 May 1988, i.e a few days after Emtel received its first licence from the DoT, the1988 Act received the assent of the then Governor General and became law. Section 4 establishes the TA. Section 5 sets out the functions of the Authority and they are as follows:

"(a) to monitor, control, inspect and regulate radio communication and telecommunication services and facilities;

(b) to ensure that no radio communication and telecommunication services or facilities are operated or provided except in accordance with this Act;

(c) to issue, modify or revoke licences under this Act;

(d) to sanction any tariff or charge under section 17;

(e) to authorize any person to conduct such technical tests and evaluations relating to telecommunication or radio communication as it may request;

(f) to do all such things as may be requisite under this Act."

THE TELECOMMUNICATION (TRANSFER) ACT 1988

28. On the same day, the Telecommunication (Transfer) Act also received the assent of the then Governor General.

29. The 1988 Acts marked a significant turn in the development of the telecommunications sector in the country. Firstly, communication and telecommunication services and facilities came under the control of a regulatory authority viz the TA. Secondly, communication services would no longer be provided by Government through the DoT but by MTS, a company incorporated for that purpose. Thirdly, telecommunication services would cease to be provided by a Government monopoly since licences to other operators could be issued by the TA.

THE FIRST CELLULAR MOBILE SYSTEM OPERATIONAL IN MAY 1989

30. The first cellular mobile system became operational in May 1989. It is the contention of Emtel that despite its pioneering efforts in the cellular mobile telephony and in creating the mobile market, the evidence shows that in the initial years of its development, it was treated in a most unfavourable manner by MT and the TA. Mr Currimjee in his testimony dwells on two particular areas where Emtel experienced unfavourable treatment. Emtel was subjected to (1) restriction on its expansion by the TA and (2) high interconnection charges levied by MT which Mr Currimjee described as a pincer movement by MT and the TA.

EMTEL'S CONTENTION OF THE AUTHORITY (TA) RESTRICTING ITS EXPANSION.

31. Mr Currimjee deponed to the effect that as Emtel's customer base grew, it became important for Emtel to have cell sites or base stations additional to the 10 to which it was allowed under its licence in 1989.

32. On 21 May 1992, Emtel applied to the TA for approval to install two new cell sites respectively at Port Louis and at Pointe d'Esny. The two new cell sites would, Emtel explained, greatly improve coverage **(Document P51)**. A further request dated 8 September 1992 from Emtel to the TA for five new cell sites followed **(Document P54)**. To Emtel's request for authorization for new cell sites, the TA responded on 17 November 1992 by observing that each cell site already had additional channels outside the scope of the licence granted to Emtel. Although the TA also observed that it understood that new cell sites and expansion of existing cell sites were required in order to provide a satisfactory service to the public, yet approval was not granted. Emtel was requested to communicate to the TA proposals including all its development projects up to December 1995, for amendment of the second schedule of the licence (**Document P58)**. Mr Currimjee stated that the response of the TA was unfair taking into consideration the considerable investment

of Emtel in the network and the necessity for Emtel to provide the necessary infrastructure. In the words of Mr Currimjee, the response of the TA "*was a bit of a cold shower".* **(VOLUME I page 4645)**.

33. Mr Currimjee stated that Emtel had no alternative but to write "*in all desperation "*on 2 August 1993 to the Prime Minister who was also the Minister of Internal and External Communications **(Document P82)**. Mr Currimjee wrote:

"*In its four years of existence, Emtel has constantly expanded its network (base station equipment, transmission equipment and others) in order to provide quality service for the growing number of subscribers and growing volume of communication.*

These expansions which have been all approved by the Telecommunications Authority were necessary in order that Emtel comply with the clauses of our License, that is operating a service to the satisfaction of the Telecommunications Authority.

However on Friday 30th July 1993, Emtel was verbally informed by the Chairman of the Telecommunications Authority that no further changes would be approved.

This decision will restrict our growth to the present capacity thereby halting our ability to provide the growing needs of our present customers and provision of service to new demands of the market such as those that will take place during the Francophonie Conference in October 1993. This will necessitate setting up cell sites in Grand Baie and Port Louis for the Conference requirements including those of the Government and Security."

34. On 28 September 1993, a meeting was held at the request of MT. The notes of the meeting are at **Document P88**. At that meeting, Mr Roy representing Emtel explained the necessity of the new cell sites at Grand Baie, Port Louis and the Airport which were to ensure a good service at the Francophonie Summit which was to be held later in that year. Mr Adam, the representative of MT, expressed the view that concerning the Airport base station, a coverage problem existed inside the buildings and approval could be given. However, he was not convinced that the new cell sites at Grand Baie and Port Louis were necessary. Approval for three new cell sites at Grand Baie, Port Louis and the Airport was finally obtained on 5 October 1993 **(Document P95)**.

35. On 14 April 1993, Emtel applied for ten additional cell sites and approval was obtained on 18 September 1996 **(Documents P69 and P373)**.

36. It is also the contention of Emtel that to a lesser extent, it met with similar obstructive treatment when it sought to extend its micro wave links. Emtel's complaint is that MT was slow in releasing leased lines. By a letter dated 3 October 1988, the MTS confirmed that it would provide leased lines for seven (7) cell sites and between Rose Hill Exchange to Emtel Switch. As regards micro wave links for the other cell sites, MTS reminded Emtel that these fell within the responsibility of Emtel.

37. On 25 July 1988, Emtel applied to set up a micro wave link between Signal Mountain and Butte aux Papayes. On 11 October 1988, the request was turned down and no reason was given **(Document P25)**. On 17 March 1989, the request was approved. Another request for extension of the micro wave links between Bar le Duc and Brisée Verdière was made by Emtel on 13 February 1992 and was only approved on 2 June 1992.

38. In a **Paper on Telecommunications** dated 13 August 1996, **(Document P362)** and submitted to the Ministerial Committee on Telecommunications set up in 1996 in connection with the entry of Cellplus in the mobile telephony market , Emtel observed that

"*Since being granted a licence in May 1989 Emtel has invested approximately 12 million USD making it a significant provider of telecommunications service to Mauritian consumers. Emtel wishes to expand its business in Mauritius and believe* (sic) *it can positively contribute to the development of a modern IT based economy.*

Further development, however, is being hampered by the weak regulatory environment and the predatory attitude of Mauritius Telecom to exploit their monopoly position."

39. Mr Trilock Dabeesing is a director of ICTA and represents the Authority in the present proceedings. He only joined ICTA in November 2003 and has no personal knowledge of the events which took place during the claim period. Mr Dabeesing can only give evidence as to his interpretation and opinion of the events as they unfold in the documents produced. It is noted that Mr Makoonlall who was the Temporary Manager of the TA during the claim period and who signed much of the correspondence on behalf of the TA during that period, was summoned as a witness and was present in Court at the start of the proceedings. However Mr V Makoonlall was not called as a witness. Mr B. Beeharee who was the Temporary Controller of the TA during the claim period and Chairman of ICTA at the time of

trial was also summoned as a witness but was not called. On being asked about this undesirable state of affairs, Mr Dabeesing stated that Mr Beeharee could not assist the Court because with the passage of time, he could not recall the circumstances of the case. Undoubtedly his testimony would have been very valuable.

40. Be it as it may, Mr Dabeesing explains that the delays in dealing with the approval of Emtel's requests for additional cell sites were due to the fact that other government agencies were involved in processing the requests. Thus the cell site at Signal Mountain was to be on Crown land and accordingly, the land had to be leased from Government.

41. Mr M. Pillay who was the Chief Executive of MT from 1993 to 2003, gave evidence. He rejects Emtel's allegations of MT's interference in its requests for expansion.

42. Mr Mark Brealey QC appearing for Emtel submits that it can be fairly inferred from the evidence on record that in its early days, by the joint action of MT and the TA, Emtel was not allowed to expand. Indeed, whilst it is possible that delay might have arisen where other government agencies had to give their approval, yet it is not easily understood as observed by Mr Currimjee, why MT should be asked for its views on the necessity of additional cell sites. There is evidence from the notes of the meeting of 28 September 1993 to say that MT and the TA were not favouring an expansion of Emtel's network. The decision of MT taken in mid 1993 to enter the mobile telephony market may have something to do with it.

EMTEL'S CONTENTION OF HIGH CONNECTION CHARGES

43. Mr John Leung Yin Ko who retired in 2005 as Chief Executive Officer of MT, explains that the interconnect charges has two main components. They cover the charges for services that are rented to the other operator, i.e PCM links and leased lines which can be micro wave links as well. They are also a percentage of gross proceeds which Emtel was to pay as from 1 July 1992. As regards leased lines, the charges were based on the telephone regulations at that time as set out in GN 62 of 1984 and they were Rs 500 per 400 metres. There were no regulated charges for PCM links. MT applied the same charges as for leased lines but multiplied by 30 as the PCM link has 30 circuits. The first Interconnection Agreement between Emtel and MT was entered into on 24 July 1995 **(Document P213)** and the PCM charges were then fixed to Rs 1,000 per month. However, for the period 1989 to 1993, Emtel was charged Rs 3,510,000 for four PCM links **(Document P57)**. Mr Currimjee stated that on being asked the rationale behind the charges, Emtel was simply told that the PCM link charges were cost based.

44. Mr Pillay explains the point of view of MT. MT had digitalized its network at great costs and it was only fair that Emtel which was using the network, should pay a reasonable fee for doing so.

45. Emtel also claims that it was unfavourably treated by MT under the Interconnection Agreements.

46. In the first Interconnection Agreement, Emtel and MT agreed that Emtel would pay to MT (a) traffic charges and (b) PCM rental charges, which would constitute all charges payable for interconnect. Emtel would pay to MT for the first 10 million minutes of traffic (constituting of mobile to land and land to mobile traffic Rs 2.32 per minute for mobile to land traffic and Rs 1.70 per minute for land to mobile traffic. Discounts of 15%, 25% and 40% applied to the next 1.5 million minutes and above 13 million minutes. Time limits were also set for the payment of the charges.

47. Soon a dispute arose between MT and Emtel as regards the method of computation of the chargeable traffic under the Interconnection Agreement **(Document P271 refers)**. The gist of the dispute was whether the chargeable traffic should be on the exact seconds or rounded up to the next minute. MT based its claims for interconnection on a "minute" basis and invoked the provisions of the Interconnection Agreement. The stand of Emtel was that the Agreement provided for charges to be "*based on actual traffic"* i.e the exact seconds of the call. The dispute was referred to arbitration on 31 July 1996. In its award of 28 April 1997, the arbitrator determined that interconnection charges should be based on the actual traffic i.e the actual duration of the calls. **(Document D2.20 refers)**.

48. The first Interconnection Agreement was renewed for one year from July 1996 to June 1997 pending the decision of the arbitrator. After the handing down of the award, a new Interconnection Agreement was entered on 31 October 1997 but took effect from 1 July 1997. In the new Agreement the charges were on a second basis and they were increased by 50%. It is the contention of Emtel that MT acted in retaliation of the award which was unfavourable to it and Emtel had no choice but to accept. However, clause 11 of the Agreement provided for a review of the interconnect charges once a new regulatory Authority would be appointed. At a subsequent meeting between the Prime Minister, the Minister of Telecommunications, MT and Emtel, it was decided that Emtel would pay only 50% of the charges billed by MT from July 1998. In September 2003, interconnection charges were reviewed and fixed at Rs 1.25 per minute.

49. Another dispute arose around the principle of "*calling party pays".* It was the contention of Emtel that applying the principle of "*calling party pays",* Emtel should not be made to pay to MT interconnection charges for calls made by MT subscribers to Emtel subscribers. The principle was finally accepted in 2004 **(Document P697)**.

50. It is Emtel's contention that its allegations of high interconnection charges have been vindicated by the subsequent actions and decisions of the Authority. Emtel does not claim damages for such unfavourable treatment but rightly contends that the unfair competition claims against MT and Cellplus when Cellplus entered the market must be viewed in the added context of these allegations of unfavourable treatment.

51. Be that as it may, the subscriber base of Emtel, as noted by the TA in a memorandum to the Solicitor General on 8 February 1995 **(Document D1.36)**, grew progressively over the period 1989 to 1994. From 100 subscribers in July 1989 the subscriber base grew to 7180 in December 1994.

THE LIBERALISATION OF THE TELECOMMUNICATIONS SERVICES IN MAURITIUS

52. The policy of Government to liberalise the telecommunication services which started with the transfer of the services from a Government department to a private company in 1988, was being pursued in the 1990s. At a meeting held on 20 April 1994 at the TA under the chairmanship of its then Chairman, the latter stated that the World Bank, during the seminar on Information Based Economy for Mauritius held in December of the previous year, had advocated the liberalisation of telecommunications services in Mauritius. The Chairman also stated that with more operators on the scene, a strong TA would be necessary and the TA, which was then understaffed, was in the process of being strengthened **(Document D1.19)**.

53. In addition, Government invested massively to roll out the fixed line network. As at 1989, there were only 50,000 fixed line subscribers. MTS and subsequently MT as the fixed line operator had because of its Universal Service Obligation to devise ways and means to even the remotest part of the island.

54. Government's strong commitment to the liberalisation of the telecommunications sector was taken up in a press communiqué issued by the TA on 5 September 1996 and announcing the grant of a GSM licence to Cellplus. In the same communiqué, the TA reiterated the commitment of Government to the World Trade Organisation to gradually liberalise the

sector by 2004. The TA also announced the commitment of Government to reconstitute the Telecommunication Advisory Council (TAC) so as to propose institutional framework in the sector and to encourage fair and healthy competition among all operators in the sector **(Document P366)**.

MT APPLIES TO OPERATE A GSM CELLULAR SYSTEM

55. On 31 December 1993, MT wrote to the TA and applied for a licence to operate a GSM Digital Cellular System **(Document D2.1, Document D3.4)**. Approval to set up and operate such a system as from 1 January 1996 -, upon the expiry of the 7 year exclusivity period granted to Emtel -, was obtained from the TA by a letter dated 17 March 1994.

56. The reasons for MT's decision to enter the cellular mobile telephony and to invest in the GSM technology are set out in a memorandum which MT submitted on 16 November 1995 together with an application for an exclusive licence for operating a GSM system for 7 years **(Document D2.8)**. MT wrote that the decision to invest in the GSM cellular system was in line with MT's policy of providing the community with a wide span of telecommunications services using up to date technology. MT added that on account of the exclusivity period enjoyed by Emtel up to the end of 1995, the project of introducing GSM could not materialise earlier. The GSM technology was the latest in the field of digital mobile cellular communications, had gained world wide acceptance and was growing very rapidly. On the local scene, reports by independent consultants had predicted a customer base of 40,000 by year 2003. MT also observed that with Emtel having already a customer base of 12,500, the growth over the subsequent years would depend on how each operator would be able to promote its products and services.

57. Mr John Leung Yin Ko was involved at MT with the technical aspects of the GSM cellular system and explained in Court the advantages of the GSM digital technology over the analogue technology. The GSM technology could transmit data, was more advanced and could be enhanced. The analogue technology could not be enhanced and around 1995/96 was nearing the end of its life and becoming obsolescent.

THE PERIOD JANUARY 1994 to SEPTEMBER 1996

58. After a start up period, Emtel was profitable in 1991 and reached in that year a profit margin of 13.58%. In 1995 which was the year before Cellplus entered the market, its profit margin was 15.88% **(Document P744 page 13 figure 3.2)**.

59. As Cellplus prepared to launch its GSM cellular service, Emtel wanted to ensure fair competition. In a letter addressed to the TA and dated 16 October 1995, Emtel through its General Manager stated that in view of forthcoming competition in the cellular market, it would appreciate that the TA would look into certain measures to ensure fair competition such as the need for transparency in costs allocations for space rental, tower space rental, power and air conditioning costs, technical staff costs and equipment usage and also the GSM company should pay the same interconnect charges as Emtel to MT and have same terms and conditions **(Document P239)**.

60. On the other hand, by 10 November 1994, MT was in a position to inform the TA that the GSM Project was in an advanced stage of implementation and that preliminary tests on the system in a closed user group were scheduled by mid June 1995 **(Document D2.3)**. By the same letter, MT requested that a seven year exclusivity period be granted to MT to operate the GSM system in order to enable MT to "*recoup its investments".*

61. The letter of the engineer in charge dated 10 November 1994 was followed by another letter dated 5 January 1995 from Mr Cowaloosur, the acting Chief Executive of MT **(Document D2.4)**. Mr Cowaloosur reiterated MT's request for a seven year exclusivity period and confirmed that the GSM system would be installed as from the beginning of March 1995 and would be fully commissioned by May/June 1995.

62. Also to operate its mobile cellular services, MT caused to be incorporated on 14 March 1996, a fully owned subsidiary company known as Cellplus Mobile Communications Ltd (Cellplus). The GSM licence would be granted to Cellplus on 5 September 1996 but it was backdated to 1 January 1996. Subsequently by a letter dated 31 March 1997, the TA amended the GSM licence to come into force on 14 March 1996 instead of 1 January 1996 **(Document D3.37)**.

63. With regard to events which took place in the year 1995 up to September 1996 when Cellplus was granted a GSM licence, it is contended by Emtel that

(a) Cellplus was operating GSM services before the end of the exclusivity period of Emtel which was 31 December 1995.

(b) Cellplus started commercial operations before its licence date and operated without a licence in between March 1996 and August 1996. By so doing, Emtel alleges that it incurred a loss in the market share.

EMTEL'S CONTENTION OF INFRINGEMENT OF ITS EXCLUSIVITY PERIOD

64. Reacting to press articles in the Business Magazine and Le Militant to the effect that fifty GSM hand held telephone sets were being operated for the internal use of MT and GSM telephones were being used on the occasion of Infotech 1995, Emtel complained by a letter dated 8 September 1995 and addressed to the TA **(Document P222)**. Emtel complained that MT was operating the GSM service before the end of Emtel's exclusivity period. On 16 October 1996, Emtel wrote again to the TA stating that dealers were openly demonstrating GSM phone operations and subscribers were being encouraged to use the GSM service illegally. Emtel further stated that should the TA not take any action, Emtel would have no alternative than to take matters to Court **(Document P240)**.

65. The TA sought the advice of the Solicitor General (SG) on the matter. Mr T. Dabeesing explains that the TA used to take all legal questions to the SG. The advice of the SG was given on 12 October 1995 to the effect that if the hand sets were used for testing purposes and the advertisements of GSM services and the marketing of products were carried out "*without enlisting of subscribers",* Emtel's exclusivity rights were not being infringed **(Document D1.23)**. By a letter dated 18 October 1995, the TA informed Emtel that it had considered the matter and that MT was not infringing on the exclusive rights of Emtel **(Document P241)**. Mr Currimjee observed that no reason was given by the TA.

66. Despite the answer given to Emtel, by a letter dated 30 October 1995, the TA requested MT for a list of <u>all</u> persons who had been issued with a SIM card and were operating a GSM cellular telephone including their status and the company's/department's name and address where they were working **(Document D2.6)**. Replying to the request from the TA on 6 November 1995, MT contented itself by stating that MT was in the final installation and commissioning phase of the GSM system and that as 1 January 1996 was the scheduled date for the start of operations, it was fair that tests be carried out. MT also assured the TA that the tests including tests of SIM cards, portable and services were being carried out in

respect of all regulations and informed the TA that some dealers had been issued with SIM cards for trial purposes and that the remaining dealers would be also issued with SIM cards. As for house tests for GSM terminals, only the top management team and the technical/sales personnel were involved in the GSM project **(Document D2.7)**.

EMTEL'S CONTENTION THAT CELLPLUS STARTED COMMERCIAL OPERATIONS BEFORE IT OBTAINED ITS LICENCE

67. In March 1996, Cellplus had no licence yet. However, it is submitted by Mr Brealey QC that the evidence clearly shows that in March 1996, Cellplus began operating a public mobile service within the meaning of section 10 of the 1988 Act.

68. Mr Leung Yinko accepted in Court that Cellplus began "*a soft launch"* in March 1996. Mr Leung Yinko's stand is consistent with an interview given to 5 Plus magazine of 22 to 28 November 1995 by Mr Pillay. Mr Pillay then stated that the new GSM network would be completed by the beginning of April 1996 and that "*a soft launching"* would then take place from mid April to mid July 1996.

69. Evidence that Cellplus had commercially launched its GSM services in March 1996 is further provided, in the submission Mr Brealey QC, by the standard letter dated 15 March 1996 issued by Cellplus to "*a friendly user"* **(Document P292)**. The "*friendly user"* is provided with a GSM handset with battery and charger. He is given a SIM card for his own use. He is informed that he will be billed for international calls but that "*local charges will be complimentary for a period up to May".* Cellplus expresses the hope that he will become "*a valued customer on a permanent basis."*

70. Mr Brealey QC rightly submits that by the letter to the "*friendly user",* Cellplus was seeking subscribers and the subscribers were using the network and were being billed for international calls but the domestic tariff was set at zero. The reference in the letter that the technical installations were not fully completed and that constant upgrading would be taking place cannot eschew the fact that a telecommunication service was being operated.

71. Further evidence that Cellplus had launched its commercial service is, in Mr Brealey QC's submission, provided by the letter dated 17 June 1996 from Cellplus to the TA **(Document D3.20)**. Cellplus wrote that if the approval of the tariffs submitted by it were delayed, it would have no alternative than to continue with the trend of friendly users. Were Cellplus

only testing its network, it could have stopped the testing. But it is submitted that it had enlisted subscribers and therefore it had to continue to provide the services.

72. To my mind, the clearest proof that Cellplus started its commercial services within the meaning of the 1988 Act before it obtained its licence is the fact that at the end of August 1996, it already had about 4000 subscribers and by the end of September 1996, it had 4,791 subscribers.

EMTEL SUBMITS A PAPER ON TELECOMMUNICATIONS TO THE MINISTERIAL COMMITTEE

73. As Cellplus was preparing to launch its mobile telephone services, Emtel shared its concerns about the then state of the telecommunications sector in a Paper on Telecommunications dated 13 August 1996 and submitted to the Ministerial Committee on Telecommunications **(Document P362)**.

74. Among the concerns of Emtel was that "*the weak regulatory environment and the predatory attitude of Mauritius Telecom"* were hampering the further development of the sector. According to Emtel, whilst it had to operate under the strict terms and conditions of its licence, MT through its GSM subsidiary was then competing unfairly. MT was proposing to implement substantially lower tariffs which in Emtel's view, could not be practised if interconnect charges similar to those that Emtel had to pay, were levied and a return on investment had to be made. Such low tariffs would put into question the very existence of Emtel.

75. In order to improve the competitiveness of Mauritius in the international scene in line with GATT and WTO objectives, Emtel advocated that certain basic rules must be respected to ensure a level playing field. Thus Cellplus must operate as a separate company. It must have the same terms and conditions of interconnect as Emtel and there must be no cross-subsidy between MT and Cellplus which cross-subsidy may also arise from usage of MT infrastructure. Also the tariffs of Cellplus must be approved by the TA.

MR PILLAY'S RESPONSE TO THE ISSUES RAISED IN THE PAPER

76. Mr Pillay explains in Court that MT had already agreed that Cellplus would be a separate company. Indeed in a memorandum submitted to the TA on 16 November 1995 in the context of the application for a GSM licence, MT wrote that the operations of the mobile communications system within MT were then vested in an autonomous unit known as Cellplus and that Cellplus would be registered as a subsidiary company under the name of Cellplus Mobile Communications Ltd which would file its own accounts in accordance with the provisions of the Companies Act **(Document D3.11)**.

77. In a second memorandum dated 24 April 1996 to the TA again in the context of the application for the GSM licence, MT wrote on behalf of Cellplus that it was aware of questions raised by interested parties of the need for separate accounts in order to avoid cross subsidisation of services. In order to ensure total transparency, MT would be operating its mobile cellular services under the subsidiary company and would ensure that the subsidiary company pay "*for all services and infrastructure at commercial rates"* **(Document D3.17).**

78. On 12th July 1996, Mr Pillay himself wrote to and informed the TA that Cellplus had been running as a separate cost centre for the previous year. Costs like wages, salaries, utilities, power and other expenses were directly attributed to Cellplus and where MT and Cellplus were sharing infrastructure, the two users were sharing costs on the following criteria: rental as per floor area occupied, electricity through separate metering, towers through a rental charge, air conditioning as a percentage of technical space used and all other facilities were charged at normal MT charges, e.g local telephone lines, PCM links, leased lines and X25 lines **(Document D3.21)**.

79. On cross-subsidy, Mr Pillay's view is that MT could "*not create a profit centre and now create a subsidiary and have the subsidiary draw on resources or services of the mother company to carry out its business."* Moreover, there was no reason for MT to subsidise or cross subsidise Cellplus.

80. Furthermore at the sitting of the Ministerial Committee on 15 August 1996, on being queried on the proposed tariffs of Cellplus and the losses that would be result therefrom for Emtel, Mr Pillay suggested the appointment of an independent auditor to look into the respective accounts of Emtel and Cellplus.

81. Mr Pillay denies that MT was predatory in its attitude and conduct. On the contrary, Cellplus met with some resistance in obtaining the GSM licence. By mid August 1996, Cellplus was

ready to start operating but could not do so as the GSM licence had not yet been granted by Government although MT was state owned. Mr Pillay then believed that pressure was being exercised on Government and the TA not to grant the GSM licence. It was when Mr Pillay complained about the status of the GSM licence that the Ministerial Committee was set up.

82. On the other hand, MT was supportive of the policy of Government to build an information based society and to this end, favoured competition. Mr Pillay recounts that after the successful beginnings of Cellplus, MT and himself agreed that the exclusivity rights for GSM granted to Cellplus be withdrawn earlier than September 1999 and on 15 October 1998 so informed the TA.

83. As far as tariffs were concerned, Mr Pillay states that the tariffs were "*well practicable"* and that Cellplus "*could have gone lower".* The tariffs were not costs based but were market based. This was because Emtel was practising a higher tariff of Rs 5 per minute. According to Mr Pillay, Cellplus could have charged Rs 1.50 or Rs 2.00 per minute. Mr Pillay bases himself on a comparison between the costs of investments in a landline and in a mobile call. Under cross examination, Mr Pillay states that the tariff of Cellplus should be cost based and covering operating costs, fixed costs and capital costs.

A GSM LICENCE GRANTED TO CELLPLUS

84. By a letter dated 5 September 1996 addressed to MT and copied to Cellplus, the TA informed MT that a licence to operate a GSM Cellular Mobile Telephone Service had been granted to Cellplus. MT was also informed that "*it should offer interconnection to that company* (i.e Cellplus) *on the same terms and conditions as those offered to Emtel Ltd without any grace period"* and that "(the) *Authority* (would) *shortly appoint an auditor to determine whether Cellplus Mobile Communications Ltd is keeping its accounts separate from Mauritius Telecom, and that it is not benefitting from any cross subsidisation from Mauritius Telecom"* **(Document D3.26)**.

85. A copy of the licence granted to Cellplus is at **Document P367.**

86. Clause 8 of the licence imposes on Cellplus the obligation to enter with the Public Operator operating the national telecommunication network an interconnection agreement at latest on 30 November 1996. The date limit for concluding the interconnect agreement was subsequently changed to 31 March 1997 **(Document D3.35)**.

87. Clause 9 of the General Conditions – which form part of the licence- provides that "(the) *licensee shall not enter into any agreement or arrangement, whether legally enforceable or not, which shall in any way prevent or restrict competition in relation to the operation of the service or any other telecommunication service licensed by the Telecommunication Authority."*

88. By a letter dated 23 September 1996 **(Document D3.28),** Cellplus acknowledged receipt of the original copy of the GSM licence and requested a meeting with the TA to discuss certain conditions which in its view, needed to be readdressed by the Authority.

89. Cellplus was also granted the exclusive rights to use the GSM technology for a period of three years as from the date of the issue of the licence i.e 5 September 1996 **(Document D3.27)**.

THE PRESS COMMUNIQUÉ OF THE TA ON THE GRANT OF THE GSM LICENCE TO CELLPLUS

90. On the same day the GSM licence was granted to Cellplus, the TA issued a press communiqué **(Document P366, Document D3.23)**. The entry of Cellplus in the mobile telephony market was no doubt considered so important by the TA as to warrant a detailed communiqué. From then on, Emtel would no longer be the sole provider of mobile services. However, Emtel's new competitor was no less than the subsidiary company of the incumbent owner and provider of the national fixed lines network which was itself until 1988 a state owned service.

91. The Communiqué recalls that Emtel was the first company authorised to operate a cellular mobile telephone service in Mauritius and that Emtel enjoyed a seven years' exclusive right and a grace period of three years during which no interconnection charges were paid to MT. It also states in no uncertain terms that the TA is alive to Government's strong commitment to the liberalisation of the telecommunications sector and more particularly to its commitment to the World Trade Organisation to gradually liberalise the sector by 2004.

92. The Communiqué further states that Cellplus was according to the licence granted to it, to have exclusive rights to use the GSM technology for a period of three years. In deciding so, the TA had taken into consideration among other matters, the investment of some Rs 450 million which would not be profitable before four years and the undertaking of Cellplus to assist MT in meeting its Universal Service Obligation (USO) by providing telephone service to distant and inaccessible customers at normal rates.

93. The Communiqué ends as follows:

"7. The Authority has further decided that the following conditions be met:

(a) the interconnection agreement between Mauritius Telecom and Cellplus should be on the same terms as those offered to Emtel Ltd without, however, any grace period as was previously granted to Emtel Ltd;

(b) the Authority would appoint an independent auditor to certify that Cellplus Mobile Communications Ltd is keeping separate accounts from Mauritius Telecom and that it is not benefiting from any cross subsidisation."

94. The grace period referred to in paragraph 7(a) above is as regards the three years when Emtel did not have to pay interconnection charges. Paragraph 7 (b) above was subsequently amended by a letter from the TA dated 4 February 1997 when the TA decided and directed MT "*to furnish to the Authority such documentary evidence as audited accounts and reports showing that Cellplus Mobile Communications Ltd is keeping its accounts separate from Mauritius Telecom and that it is not benefitting from any cross subsidisation from Mauritius Telecom"* **(Document D3.33)**.

MR PILLAY'S RESPONSE TO THE GSM LICENCE PROVISIONS

95. Mr Pillay expresses in Court the disappointment of Cellplus which was expecting a licence in similar terms to that of Emtel especially as regards the three years' grace period. Mr Pillay says that Cellplus was expecting parity of treatment with Emtel. He is of the view that the TA misinterpreted the context in which his suggestion for an independent auditor was made. Furthermore, only Cellplus was subjected to the obligation of having its accounts scrutinised by an independent auditor.

96. Mr Pillay sought legal advice and wrote to the TA on 22 October 1996 **(Document D3.30)**. Mr Pillay sought among other amendments to the GSM licence, the removal of the words "*without any grace period"* and also the removal of the appointment of an independent auditor. By a letter dated 4 February 1997 **(Document D3.33)**, the TA maintained its decision that Cellplus was not to have any grace period for the payment of interconnection charges. However paragraph 7(b) was amended as stated above.

THE TARIFFS OF CELLPLUS AT THE TIME OF THE LAUNCH OF ITS GSM SERVICE

97. Cellplus launched its GSM service on 8 September 1996. It introduced airtime calling charges and subscription charges which were significantly below those charged by Emtel. It is the contention of Emtel that the tariffs practised then were not only substantially lower than the tariffs provided by Emtel but were also not commercially sustainable and reasonable unless Cellplus was grossly subsidised whether by non payment of interconnect charges at the prescribed level or at all, and/or by other forms of cross–subsidy.

THE INTERCONNECTION AGREEMENT BETWEEN MT AND CELLPLUS

98. As at 18 January 1997, no interconnection agreement had been concluded between MT and Cellplus and no interconnect charges were being paid by Cellplus. This was admitted by Mr Gopalen Mooroogen, finance executive of MT before the arbitration proceedings between MT and Emtel in the "*seconds or rounded minute"* dispute.

99. The first Interconnection Agreement between MT and Cellplus was signed on 31 March 1997 to take effect as from 1 October 1996 **(Document D2.19)**. The charges and terms for payment, save for the volume discounted rates, were the same as those found in the Interconnection Agreement 1995 between MT and Emtel. By an amendment brought on 17 October 1997, Cellplus also benefited from the volume discounted rates.

THE COMPLAINTS OF CROSS-SUBSIDISATION AS SET OUT IN THE SOC

100. It is Emtel's contention that Cellplus was not dealing at arms' length with MT and was receiving direct and/or indirect cross-subsidy by MT and this in breach of an essential condition of Cellplus' licence.

101. At Paragraph 12.3 (h) of the SOC, Emtel states that Cellplus had a share capital of Rs 500,000 only and owned no fixed assets apart from a billing system. It was financed mainly by intercompany payables. No interest was paid on the intercompany payables.

102. In the answer to particulars requested by the TA, Emtel gives further instances of cross-subsidisation. Thus Cellplus customers were given free calls for over six months, customers paying Cellplus bills can do so at MT's service centres with cheques payable to MT and Cellplus' public relations and marketing are operated with MT's units and resources. Use is being made by Cellplus of MT's infrastructure (i.e buildings, towers, transmission links, showrooms, power equipment, air conditioning etc…). MT and Cellplus carry out joint

advertisements. The published accounts of Cellplus for the financial year 1998-1999 show evidence of cross-subsidy such as (1) Cellplus had a share capital of Rs 500,000 only, (2) Cellplus owned no fixed assets apart from a billing system, (3) It was financed mainly by intercompany payables of Rs 316,452,134 and (4) no interest was paid on the intercompany payables.

THE ISSUE OF CROSS-SUBSIDISATION

103. Whether Cellplus was cross-subsidised by MT in breach of conditions imposed in its licence by the TA and was therefore in a position to practise commercially unsustainable tariffs to obtain an unfair advantage over and to harm Emtel is one of the main questions raised in Emtel's claim. Expert evidence was adduced by Emtel on the one hand and MT and Cellplus on the other. Emtel's case is that MT provided an economic cross-subsidy to Cellplus whereas the response of MT and Cellplus is that the licence prohibited an accounting cross-subsidy and that the audited financial statements of Cellplus do not show any accounting cross-subsidy.

THE EXPERT EVIDENCE OF MR PAUL LAURENCE HALPIN ON HOW CELLPLUS WAS FINANCED AND WHETHER MT WAS CROSS-SUBSIDISING CELLPLUS

104. Mr Halpin is a chartered accountant. His specialist field is finance and accountancy. At the request of MT and Cellplus, he examined the audited financial statements of the two companies for the period from 1989 to 2001 and he gave his expert evidence on how Cellplus was financed. His report is at **Document D2.35**.

105. Firstly, Mr Halpin finds that MT and Cellplus kept separate financial statements. The audited separate financial statements show that expenses of each entity matched its revenue and the independent auditors certified same. Mr Halpin's conclusion therefore is that there was no material mis-matching of revenues and expenses either in MT or in Cellplus.

106. Secondly, Mr Halpin confirms that the subscribed share capital of Cellplus was half a million rupees. However, Mr Halpin observes that a company's share capital is only one of its many sources of funding. Other sources include debt and intercompany funding. In the case of Cellplus, there was no legislative or regulatory constraint on Cellplus in the manner it could be funded.

107. Thirdly, according to the information in the accounting records supporting the audited financial statements of MT and Cellplus, MT re-charged expenses incurred on behalf of Cellplus through an intercompany account. The operating expenses (opex) were re-charged at cost, whereas the capital expenditure (capex) was marked up by 15%, and it was charged over a ten- year period to Cellplus **(Document D3.53)**. Mr Halpin also notes that the movements on the inter company account demonstrated that repayments were made when Cellplus received funds from customers. He was of the view that "*if the costs of capex and opex were not re-charged by MT to any material extent*, *that fact would have prevented the independent auditors from signing unqualified audit opinions for both companies, because the fundamental accounting concept of accruals, requiring the matching of expenses and revenues would not have been correctly applied."*

108. Fourthly, in Mr Halpin's view "*the permanent funding that is provided by MT to Cellplus, via the intercompany account, is akin to a share capital, because it is a free source of funding and it was committed as if it had been paid into Cellplus in return for the issue of shares. As quasi-capital, the intercompany funding enabled Cellplus to behave as a well capitalised company, with an obligation to repay its owners."*

109. Fifthly, in Mr Halpin's further view, the published accounts of Cellplus do not show evidence of cross-subsidy. The lease arrangement for the assets that were being used by Cellplus resulted in a matching of expenses with revenue and the costs of such assets was marked up by 15% before being transferred to Cellplus. The intercompany account did not imply a cross-subsidy as Cellplus had the obligation to repay MT.

110. Sixthly, in the opinion of Mr Halpin, no accounting cross-subsidy was provided by MT to Cellplus since the audited financial statements of the two companies showed the matching of expenses with revenues in each company.

111. Finally, Mr Halpin emitted the opinion that the GSM technology adopted by Cellplus which had more mass-market appeal than the analogue technology could explain the reason why Cellplus was in a position to sustain its lower tariffs.

MT CONFIRMS HOW CELLPLUS WAS FINANCED

112. MT states on personal answers given by it that with effect from the commencement of operations in 1996, the cost of capital and recurrent expenditure that MT incurred on behalf of Cellplus were recharged to Cellplus through intercompany charges that included an

interest rate of 15%. The related charges are identified in the profit and loss account of Cellplus as a "*lease charge",* using a lease period of ten years. MT does not make the difference that Mr Halpin makes about operating expenses being not subjected to any payment of interest.

THE EXPERT EVIDENCE OF MR NICHOLAS FORREST ON HOW CELLPLUS WAS FINANCED AND WHETHER MT WAS CROSS-SUBSIDISING CELLPLUS

113. Mr Nicholas Forrest is a director of the Economics and Policy and Consulting Department of the firm PricewaterhouseCoopers, United Kingdom. Mr Forrest specialises in economic and financial analysis in the context of regulatory, valuation, competition and dispute purposes. He uses economic techniques to help guide pricing, licensing and investment decisions for both regulators and policy makers and for corporate clients. Mr Forrest has worked with numerous international telecommunications clients. Mr Forrest gave evidence on behalf of Emtel.

114. The expert evidence of Mr Forrest is set out in two reports and he also deponed in support of his reports. The first report of Mr Forrest is at **document P744** (dated 22 April 2016) and his second report which is in rebuttal of the reports of Mr Halpin and Mr David Thomas, the other expert witness for MT and Cellplus, is at **P748** which is dated 24 May 2016. Furthermore, at the request of the Court and of Mr Chetty SC appearing for MT and of Mr D. Basset SC appearing for Cellplus, Mr Forrest also prepared a series of exhibits to expatiate on his calculations **(Documents P750 to P753)**.

115. In his first report at **Document P744** at paragraph 4.13, Mr Forrest states that it would have been impossible for Cellplus to set unreasonably low tariffs had it not benefited from cross-subsidisation from MT. However he states that "*it is difficult for* (him) *to assess the extent to which Cellplus benefitted from cross subsidy from Mauritius Telecom without access to detailed financial records and internal contracts."* However, information which has been provided as part of the Court process has enabled him to provide quantification of the financial cross-subsidy from which Cellplus benefitted and he does so in his second report at **Document P748**.

116. Mr Forrest does not share the views of Messrs Halpin and Thomas as to the absence of cross-subsidy between MT and Cellplus and gave evidence of an economic cross-subsidy between MT and Cellplus. At **Document P748 Section 3**, Mr Forrest gives a detailed

account of his analysis of the financial statements of Cellplus and of the calculations he made. He also supported his views in Court and his testimony runs to more than 500 pages **(VOLUME III pages 5563 to 6095).**

WHAT IS AN ECONOMIC CROSS-SUBSIDY?

117. Mr Forrest first explains that the technique of prohibiting cross-subsidy between a parent company and its subsidiary in the telecommunications sector in order to ensure fair and healthy competition has been resorted to in other jurisdictions. Mr Forrest cites two examples which give, in his view, an insight as to what constitutes cross-subsidy between a parent company and its subsidiary in the telecommunications sector.

118. The first example cited is the European Commission decision in relation to requiring the parent company Telecom to deal at arm's length in its operations and funding of its subsidiary Eirpage **Commission Decision October 1991 (91/562/EEC) (Exhibit NF 202).**

"*Written assurance have been provided by Eirpage that pays full cost and expenses to Telecom and to Motorola for staff, facilities and services. Telecom does not cross-subsidise Eirpage's activities through revenues from services reserved to Telecom as the national telecommunications organization, nor does Eirpage enjoy preferential tariffs for the use of facilities provided by Telecom, such as leased lines. Eirpage operates at arm's length through a bank overdraft facility which is entirely separate from either parent company. Eirpage establishes its own financial statements, independent of Telecom's annual accounts."*

119. The second example cited is the undertaking by Deutsche Post in relation to its subsidiary DHL **Undertakings by Deutsche Post AG (Case IV/M.1168)**.

"*It will abstain from using the revenues earned from its national exclusive postal concession to subsidise the operational costs of DHL, in particular, that any financial and commercial relationship with DHL will be at arm's length conditions."*

120. The cross-subsidy which is dealt with in the two above citations, is an economic cross-subsidy and not an accounting cross-subsidy. Mr Forrest described in Court as to what amounts to cross-subsidy between related parties. Put in simple terms, there is cross-subsidy between a parent company and its subsidiary when a parent company provides to its subsidiary resources including capital lay out and financial resources for operational

expenses and the subsidiary does not pay for the full commercial costs of the resources. In other words, the related parties do not deal on a commercial arm's length basis. There is a difference between accounting cross-subsidy – which looks at whether revenues and expenses match – and economic cross-subsidy from a regulatory and economic perspective.

121. There are two items in the audited financial statements of Cellplus which in Mr Forrest's view, indicate clearly that MT was cross-subsidising Cellplus from an economic perspective. The two items are:

(i) Intercompany account or intercompany payables.
(ii) Lease for assets and pre-operational costs.

INTERCOMPANY ACCOUNT OR INTERCOMPANY PAYABLES

122. As confirmed by Mr Halpin, the operational expenses (opex) of Cellplus were financed by MT by means of an intercompany account. Rather than paying cash for these expenses, Cellplus had an account with MT which was paying for the expenses. Mr Forrest compares the intercompany account to a bar tab whereby drinks are enjoyed without the bill being settled on the spot but being accounted for by a tab to be paid later.

123. Mr Forrest examines the audited financial statements of Cellplus for the years ending 30 June 1997 to 30 June 2001 **(Documents D3.54, D3.55, D3.56, D3.57 and D3.58)**. His analysis is at paragraph 3.16 of his second report **(Document P748)**. In the first year of its operation, out of the total expenses of Cellplus, the intercompany debt account was used to settle Rs 11,439,714 million (equivalent to 83 % of the expenses). By June 2001, the intercompany debt account had grown to Rs 370,135,286 million. The intercompany debt account was used for more than working capital purposes - i.e more than the small delay in raising and settling invoices. In April 2000 and December 2002, Cellplus took out shareholder loans of Rs 100 million and Rs 150 million. This coincided with a reduction in the amount of the intercompany account by December 2002 to Rs 254 million **(Document D3.46)**. According to Mr Forrest, Cellplus therefore moved the intercompany debts onto a proper commercial basis of financing.

124. Mr Forrest observes that the amounts of the intercompany account of Cellplus were very significant. Furthermore, the intercompany debts of Cellplus had the following two features. Firstly, they were not settled quickly and secondly they bore no interest. Therefore, they

conferred a significant financial benefit to Cellplus. Mr Forrest calculates the actual financial benefit which the intercompany debt/payables conferred on Cellplus from the two perspectives that they were not settled quickly and that they were interest free.

125. Firstly, the substantial intercompany account allowed Cellplus to benefit from a longer period of time to settle its bills for operating expenses when in usual business practice, the number of days for doing so ranges from 30 to 60 days. For Cellplus, its trade creditor days over the first six years of the licence average at 259 days and for the intercompany debts at 435 days, peaking at 633 days in 1999 **(Document P748 at paragraph 3.22)**. On the other hand, Emtel had trade creditor days closer to two months. Emtel was also required to and did pay monthly interconnection invoices on a monthly basis **(Documents P431 and P432)**.

126. Secondly, if the excess financing were to be provided by financial institutions at commercial rates, there would have been a cost which would have to be borne by Cellplus. According to the calculations of Mr Forrest which are shown in Table 2 at paragraph 3.28 of **Document P 748**, applying a rate of interest of 12% per annum, the excess intercompany balances equates to an additional financing cost of Rs 148 million. In fact, Cellplus converted its intercompany debt into shareholder loans at a rate of 12% per annum in April 2000 and December 2002 **(Document D3.46)**.

LEASE ASSETS & PRE-OPERATIONAL COSTS

127. The capital expenses on infrastructure and pre-operational costs for the launching of Cellplus were met by MT. **Document D3.52** gives a detailed breakdown of the expenses and costs met by MT as at 30 September 1996. The total amount was Rs 421,785,224.46 and was the subject matter of a lease between MT and Cellplus. From 1997 to 2001, yearly additional capital expenditure was added to the original value of the lease. The value of the lease was uplifted by 15% and the total cost was then spread over a period of ten years. Therefore, the interest of 15% - having been amortised over ten years - was in fact 1.5 % per annum.

128. **Document D3.53** sets down the lease charge calculations from 1996 to 2001. In June 2001, the gross value of the lease was at its peak Rs 1,127,927,814. It sets down as well the lease charge for each of the years 1997 to 2001. The lease charges were not paid cash by Cellplus to MT but were accounted for in the intercompany account.

129. Mr Forrest is of the view that Cellplus benefited from financial cross-subsidy from MT through not paying, or being required to pay full commercial financial costs on capital employed in its business.

130. Mr Forrest assessed this financial cross-subsidy by calculating the lease payments using a market rate of 12% and then by comparing this amount with the lease payments under the lease with MT. The value of the financial cross-subsidy is Rs 581 million.

THE TEN YEAR PLAN OF CELLPLUS AND OVERALL INVESTMENT RETURN REQUIREMENTS

131. Mr Forrest examined and analysed the ten year plan of Cellplus at its launch in September 1996 **(Document D3.51)**. In the opinion of Mr Forrest, the plan indicates that the target rate of return on the investment made was below that which an investor would in the usual course of things expect. Mr Forrest considers that financing a business at a target rate of return below a commercial rate of return is a form of financial cross-subsidy.

132. The ten year plan was based on a number of assumptions including the one that Cellplus would benefit from a three year grace period as regards payment of interconnect charges and also that after the three year period, Cellplus would not be actually paying cash for the interconnect charges since interconnect charges would be accounted for in the intercompany debt with MT. The forecast also shows that Cellplus would be making losses during the first six years and would be making cumulative losses for eight years. In the opinion of Mr Forrest, a commercial investor would find this period of loss making long and risky. Mr Forrest plugged in the interconnection charges and calculated the rate of return for the ten year period and according to his calculations, the rate of return in the adjusted internal forecast is 1.3% which rate is markedly below the required rate of return for a business venture such as Cellplus. **SEE MARKET ECONOMY INVESTOR TEST NF 206.**

MR DAVID THOMAS ASSESSES EMTEL'S CLAIMS OF UNFAIR COMPETITION

133. Mr David Thomas, a chartered accountant, a past Director of Competition and Regulatory Finance at Ofcom, the UK communications regulator and competition authority and a director of telecoms regulation at KPMG since 2006 was instructed by MT and Cellplus to give his expert opinion on the claims of Emtel. His reports are at **Documents D2.2A, D2.2B and D2.2C** and he also gave evidence in Court.

134. Mr Thomas carried out a high level assessment of Emtel's alleged claims of unfair competition including Emtel's allegations of cross-subsidisation. Before turning to the expert evidence of Mr Thomas and his response to Mr Forrest on the allegations of cross-subsidisation, it is appropriate to deal first with the assessment of Mr Thomas on the alleged claims of unfair competition.

135. Mr Thomas considers that Cellplus' entry into the mobile market in Mauritius led to increased competition and better outcomes for consumers in that market through lower prices, better quality, more choice and a higher rate of market penetration. Mr Thomas explains in his report at **Document D2.2A** at section 6 how mobile subscriptions and air time tariffs fell and also how the introduction of GSM technology resulted in the provision of better services.

136. More importantly, Mr Thomas demonstrates how the entry of Cellplus in 1996 brought about a substantial increase in the number of mobile subscribers in Mauritius. This is due to what is known in mobile telephony markets as the network effects. In the words of Mr Thomas, the more users there are on the network, the greater the benefits to all the users of that network and the more attractive that network becomes to potential new subscribers. As a consequence, the network also becomes more valuable when it grows in size. Both Emtel and Cellplus benefited from the increase in the overall number of subscribers.

137. As regards Emtel's claim that "*the actions of Mauritius Telecom, the concerted actions of Mauritius Telecom and Cellplus and the abuse of the dominant position of Mauritius Telecom to destroy and/or harm Emtel constitute "faute",* Mr Thomas finds no evidence that Emtel was destroyed. On the contrary, Emtel has remained in the market and its subscriber base has increased five fold during the claim period from 1996 to 2002. It has continued to innovate in the market; it introduced the first prepaid service in Mauritius in 1998 and in 2004, launched the first 3G service in the whole of Africa.

EMTEL'S LOSSES AND THE GSM TECHNOLOGY

138. So to the question why did Emtel make losses when Cellplus entered the market despite significant growth in subscribers, Mr Thomas says that one possible reason is that Emtel did not adopt GSM prior to Cellplus. When Emtel launched the first mobile telephone service in 1989, the analogue technology was the only choice. However the GSM technology which was first launched in Finland in 1991, was rapidly adopted worldwide reaching one million in 1993 and peaked at 4.5 billion subscribers in 2012 before being replaced by more advanced technologies such as 3G and 4G. The GSM technology was a superior one and the

advantages were caller identification, text messaging and international roaming. Emtel migrated to GSM in 1999 and operated GSM services alongside its TACS analogue service until 2002 when the analogue service was shut down.

139. In the opinion of Mr Thomas, the choice of technology in mobile telephony is an important aspect of the competitive process and a key determinant of success. Mr Thomas relies on an economic study made by Seim and Viard on "The effect of Market Structure on Cellular Technology Adoption and Pricing" and published in the American Economic Journal: Micro economics in 2011. Mr Thomas also invokes the strategy of Sing Tel in Singapore which maintained its lead position in the market by the fact that it had adopted GSM before the liberalisation of the market and before the entry by other competitors.

140. Mr Thomas is also of the view that even if Emtel made losses following Cellplus' entry, it is not unusual for an incumbent operator to experience a decline in profitability after a market is opened to competition. The study by Seim and Vard (2011) finds evidence that with the advent of competition, incumbents' profits from analogue services are more adversely affected than those offering digital services. Mr Thomas points out that in the six years subsequent to the claim period, Emtel made profits of Rs 2.1 billion.

141. Mr Thomas further finds that Emtel's average revenue per user (ARPU) declined consistently since launch and this decline does not appear to have been accelerated or significantly affected by Cellplus' entry in the market.

MR THOMAS ASSESSES EMTEL'S SPECIFIC CLAIMS OF UNFAIR COMPETITION

142. Mr Thomas views Emtel's specific claims of unfair competition, abuse of dominance and of MT cross-subsidising Cellplus in the light of the Competition Act 2007 and the Guidelines of the Competition Commission of Mauritius 2009 (CCM Guidelines) **(Document D2.2A at paragraph 7.1.3)**. Mr Thomas concedes that the Competition Act and the CCM Guidelines were not in force at the period relevant to Emtel's claim. However, in his view, the principles for determining the existence of unfair competition including abuse of dominance, set out in the Competition Act and in the Guidelines are not inconsistent with the tariff approval provisions contained in the three successive telecommunications acts (the 1988 Act, the 1998 Act and the ICT Act), that were in force during the period relevant to the claim and with the competition provisions in the 1998 Act and the ICT Act. In the view of Mr Thomas, Emtel's claim is therefore based on the prohibition of predatory pricing under the competition law.

143. "Predatory pricing" is defined by the CCM as "*a form of exclusive abuse in which an enterprise with market power prices low with a specific strategy of forcing competitors out of the market, in order to exploit customers in the subsequent period in which competition is weakened or eliminated".* In the words of Mr Thomas, predatory pricing happens when a firm with a significant share of the market uses its dominant position in that market to set prices at such a low level that competitors who are not efficient, cannot match it. The firm's ultimate strategy is to force its competitors out of that relevant market through financial losses.

144. Mr Thomas then undertakes a financial and analytical review of Emtel's alleged claim of predatory pricing in the light of paragraph 3.35 of the CCM Guidelines. Under paragraph 3.35, a case of predatory pricing must meet three conditions which are:

(a) "*the pricing strategy must be clearly unprofitable for the alleged predator in the short term. Prices must be below average variable cost (as a simple proxy for short-run marginal cost), so that the supplier is losing money on every additional item sold,"*

(b) *"the pricing strategy has resulted (or is expected to result) in the exit of significant competitors, or increased marginal costs for competitors as a result of reduced scale, such that the market is less competitive than previously",* and

(c) *"it can be expected that any such losses can be recouped as a result of eliminated or weakened competition in the future. This requires that damage to competition is, for a significant period, irreversible. It would not be a successful predatory strategy to price low to eliminate a rival, if the resulting monopoly cannot sustain high prices because rivals simply enter again."*

145. Mr Thomas finds for the reasons set out below that none of the above conditions was met and concludes that Cellplus cannot be found to have engaged in predatory pricing.

146. Condition (a) requires that the prices be below average variable cost. Mr Thomas explains that certain costs incurred by mobile providers are independent of the number of subscribers, while others vary according to that number. Costs which have no relationship with subscriber numbers are defined as fixed costs, for example rent paid for office space. On the other hand, variable costs are the costs that vary according to the number of subscribers and/or traffic volumes. For condition (a) to be satisfied, Cellplus' average

revenue (i.e total revenue related to mobile service provision divided by the average number of subscribers for the corresponding period) would have to be less than the average variable cost (total variable cost divided by the average number of subscribers for the corresponding period).

147. Mr Thomas relies on the revenue and cost data sourced from Cellplus' financial accounts from 1996 to 2000 and finds that for the years 1996 to 2000, the average revenue per subscriber was always higher than the average variable cost. The relevant figures are set out at Table 9 of **Document D2.2A**. Mr Thomas also observes that he has had recourse to the type of variable cost that was used in the landmark *Wanadoo Interactive* predatory pricing case in the telecommunications sector undertaken by the European Commission.

148. As regards conditions (b) and (c), Emtel did not exit the market. In fact, Emtel's subscriber base continued to grow at a substantial average rate of 37% year on year from 1996 to 2002 and Emtel has been innovative by, for example, launching the first prepaid service in Mauritius and by launching the first 3G network in the whole of Africa. Furthermore Cellplus' entry led to increased competition and better consumer outcomes in the mobile market.

THE ASSESSMENT BY MR THOMAS OF EMTEL'S CLAIMS OF CROSS-SUBSIDISATION

149. Mr Thomas notes at **Document D2.2A** at paragraph 7.3.4 that the term "*cross-subsidisation"* is not defined in the 1988, 1998 and 2001 Acts. It is also not defined in the Competition Act and the CCM Guidelines. However the 1998 Act, unlike the 1988 Act, specifically required the new regulator to consider competition issues, including the "*promotion of fair competition and efficient market conduct"* and the prevention of "*any unfair competitive practices by licensees such as cross-subsidising."* (1998 Act section 6(1)(b)(d)).

150. Mr Thomas therefore draws on his experience as a past Director of Competition and Regulatory Finance at Ofcom and responsible for the implementation of the financial reporting régime for BT Group plc. The other operators were concerned that the financial arrangements between Openreach and the rest of BT should be transparent and reasonable. BT was therefore required by the regulator to separate its local access business from the rest of its business. Mr Thomas states that nevertheless

"(a) Openreach remained an operational division of BT and as such had no share capital. All funding of its activities was therefore carried out at BT group level;

(c) No interest was charged on the intra-company accounts; and

(c) BT and Openreach did not generally issue invoices to each other for services rendered between the two parts of the business. Instead, an internal trading model was developed and the accounting was driven by internal transfer charges as opposed to invoices in the way that transactions with third parties were."

151. Mr Thomas concludes that "….*in one of the most widely cited telecommunications régimes in the world, a number of alleged abuse in the SOC were part of permitted practice in the establishment of a functionally separate business."* In my view, this specific conclusion of Mr Thomas is not relevant to the present case which is based on a breach of licence conditions which prohibit cross-subsidisation.

MR FORREST CONSIDERS THE ANALYSIS OF PREDATORY PRICING OF MR THOMAS

152. Mr Forrest is emphatically of the view that Emtel's case cannot be considered under the Competition Act 2007 and the CCM Guidelines. He is of the opinion that Mr Thomas is incorrect to take the 2007 Guidelines of the CCM as the basis for his pricing test.

153. This is because the claim of Emtel is for breach of the licence conditions by Cellplus and the failure of the TA to ensure that the licence conditions be complied with, in accordance with its duties under the 1988 Act.

154. More importantly, the pricing test of AVC proposed by Mr Thomas as a measure of commercial sustainability is not appropriate for the telecommunications industry. The AVC pricing test is not appropriate for the following three reasons:

(a) It is not suited to the telecommunications industry;
(b) It is inconsistent with a wider application of predation tests; and
(c) Margin Squeeze test is a better test.

155. The AVC test does not take into account the fixed costs of the business. In the telecommunications industry, the costs of providing for infrastructure, cell sites, towers, switches and other equipment are accounted as fixed costs. Thus Mr Thomas in his exercise of allocation of costs categories from Cellplus' audited statutory accounts into either

fixed or variable cost categories at **Document D2.2A Tab 2** considers as fixed costs the following: lease charges on assets, staff costs, salaries, wages and other pension contributions, interest on shareholder loan, bank charges and commissions, depreciation charges and telephone and leased lines charges.

156. In the words of Mr Forrest, AVC sets a very low level of cost recovery for the purpose of defining commercial viability and sustainability because it suggests that fixed costs cannot be recovered. Also Mr Forrest expresses the view that any mobile telecommunication provider which is not able to earn sufficient revenue to recover for infrastructure or staff administration will go out of business quickly. This is all the more so since costs for infrastructure are met upfront and costs to the business must be recovered by a proper pricing mechanism. Mr Forrest suggests that because the provision of telecommunication services is characterised by a high level of capital costs, it is appropriate to have recourse to the Long Term Incremental Cost (LRIC) measure. LRIC takes into account the total long term capital and operational costs. Unlike AVC, it covers all relevant costs such as equipment, staff and finance costs.

157. Mr Forrest draws support for his views from the guidance published by the Office of Fair Trading (OFT) in the United Kingdom on the Competition Act. The OFT recommends that "*when examining pricing issues in the telecommunications sector, LRIC is therefore a more satisfactory cost base than marginal or average variable cost."* Mr Forrest also refers to the similar reservation of the European Commission in its guidelines for telecommunications published in 1998. The Commission also recommends against predatory pricing tests used in previous cases such as AKZO. The Commission states as follows:

"In general a price is abusive if it is below the dominant company's average variable costs or if it is below average total costs and part of an anti-competitive plan. In network industries a simple application of the above rule would not reflect the economic reality of network industries".

"For example, in the case of the provision of telecommunications services, a price which equates to the variable cost of a service may be substantially lower than the price the operator needs in order to cover the cost of providing the service. To apply the AKZO test to prices which are to be applied over time by an operator, and which will form the basis of that operator's decisions to invest, the costs considered should include the total costs which are incremental to the provision of the service."

158. Mr Forrest also takes the view that the predatory test of AVC which Mr Thomas resorts to for assessing whether the tariffs of Cellplus were reasonable, sets a high threshold for predation which is not aligned with international standards. For example in the airline industry, fixed costs are high and variable costs are in comparison low and pricing based on AVC is not appropriate. In the Lufthansa-Germania case (2002), marginal cost/average variable cost as an appropriate cost measure for the airline industry was rejected and average total cost was used as the relevant benchmark.

159. Mr Forrest suggests that in the present case, margin squeeze is a more appropriate test when considering the pricing behaviour of MT and its subsidiary and the effect it had on Emtel. Margin squeeze is a distinct form of anti competitive behaviour. It happens when in a vertically integrated business, the upstream operating arm of the dominant company offers low charges to its own downstream operator but offers high charges to a competitor of its downstream operator. MT in the present matter charged Emtel high interconnection charges but practised low resale charges to Cellplus. Mr Forrest draws attention to the fact that whilst the case law around margin squeeze post dates the claim period, the principles governing it are valid and relevant to his calculations.

160. Mr Forrest is also of the view that "*As a licensed entity, Cellplus should have set its retail tariffs with reference to the FAC of providing retail services. Likewise the Telecommunication Authority should have approved retail tariffs with reference to FAC. The calculation of FAC should include an allocation of indirect (or overhead) costs and both depreciation and return on capital invested"* **(Document P744 page 94)**.

THE EXPERT EVIDENCE OF MR FORREST ON TARIFFS

161. Central to the present claim is the contention of Emtel that the tariffs of Cellplus when it entered the market were unreasonable; such low tariffs were commercially unsustainable were it not for the fact that Cellplus was cross-subsidised by MT. Following the cut in tariffs by Cellplus, Emtel was compelled to cut its own tariffs by half.

162. The tariff comparison (Rs per billed minute) of Emtel and Cellplus before the entry of Cellplus in the market is set out at Table 3.2 of the first report of Mr Forrest at **Document P744** and is reproduced below.

Table 3.2 Tariff comparison (Rs per billed minute)

Company	Emtel	Cellplus		
Date	May 1995 – October 1996	September 1996		
Tariff type		Special	Optima	Excelsior*
O: Peak	5.00	4.50	4.00	3.50
O: Off Peak	5.00	3.00	3.50	3.00
O: Mobile to Mobile	3.00	1.00	1.00	1.00
I: Fixed Line to Mobile	5.00	1.50	1.50	1.50
I: Mobile to Mobile	Free	Free	Free	free
Access Fee (Rs per month)	335	150	200	300

Source: Emtel
** Billing is done for minimum of 30 seconds and then by second. O: denotes outgoing, I: denotes incoming*

163. The table shows that in September 1996 Cellplus cut the tariff for domestic airtime by 48% and for subscription by 59%. The weighted average domestic tariff for Emtel was then Rs 4.67 per minute and that of Cellplus Rs 2.24. The average tariff offered by Cellplus was therefore at half of that of Emtel. Furthermore, the tariff for a call from a fixed line to a mobile was Rs 1.50 when the interconnect charge which Emtel had to pay according to the 1995 Interconnect Agreement was Rs 1.70. The interconnect charge was changed subsequently in application of the principle "*calling party pays".*

164. Mr Forrest reviews the reasonableness of both Emtel and Cellplus tariffs having regard to the economic costs of providing telecommunications services.

MR FORREST IS OF THE VIEW THAT THE AVERAGE DOMESTIC TARIFF OF EMTEL WAS REASONABLE

165. In the expert opinion of Mr Forrest, at the time of the launch of GSM service by Cellplus, the average domestic tariff of Emtel was reasonable. Section 5 of his report at P 744 deals with his examination of Emtel's tariffs.

166. He considers four distinct areas as set out at paragraph 5.1

"*(a) Emtel's tariffs – tariffs should be reflective of economic costs.*

(b) Emtel's profitability - if its tariffs were reasonable, then Emtel should neither be making excessive profits, nor inadequate profits to both recover historic investment and maintain ongoing investment needs……..

(c) Emtel's efficiency - tariffs should not be elevated as a consequence of inefficiencies.

(d) International comparisons - by way of a sense check, Emtel's tariffs compare reasonably with those in comparable countries."

167. Mr Forrest takes the view that "*an efficient operator's approved or regulated retail tariff should be broadly in line with its economic costs, or FAC."* FAC stands for fully allocated costs and is the technique which takes into account all the costs of providing a service i.e capital costs, operating costs and return on capital or an allowance for a normal or reasonable profit. It is also the technique used by Mr Forrest to assess whether Emtel's domestic tariffs were reasonable when Cellplus entered the market. Mr Forrest also observes that the FAC approach was used by the UK Competition Commission to set mobile termination rates in the Mobile phone market study in 1998.

168. At paragraph 5.3 of **P744**, Mr Forrest explains the FAC method as follows:

"*The FAC method requires the calculation of the full economic costs for a set of services, which are then allocated to individual services using allocation drivers. The costs include:*

a. ***Operating costs, e.g.*** *interconnection payments, salaries, recurrent maintenance, etc.;*

b. ***Cost of using tangible and intangible assets,*** *as captured by depreciation and amortisation charges; and*

c. ***Cost of capital,*** *which is the return required to remunerate investors, in the form of either equity or debt investment.*

Equation 5.1 Components of total economic cost
Total economic cost = Operating cost + Cost of assets + Cost of capital.

169. Mr Forrest relies on data from Emtel's management accounts. To calculate the domestic FAC per minute, he carries out the following steps. Firstly, he calculates the total economic costs for Emtel as a whole. Secondly, he deducts the revenues that Emtel earned from non-airtime sources. This includes connection charges, subscription charges and net handset sale revenues. Thirdly as it is domestic charges that are being considered, he deducts

international calling revenues. Lastly, he divides the resultant economic cost which needs to be recovered from call charges by the number of minutes of domestic call traffic (i.e. excluding international traffic).

170. At Table 5.1, page 29 of **P744**, Mr Forrest sets out his FAC calculations for the year ending 31 August 1996 based on data from Emtel's management accounts. The calculations show that the domestic airtime FAC per minute was Rs 5.40. Mr Forrest also finds that the average operational cost per minute (excl cost of capital) was Rs 4.21. In the months ending at 31 August 1996, i.e before Emtel reduced its tariffs to match Cellplus, Emtel was earning Rs 4.87 per minute from domestic airtime revenue. It was not recovering its full economic cost and not quite earning a full return of 20%. However, in Mr Forrest's opininon, Emtel's tariff over the 12 months ending at 31 August 1996 was reasonable given its total economic cost base.

171. Mr Forrest was referred by Mr R. Chetty SC to the Telecommunications Order (5 of 2003) where the Authority applies the Unbundled Network Elements (UNE) test to calculate interconnection usage charge **(Document P671)**. The UNE test takes into account all the elements required and used for each type of call such as the local access, the exchange equipment, the transmission network, the earth stations in Mauritius and Rodrigues for Inter-island calls, the International gateway, the International Bandwidth, administration and retail. Mr Forrest was cross examined as to whether the test of Unbundled Network Elements (UNE) is not more appropriate than the FAC test for assessing the reasonableness of call tariffs. According to Mr Forrest, the approach adopted in the UNE test – which takes into account all the costs of interconnection - is similar to that of the FAC test which takes into account the fully allocated costs of a call and which is set out at equation 5.1 above. UNE is applied at a granular level and FAC at a core level.

172. Mr Thomas is of the view that the exercise of determining the FAC is complicated and may in certain instances, take years. Mr Thomas also questions the methodology of Mr Forrest of using accounting data without making economic adjustments to them.

173. The second perspective from which Mr Forrest tests the reasonableness of Emtel's tariffs is Emtel's profitability in the same period. Emtel's accounts show that over the period 1991 to 1995, the profit margin ranged from 2.77% in 1993 to 19.71% in 1992 and 15.88% in 1995. International comparators show that the profit margin was 27% at about the same time and MT realised a profit margin of about 30% over the same period. Mr Forrest therefore concludes that Emtel's tariffs were reasonable.

174. Mr Thomas underlines in his testimony that Emtel was the only operator in the years examined by Mr Forrest and that it would be expected that it would be making significant profits.

175. The third perspective from which Mr Forrest considers Emtel's tariffs, is Emtel's efficiency. In dealing with this area, Mr Forrest looks at and compares Emtel's expenditure on infrastructure and on staff to that of Cellplus. Mr Forrest finds that Emtel and Cellplus spent about the same amount on GSM equipment but Emtel spent less than MT and Cellplus to provide mobile telecommunications coverage across the whole of Mauritius. On being cross-examined by Mr R. Chetty SC, Mr Forrest does not agree that he should have taken the full actual spend of Rs 954 million spent by Emtel by 2003 instead of Rs 583 million. This is because there was an overlapping in the expenses on analogue and GSM equipment. As regards Emtel's labour efficiency, Mr Forrest found that Cellplus spent on average Rs 8, 942 to serve each subscriber with a similar scale operation whereas Emtel's gross operating expenditure was between Rs 3,576 and Rs 4,494. Mr Forrest spoke to Emtel's management when he came to Mauritius in 2002 and 2014 and reviewed the actual expenditure of Emtel and the commercial rationale of its expenditure. Mr Forrest concludes that Emtel was efficient at about the time Cellplus launched its service.

176. The fourth perspective from which Mr Forrest considers Emtel's tariffs is benchmarking with international tariffs. Mr Forrest looks at data about mobile cellular monthly subscriptions and mobile cellular prices of a one minute local call from the International Telecommunications Union (ITU). He finds that before the cut in tariffs, Mauritius had lower call charges than the three countries of comparable income level. The international comparisons of subscription fees and tariffs of a one-minute local call with chosen comparators before the tariff cuts are shown at **Document P748 pages 31 and 32 Appendix B Figures 5.4, 5.5, E6 and E7**. The international comparisons show that before Cellplus' entry, Emtel was providing mobile services at about 40% and about 47% according to Mr Thomas, below the average of countries of comparable income level. After Cellplus' entry, call charges in Mauritius became the second lowest in the world behind Lebanon and subscription charges became third lowest behind Philippines and Bolivia.

177. In conclusion, after having assessed Emtel's tariffs from the above four perspectives, Mr Forrest found that Emtel's tariffs prior to the entry of Cellplus in the market were reasonable.

MR FORREST'S EVIDENCE ON THE TARIFFS OF CELLPLUS AT ITS LAUNCH

178. On the other hand, Mr Forrest assesses the tariffs of Cellplus at the launch of its GSM service in September 1996 from three perspectives and finds that the tariffs of Cellplus were unreasonable. Mr Forrest looks at the tariffs from the following three perspectives:

(a) Cellplus' entry business case did not support the tariffs it set at commercial launch;
(b) Cellplus' tariffs remained considerably below its fully allocated or economic costs until 2003; and
(c) Evidence of financial support from MT by way of intercompany debt and lease arrangements **(Document P744 at Section 6)**.

179. Mr Forrest examined the five year business plan of Cellplus attached to the application of MT for a GSM licence dated 29 April 1996 **(Document D3.18)** and the ten year plan dated September 1996 **(Document D3.51)** and saw that at its launch, Cellplus had no commercially viable plan. The five year plan forecasted that Cellplus would be making losses up to the fifth year of operation. Examination of the ten year plan is dealt with above (paragraphs 131-132). Therefore, the new tariffs introduced by Cellplus at its launch were not supported by the business plans. In Mr Forrest's view, it is reasonable to assume that Cellplus, a new entrant would not set tariffs consistent with its FAC but it should have set retail tariffs which should have been able to cover economic costs within four years **(Document P744 page 99)**, the more so as Cellplus achieved a market share of 30% within four months from its entry.

180. Mr Forrest then examined Cellplus' economic cost of providing services and did a similar exercise as that he undertook to find out the economic costs of Emtel. He obtained information on Cellplus' unit costs from the following sources: the annual accounts of Cellplus, subscriber information from ICTA, interconnection traffic from MT and information on fixed assets and lease charges from MT and Cellplus. However since Cellplus had no fixed assets in its balance sheet for the financial years 1996/97 and 1997/98, Mr Forrest capitalised the leases it had with MT and depreciated these fixed assets on a straight line basis at the same rate of 12% as in Cellplus' business plans.

181. The fully allocated cost calculation for Cellplus for the years 1997 to 2002 is at Table 6.2 at page 44 of **Document P744**. The domestic FAC per minute of Cellplus was Rs 9.1, Rs 4.9, Rs 6.4, Rs 6.2, Rs 4.0 and Rs 2.5 respectively for the years 1996/1997, 1997/1998, 1998/1999, 1999/2000, 2000/2001 and 2001/2002. Cellplus' weighted average domestic

tariff of Rs 2.24 in October 1996 when compared with the domestic FAC per minute is in Mr Forrest's view, unreasonable. Mr Forrest acknowledges that at launch Cellplus had very high unit costs because it had incurred upfront expenditure and had few subscribers. The FAC measure for assessing reasonableness of tariffs may not be appropriate in the few years after commercial launch. However, as Cellplus' operations grew, FAC would be appropriate. Mr Forrest's calculations at Table 6.2 show that Cellplus' domestic FAC per minute was both above Emtel's FAC and its tariffs until 2001. From 2001, its scale advantages mean that its FAC was lower than Emtel's.

182. When cross-examined by Mr Basset SC as regards Table 6.2, Mr Forrest admits to an amount of Rs 60 million representing Rs 48 million depreciation and Rs 12 million shareholders' loan that should have been taken away from the operating and other expenses for the year 2001/2002.

183. Again when cross examined by Mr Basset SC, Mr Forrest also acknowledges that there are two errors in the depreciation and costs of capital figures for the year 1996 to 1997. Referring to Table 1 at Appendix A of his second report at **Document P748**, he has calculated the depreciation and costs of capital over a period of 12 months when in fact the calculation should be for a period of nine months to June 1997.

184. Again upon cross examination by Mr Basset SC, Mr Forrest explains that since he did not have access to Cellplus' management accounts, he assumed that the split in the ratios of connection and subscription revenues of Cellplus were the same as Emtel. He acknowledges when confronted with the figures for outgoing telephone payments from Cellplus' financial statement for the year ending 30 June 2000 at **Document D3.57** that, he underestimated the outgoing international roaming revenue which is an item of deduction in Figure 6.2. He allowed deductions in the amounts of Rs 2 million for 1998/99 and Rs 11 million for 1999/2000 when the international roaming revenue was Rs 115 million in 1999 and Rs 189 million in 2000.

185. However, Mr Forrest maintains that despite these errors, the domestic FAC of Cellplus would still be above the average revenue per minute because Cellplus made an operating loss over the periods concerned without accounting for finance costs.

186. Mr Forrest draws from evidence of the high level of financial support which Cellplus benefited from MT from the inter company debt which Cellplus had with MT from 1996 up to 2002 and concludes that the tariffs of Cellplus at launch were below a reasonable level.

EMTEL'S LOSS OF TARIFF INCOME

187. In order to compete with Cellplus and remain in the business, Emtel matched Cellplus' tariffs in November 1996. Emtel's matched tariffs are shown at Table 3.3 of Mr Forrest's first report **(Document P744)**.

Table 3.3 Emtel tariff after Cellplus's market entry (November 1996 – August 2000). Rs per billed minute

Tariff type	Private	Pro	Business
O: Peak	4.50	3.50	3.50
O: Off Peak	3.00	3.00	2.50
O: Mobile to Mobile	1.00	1.00	1.00
I: Fixed Line to Mobile	1.50	1.50	1.50
I: Mobile to Mobile	Free	Free	Free
Access Fee (Rs per month)	125	250	500

Source: Emtel

* Billing is done for minimum of 30 seconds and then by second. O: denotes outgoing, I: denotes incoming

188. Emtel's "Private" tariff matched Cellplus' "Special" tariff, but with a Rs 25 lower monthly access subscription fee. Emtel's "Pro" tariff matched Cellplus' "Excelsior" tariff, but with a Rs 50 lower monthly access subscription fee.

189. In the result, the weighted average domestic tariff per minute of Emtel which was Rs 4.70 in October 1996 fell to Rs 2.24 in November 1996, i.e to the same level as that of Cellplus.

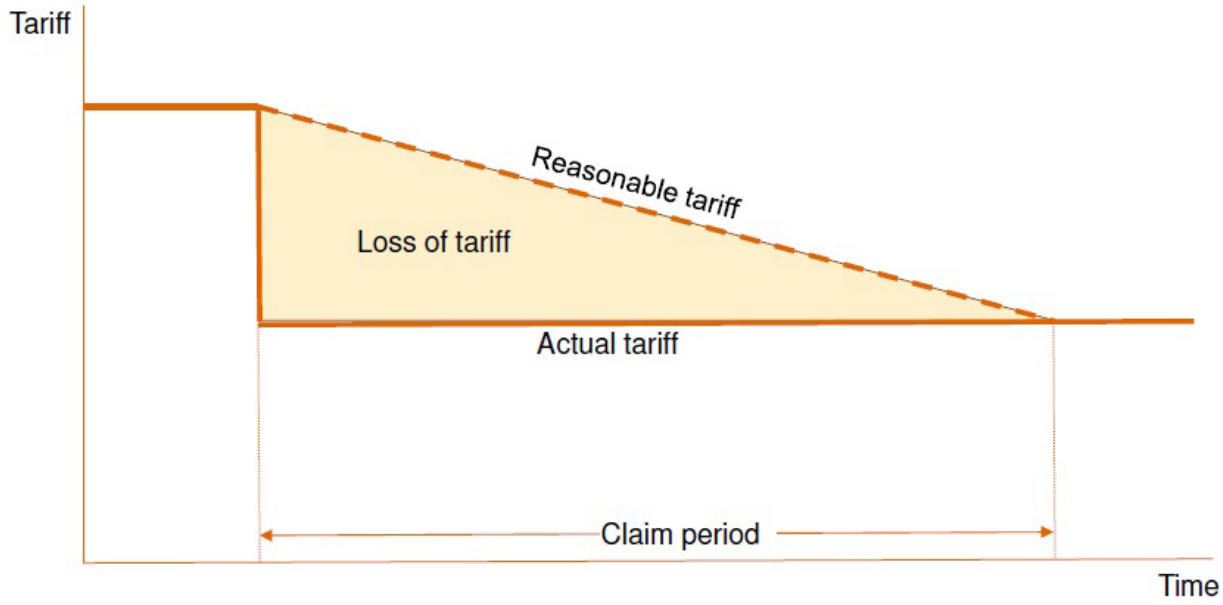
190. In the contention of Emtel, as a result, the average domestic revenue per minute earned by Emtel as well as the average post pay subscription revenue decreased considerably after November 1996 **(Document P744 paragraph 3.23).**
Emtel's claim therefore is for loss of tariff income.

MR FORREST'S CALCULATION OF EMTEL'S LOSS

191. To calculate Emtel's loss, Mr Forrest assesses the difference between the revenue that Emtel would have earned had Cellplus not breached the conditions of its licence and therefore, in Emtel's contention,would have been compelled to charge reasonable tariffs and the revenue that Emtel actually earned during the claim period i.e November 1996 to 2002. What would have been the reasonable tariffs during the claim period? Mr Forrest draws up a counterfactual alternative scenario of reasonable tariffs, which is central to his calculation of

loss of tariff income suffered by Emtel. The counterfactual case shows a slower rate of decline in tariffs instead of the sharp fall initiated by Cellplus in October 1996.

192. The chart at Document **P748 page 3 paragraph 2.3** sets out graphically the methodology that Mr Forrest used to find the reasonable tariffs path. For ease of reference, it is reproduced below:



193. The difference between the reasonable tariff and the actual tariff represents the loss of tariff revenue.

194. The following attempts a simple explanation of the chart which also takes into account three fundamental assumptions made by Mr Forrest in the drawing up of the counterfactual case.

195. The uppermost point at the top of the tariff axis on the left of the chart at **A** shows the start of the reasonable tariffs path. Mr Forrest firstly assumes the reasonable tariff at **A** to be Emtel's tariffs in September/October 1996. The reasonable tariff is the weighted average domestic airtime tariff of Rs 4.87 per minute which was below Emtel's FAC of providing domestic calls, which was Rs 5.40 per minute for the year to August 1996. The analysis of Emtel's tariffs and the reasons why Mr Forrest concludes that Emtel's domestic airtime tariff in October 1996 was reasonable, are set out at paragraphs 165 to 177 above.

196. As regards Cellplus' tariffs, its commercial plan at its launch indicates that its tariffs were not reasonable. Cellplus benefited from cross-subsidy from MT. The setting of the tariffs of Cellplus was on the basis of a business plan which did not include the cash costs of

interconnection and which did not show adequate commercial returns (estimated at 1.3 % per annum, which is substantially below the Mauritius Central Bank rate in 1996). A more detailed account of Mr Forrest's analysis of Cellplus' tariffs is at paragraphs 178 to 186 above.

197. Mr Forrest makes a second assumption as to the point when the tariffs became reasonable again. This point is at **B** at the far right of the chart and tariffs, in Mr Forrest's view, became reasonable again at the end of 2002 and by 2003. Mr Forrest relies on the FAC, profitability analysis and markets developments. The lines of costs and revenues were becoming closer as shown in **Document P744 Figure 5.2**. Emtel's profitability had improved and was earning a profit margin of 22.5%. Market growth and economies of scale had brought down the unit costs. In the mobile telecommunications industry, as the market grows, the cost of providing services to one subscriber tends to go down and revenues grow faster than costs. Furthermore, the interconnection charges became more reasonable with the introduction of the principle calling party pays.

198. The third assumption made by Mr Forrest is based on commercial considerations and international trends which indicate a downward trajectory in tariffs. In his opinion, the reasonable profile of tariffs between September 1996 and the beginning of 2003 would be the reduction of the tariffs in annual increments on a straight line basis. Mr Forrest notes that this line shows annual reductions of both airtime and subscription charges in the first year (1997) of 10% which is the top end of the international range of 4% to 13% in annual tariff reductions. This line, in his contention, shows how the reasonable tariffs would have evolved in the counterfactual case and is consistent with international trends; market growth around the world was bringing down unit costs and reductions in tariffs and the overall average revenue was close to FAC.

199. The glide of subscription charges assumption in the counterfactual case is set out at **Document P744 page 59 Table 8.1**

Table 8.1 Subscription charge assumption in the counterfactual case

	1996	***1997***	***1998***	***1999***	***2000***	***2001***	***2002***	***2003***
Subscription charge	***335***	***301***	***268***	***234***	***201***	***167***	***134***	***100***

Source: Mr Forrest's calculations using Emtel data

200. The glide of post pay calling charges in the counterfactual case is set out in **Document P744 page 60 Table 8.2**

Table 8.2 Post-pay calling charges in the counterfactual case

Type of call	*1996*	*1997*	*1998*	*1999*	*2000*	*2001*	*2002*	*2003* [64]
Landline to mobile	*5.00*	*4.45*	*3.89*	*3.34*	*2.78*	*2.23*	*1.67*	*1.12*
Mobile to landline	*5.00*	*4.70*	*4.40*	*4.10*	*3.80*	*3.50*	*3.20*	*2.90*
Mobile to mobile	*3.00*	*2.69*	*2.37*	*2.06*	*1.74*	*1.43*	*1.12*	*0.80*

Source: Mr Forrest's calculations using Emtel data

201. Furthermore the methodology adopted by Mr Forrest to calculate Emtel's loss is set out in detail at **Appendix H of Document P744** and the actual detailed calculations are set out at **Appendix I** of the same document. Apart from the above three assumptions, Mr Forrest also took into account considerations which in his view, would impact on Emtel's loss.

202. Thus Mr Forrest also takes into account the consequential effects of higher tariffs in the counterfactual case. Firstly, Mr Forrest conservatively assumed that the market would have continued on the growth rate prior to Cellplus' entry when in fact the market grew at a higher rate when the tariffs dropped. From data available, the compound monthly growth rate of Emtel was 4.39% over the 26 months leading to March 1996. After Cellplus' entry, the pace of market growth increased to a compound monthly growth rate of 5.68% in the 12 months following and 4.58% in the 26 months following **(Document P744 at page 66 paragraph 8.52)**. Such an assumption impacts on the number of subscribers in the counterfactual case; the number of subscribers would be lower. Emtel's claim is therefore not overstated. Secondly, Mr Forrest assumes that Emtel had the same market share as Cellplus in the counterfactual case; this assumption is conservative given Emtel's extensive loss of market when Cellplus entered the market.

203. Mr Forrest also takes into account commercial considerations such as the costs of promotional materials and billing charges when changing tariffs, the short economic life of mobile telecommunications equipment and uncertainty regarding future telecommunications market development and made annual changes to tariffs rather more frequent changes in the counterfactual case.

204. To complete the picture on the evolution of tariffs in the counterfactual case Mr Forrest provides at **Document P744 page 55 Figure 8.1**,the evolution of Emtel's domestic airtime

FAC over the period of March 1996 to September 2003. Mr Forrest notes at paragraph 8.7 "(*the) domestic airtime FAC per minute measure provides helpful insight for the overall setting of reasonable tariffs in the counterfactual case, but (he does not) expect tariffs to be calibrated to FAC on a monthly basis. Rather its overall level and trend is more insightful in assessing tariffs",* it is to be observed however that the domestic FAC per minute of Emtel was higher than its historic domestic revenue per minute in September 1996, that it remained so until September 1998. And it was then at the same level or slightly lower than the historic domestic FAC until September 1999 when Emtel in the process of adopting the GSM technology.

205. At **Document P744 page 56 Figures 8.2 and 8.3**, Mr Forrest further demonstrates the evolution of the price of one minute call and of subscription fee in the world and in middle income countries at about the time of the claim period. The international comparisons show that mobile tariffs may have been expected to decline by around 4 to 13% per annum, significantly less than the substantial reductions experienced in Mauritius in 1996. They also show that annual rate of decline in worldwide subscription charges over the period 1996 to 2002 was 12.8 %.

206. Mr Forrest in the counterfactual case is calculating in 2016 the loss which happened in his view in the period 1996 to 2002. Mr Forrest states that the key principle is not to use hindsight. Thus he does not take into account the consequential effects of economies of scale during this period when the increased number of subscribers and the increased call volumes reduced the costs of providing mobile telecommunications services more quickly than expected. However, Mr Forrest uses hindsight in relation to the interconnection agreements between MT and Emtel. He took into account the fact that Emtel paid only 50% of the interconnection charges from July 1998 until it signed another agreement in 2003.

207. At **Document P744 page 58 paragraphs 8.18 to 8.20** Mr Forrest carries out a profitability analysis of Emtel from 1996 to 2005. His analysis shows that Emtel had not been able to earn a reasonable profit over the period 1996 to 2002. By 2003, the domestic charges had converged with the domestic FAC and Emtel's profit margin was 22% which was still below international benchmarks. By 2004, Emtel's profit margin had reached 35%. Relying on his analysis, Mr Forrest is of the view that 2003 marked a turning point and by 2004, there is little evidence that Emtel was suffering losses. Mr Forrest ends the claim period at 31 December 2002.

208. Mr Forrest then obtains the airtime and subscriber revenue Emtel would have earned in the counterfactual case by multiplying Emtel's number of subscribers in the counterfactual case by the revenue per subscriber. The revenue per subscriber is itself a product of call time per subscriber across different call types multiplied by the reasonable tariff. The airtime and subscription revenue which Emtel actually earned in the claim period as revealed in its accounts is deducted from the revenue in the counterfactual case and the loss of airtime and subscription revenue is obtained. Adjustments are made as regards connection fees that would have been saved, interconnection charges that would have been paid, lesser losses on handset revenues and lesser bad debts. The calculations of Mr Forrest show that the loss of net income over the claim period is in the amount of Rs 415 million **(Document P744 page 10 Table 2.1)**. The economic loss of Emtel up to May 2016 is Rs 1,206 million applying simple interest at the statutory rate of interest of 11% and Rs 1,208 million applying Emtel's actual finance costs

209. Mr Forrest also checks the reasonableness of the loss in relation to the profit margins Emtel would have achieved at higher tariff levels. His calculations show that Emtel's profit before interest and tax (PBIT) margin would have averaged 15% in the counterfactual case. From the perspective of reasonableness, this compares favourably to Emtel's PBIT margin of 31% in 1991 and 1992 and 35% in 2005. When compared to international benchmarks, the PBIT margin in the counterfactual case is reasonable as international comparators used by Mr Forrest were able to generate between 11% and 25% on average during the period 1995 and 2004.

210. Mr Forrest also checks the reasonableness of the loss by comparing the FAC using historical expenses and revenues with the FAC incorporating the incremental revenues and expenses from the loss calculation. His findings are that the FAC which incorporates the incremental revenues and expenses from the loss calculation tracks the line based on historical revenues and costs as shown in **Document P744 page 79 Figure 9.3**.

THE MARKET SHARE LOSS CASE

211. Emtel also contends that Cellplus launched commercial activities in March 1996 before it obtained its licence in September 1996. Should this contention be proved, it is Mr Forrest's view that this would have meant that Cellplus entered the market earlier. Consequently, Emtel's loss of market share did not start in October/November 1996 with the cut in tariffs but in March 1996. This loss of market share which started in March 1996 but continued after Cellplus obtained its licence in September 1996, in Mr Forrest's view, impacts on the

counterfactual case. Thus in the counterfactual case, during the period of March to September 1996, Emtel's market share is assumed to be 100%. Mr Forrest presents an additional quantification of Emtel's loss. In Mr Forrest's calculations, this period is treated as Period 1. For the period September 1996 to 2002 which in Mr Forrest's calculations is Period 2, the impact is one of delayed decline in market share since Cellplus' subscribers' base would only start in September 1996.

212. Mr Forrest's revised loss calculations in the Market Share Loss case are at **Document P744 page 86 Table 10.4**. He calculates after incorporating the loss caused by Cellplus' alleged unlawful commercial operation between March and August 1996, Emtel's loss of net income to be 538 million up to the end of December 2002. Consequential finance losses to May 2016 increase this figure to Rs 1,323 million applying simple interest and Rs 1,514 million applying compound interest at the actual finance costs.

MR FORREST GIVES A MORE DETAILED ANALYSIS OF THE ASSUMPTIONS UNDERLYING HIS CALCULATIONS OF EMTEL'S LOSS UNDER CROSS-EXAMINATION

213. Under cross-examination by Mr R. Chetty SC, Mr Forrest was referred to Annex 11 to the Answer of Particulars requested by MT and Cellplus and to Appendix I to **Document P744**. Annex 11 sets out the calculations Mr Forrest carried out in December 2002 of the damages suffered by Emtel. Appendix I of **Document P744** (pages 1 to 77) sets out the detailed calculations of each of the components of Emtel's claim and also the supporting calculations.

214. Mr Forrest explains in more details under cross examination by Mr Chetty SC, his assumptions and how he calculated each of the four components of Emtel's claim. The two main components of the claim are the loss of subscription fees and airtime revenue.

215. Thus the loss of subscription revenue is equal to the subscription revenue in the counterfactual minus the actual subscription revenue. For period 1, the subscription revenue in the counterfactual is equal to the average number of subscribers in the counterfactual multiplied by the actual subscription fees of Rs 325 per month. The calculations of average number of subscribers in the counterfactual take into account the actual monthly growth rate over the twenty six preceding months during which Emtel operated. The calculations of the average number of subscribers also take into account the churn, i.e the actual rate of loss of subscribers on a monthly basis.

216. The calculations for the loss of airtime revenue take into account the total talk time in the counterfactual case which itself is equal to the average number of subscribers in the counterfactual case multiplied by the actual monthly talk time. The actual monthly talk time is on the basis of Emtel management accounts about 200 minutes per month on the post paid tariffs of around that time. The calculations also take into account the call directions, i.e whether they are incoming or outgoing or mobile to mobile or mobile to international.

217. As regards period 2, the calculations take into account that prepaid tariffs - where no monthly subscriptions are charged but the airtime tariffs are at a higher rate - were introduced in 1998.

ELASTICITIES

218. Mr Thomas explains at **paragraph 6.2.7 of Document 2.2A** the concept of elasticity of demand in economic theory. Lower prices are generally associated with an increase in demand. Mr Thomas illustrates this concept from examples in the rise of subscribers at two points in time. In May 1995, Emtel set mobile incoming traffic at zero and dropped the price of mobile outgoing traffic from Rs 5 per minute to Rs 3 per minute. In October and November 1996, prices dropped with Cellplus' entry. On both occasions, the drop in prices resulted in a rise of subscribers.

219. Accordingly in the view of Mr Thomas, the greater demand resulting from the drop in prices in October and November 1996 greatly benefited Emtel which saw its number of subscribers increased. Also elasticities in demand which result from prices fluctuations, impact on the growth rate of the market as a whole. Whilst Mr Thomas agrees that the data from January 1994 to February 1996 give a monthly cumulative growth rate of the market of 4.39% - which growth rate is used by Mr Forrest in the counterfactual case - yet it has not taken into account the right co efficient of elasticity.

220. When cross examined by Mr D. Basset SC, Mr Forrest agrees to the importance of network effects in the mobile telephone markets and to its impact on prices and growth rate of subscribers. Mr Forrest also agrees that the choice of elasticity of demand is important to the assessment of the total market in the counterfactual model. To the extent that the counterfactual is based on the growth rate in the two years before Cellplus' entry in the market, the incidence of network effects has been implicitly incorporated in the counterfactual. Mr Forrest does not agree that he has built in a very low elasticity of demand

in his counterfactual model. He has used two pieces of evidence to test the monthly market growth rate of 4.39% used in the counterfactual; he has examined the growth rate the market achieved before Cellplus entered the market and he has undertaken an international study of price elasticities.

221. Mr Forrest was also cross-examined by Mr D. Basset, SC as the reasonableness of the monthly growth rate of 4.39% and especially at the end point of the claim period in December 2002 when the number of subscribers is projected to be 97,137 (**Document P 744 Appendix I.62**). Mr Forrest explains that he carried out a check by comparing the counterfactual market size with the actual size. Figure 8.8 at **Document P744** shows the trajectories of the market size in the actual and counterfactual cases and the trajectories are not far apart and they converge at the end of the claim period.

222. Finally, Mr Forrest was asked whether the assumption he makes that demand is highly inelastic, then his counterfactual is modeled on higher prices than in the actual world without losing subscribers. Mr Forrest does not agree.

EMTEL'S CONTENTION OF DROP IN REVENUE AND LOSS MAKING AS A RESULT OF CELLPLUS' REDUCED TARIFFS

223. It is Emtel's contention that as a result of the fact that it had to drop its tariffs to match those of Cellplus in November 1996, it suffered a major drop in revenue on a month to month basis which accentuated itself in 1997 and 1998.

224. Mr Currimjee reckoned that the drop in tariffs resulted in a reduction of revenue of about Rs 5 million per month. Emtel which was growing and had to invest in new and additional equipment, and was compelled to seek additional finance. In Mr Currimjee's view, were it not for this drop in revenue, Emtel would not have had to seek loan and overdraft facilities.

225. On 25 March 1998, Emtel was able to secure from the Mauritius Commercial Bank an additional medium term loan of Rs 21 million at interest rate of 13% per annum for additional equipment. The loan was to be repaid in six equal and consecutive half yearly instalments, the first one starting on 30 April 1998. Emtel also secured an overdraft up to an amount not exceeding Rs 35.5 million at an interest rate of 13%. The purpose of the overdraft was for working capital. Mr Currimjee stated that the company was running short of cash and had to pay its monthly bills; hence the overdraft facilities. The letter of the Bank is at **Document P433**.

226. Mr Currimjee explained that nevertheless, Emtel continued to lose money and was having pressure from the banks. As it was not able to resolve the fundamentals of the business through the regulatory process, the company decided towards the end of 1998 to sell its shareholding in Bharati Cellular. Bharati Cellular was an Indian company and Emtel was one of its founding partners. Emtel was able to repay its loans with the proceeds of the sale of its stake in Bharati Cellular. By 1999, Emtel was able to refinance the whole business and adopt the GSM technology.

THE FINANCIAL STATEMENTS OF EMTEL FOR THE YEARS 1995, 1997 and 1998

227. That Emtel was making losses after November 1996 until it took remedial measures in 1998 is supported in Mr Forrest's view, by the financial statements of the company for the relevant years.

228. Emtel's financial statement ending 31 December 1995 **(Document P729)** shows that the turn over of the company was in the amount of Rs 179.6 million and that it made a modest profit of Rs 15.8 in that year. The financial situation changed dramatically in 1997. The financial statement for the year ending 31 December 1997 **(Document P731)** shows that the turn over of the company increased and was in the amount of Rs 236 million. However, Emtel made a loss of Rs 30.09 million. The cash flow statement shows that it earned net from operating activities Rs 6.7 million but had to pay interest in the amount of Rs 20.7 million. Emtel was therefore in the words of Mr Brealey QC "*was bleeding money".*

229. Emtel's financial statement ending 31 December 1998 **(Document P732)** shows that the turn over of the company was in the amount of Rs 306 million and that it made a loss on ordinary activities in the amount of Rs 10 million. However the sale of the 17% shareholding in Bharati Cellular Ltd held by Emtel International (Mauritius) Ltd, a 100% subsidiary of Emtel brought an amount of Rs 710.6 million into the company but an amount of Rs 641.7 million was distributed as dividends.

230. By the end of 1999, Emtel was profitable again. For that year, it achieved a 19.36% profitability from its ordinary activities **(Document P744 Figure 3.6)**.

THE FINANCIAL STATEMENT OF CELLPLUS FOR THE YEAR 1997

231. In fact, both Emtel and Cellplus made losses in 1997. The financial statement of Cellplus for the year ending 30 June 1997 **(Document D3.54)** shows that the turn over of the company was in the amount of Rs 104.5 million and that it made a loss of Rs 51.2 million. The net cash flow from its operating activities was in the amount of Rs 39.6 million. It had a positive cash flow of Rs 40.4 millions and an amount of Rs 111.4 million was owed as intercompany payables.

EMTEL'S CAUSE OF ACTION

232. Emtel pleads "*faute"* under article 1382 of the Code Civil against the four defendants although the breaches constitutive of the "*faute"* alleged *quoad* each of the four defendants are different. The TA, in Emtel's contention, failed in essence in its duty to ensure that the conditions of the GSM licence granted to Cellplus were complied with. As regards MT and Cellplus, they breached the conditions of the GSM licence and engaged in unfair competition resulting in damages to Emtel. The Ministry is blamed for having failed to ensure compliance with its direction to the TA that the conditions of the GSM licence should be observed.

233. It is proposed to consider the case of breach of conditions of the GSM licence against MT and Cellplus first since if Emtel fails to prove its case against MT and Cellplus, then its case against the TA and the Ministry falls as well.

EMTEL'S CASE AGAINST MT AND CELLPLUS

234. Civil liability for unfair competition "*concurrence déloyale"* - which is Emtel's case against MT and Cellplus - is governed by article 1382 of the Code Civil which replicates the French provision for liability in tort. It is therefore appropriate to consider how the matter is dealt with in French law. In an article on **Concurrence Déloyale** in **Dalloz Répertoire de Droit Commercial,** Professeur Yves Serra, to which article Mr D. Basset SC also refers, makes a comprehensive study of the subject of what constitutes "*concurrence déloyale",* Professeur Serra writes at **notes 67** and **68**

> "**67**. ……*la jurisprudence affirme, on ne peut plus clairement, que "*l'action en dommages et interêts pour concurrence déloyale ne peut être fondé que sur les dispositions des articles 1382 et 1383 du Code Civil"".

> "**68**……*Cela étant, les éléments constitutifs de l'action en concurrence déloyale sont ceux traditionels de la responsabilité civile: un fait générateur de responsabilité…, un préjudice ...et un lien de causalité entre le fait générateur et ce préjudice."*

235. To succeed in a claim for damages for "*concurrence déloyale",* the claimant must therefore prove an act giving rise to the liability for damages, the damages and the causal link between the act and the damages.

236. Which acts give rise to liability for damages in a claim for "*concurrence déloyale"* when - as observed in the case of **Ferney Spinning Mills Ltd v Independent Spinning Mills Ltd** [2000 SCJ 334] and picked up by Mr D. Basset SC - by the very nature of the competitive game, damages are likely to be caused to competitors? In answering this question, Professeur Serra highlights the incidence of the well accepted principle of "*libre concurrence"* and consequenty only an "*acte fautif"* will give rise to liability. At **note 83** Professeur Serra states:

> "**83**. *Dans le domaine de l'action en concurrence déloyale, le fait générateur de responsabilité doit non seulement résider dans une intervention sur le marché, mais encore dans l**e caractère fautif de cette intervention.** Il s'agit de sanctionner un fait dommageable fautif et la jurisprudence est amenée à rappeler périodiquement que "*l'action en concurrence déloyale trouve son fondement dans les dispositions des articles 1382 et 1383 du code civil, **lesquels impliquent l'existence d'une faute**"….*". **(Emphasis added)**

237. Diverse breaches may constitute an "*acte fautif".* This is because as Professeur Serra explains, "*concurrence déloyale"* as a cause of action serves different aims and objectives, one of which is to sanction anti competitive conduct. The learned author writes at note 85:

> "**85**. *Cependant, l'action en concurrence déloyale n'a pas pour seule raison d'être la protection des concurrents ou même celle d'assurer une certaine discipline professionelle. D'autres interêts sont en jeu; ceux des consommateurs, mais aussi ceux des salariés de l'entreprise et celui, plus général, du bon fonctionnement du marché, autrement dit des considérations d'utilité sociale.* ***La faute dans l'action en concurrence déloyale ne doit plus être, dès lors, uniquement identifiée à la violation des usages professionels, mais peut aussi résider dans l'idée plus générale de rupture d'égalité dans la concurrence. Celui qui, intentionellement ou par négligence ou imprudence, use de moyens qui créent une rupture d'égalité dans les moyens de la concurrence commet une faute et engage sa responsabilité pour concurrence déloyale."*** **(Emphasis added)**

"*ACTE FAUTIF":* BREACH OF LICENCE CONDITIONS OR PREDATORY PRICING?

238. The "*acte fautif"* alleged by Emtel against MT and Cellplus is a breach of conditions of the GSM licence. It is submitted on behalf of MT and Cellplus that the pleaded case of Emtel has moved in the course of the trial from one of predatory pricing to one of breach of licence conditions.

239. Indeed, Emtel refers to the alleged predatory pricing of Cellplus in the answer to the particulars moved for by MT and Cellplus under paragraph 12.1 of the SOC. **(Page 4158)**

240. Paragraph 12.1 of the SOC reads as follows:

"*Emtel avers that such a tariff was not commercially sustainable unless Cellplus was grossly subsidised whether by non payment of interconnect charges at the prescribed level or at all, and/or there are other forms of cross-subsidy between Mauritius Telecom and Cellplus."*

241. The following particulars were moved for and provided by Emtel

Q.60. *What according to the plaintiff are the considerations to take into account for a commercially sustainable tariff?*

A.60. *It is Plaintiff's contention that the following amongst other considerations should be taken into account for a commercially sustainable tariff:*

- Investment required;
- Direct cost (including interconnection cost);
- Indirect cost (such as, marketing and other operating expenses);
- Reasonable return to all stakeholders based on risk involved.

Q.61*. Will plaintiff state whether tariffs have to be reasonable in order to be approved by the Authority?*

A.61*. Yes, it is the role of the Authority to check that tariffs are reasonable* ***and not predatory****. The Authority failed in its duty to ensure whether the tariffs proposed by Cellplus were predatory or not. Its action to approve those tariffs was thus unreasonable.* **(Emphasis added)**

242. It is replied on behalf of Emtel that this odd reference to "*predatory"* should not be taken out of context and that the word is being used in its normal meaning as opposed to describing a type of conduct prohibited under the law of competition.

243. It is noted that at paragraphs 17 and 18(c) of the SOC, abuse of dominant position by MT, another type of conduct prohibited under the law of competition is also alleged. However

paragraph 18(a), (b) and (c) of the SOC are directed towards an alleged breach of licence conditions which constitutes "*faute"* and which caused damages. It cannot be said therefore that breach of licence conditions is not alleged in the SOC. It is at least one of the alleged tortious acts and no objection can be taken to Emtel relying on this allegation of breach of licence conditions.

DOES PARAGRAPH 7(a) AND (b) OF THE PRESS COMMUNIQUÉ SET OUT CONDITIONS OF CELLPLUS' LICENCE ?

244. Reference has been made in the course of the trial to condition 9 of the licence of Cellplus notably by Mr Forrest. However, the licence conditions which in the contention of Emtel, were breached, are those set out under paragraph 7(a) and (b) in the Press Communiqué issued by the TA on 5 September 1996 and communicated to both MT and Cellplus.

245. Paragraph 7(a) and (b) as amended is therefore at the heart of Emtel's claim. It is Emtel's contention that paragraph 7(a) and (b) as amended set out conditions of the licence of Cellplus, which Cellplus was under an obligation to comply with, but which it breached with the complicity of MT and the TA and that the breach caused damages to Emtel. It is however the contention of the TA, MT and Cellplus that paragraph 7(a) and (b) as amended does not set conditions of Cellplus' licence since it is not inserted in the licence proper. As regards the stand of the Authority, it is of the view that it is unusual for licence conditions to be incorporated in a press communiqué. However, Mr Dabeesing was of the view that this matter revolves on a legal interpretation of the documents.

246. Whether paragraph 7(a) and (b) as amended sets out conditions of the GSM licence must be considered by looking closely at the Press Communqué and the language in which it is couched and also in the light of the circumstances surrounding it. The evidence on the circumstances leading to the issue of the communiqué and of the inclusion of paragraph 7 (a) and (b), on the events after its issue and on the intention of the parties leaves no room for doubt that paragraph 7(a) and (b) sets out conditions of the GSM licence granted to Cellplus albeit they are not found in the licence proper.

247. Firstly, the entry of Cellplus in the mobile telephony market was in the context of the liberalisation of the sector. There is also no doubt that Government was fully committed to this policy **(Document P366)**. The liberalisation of the sector entailed the opening of the sector to new entrants and therefore competition. In the interests of the market and of the public, it was recognized by all parties that the competitors should operate on a level playing

field and that a new entrant should not benefit from an unfair advantage such as cross-subsidisation of a subsidiary by an incumbent from profits earned in a monopoly market. Mr Leung Yin Ko explained that the question of cross-subsidisation was discussed at conferences, training sessions and seminars which he attended and his understanding was that "*the revenue of one service should not be used to subsidise the tariffs of another service especially with a view to cable off competition."* Mr Leung Yin Ko adds that the question of how the company is financed and its impact on the question was not discussed. **(Volume 11 page 6607).**

248. Secondly, all parties were very much aware of the implications of a liberalised market including the necessity of fair competition and MT made commitments to respect the principle of fair competition.

249. This commitment is found in the memorandum submitted to the TA wherein under the heading of "*Commercial Autonomy",* MT informed the TA that Cellplus would be an autonomous unit. Under the heading Interconnect Agreement, MT informed the TA that there would be an Interconnect Agreement between MT and Cellplus which would be along the same provisions as those in the Agreement with Emtel **(Document D2.8, Document D3.11)**. This commitment to commercial autonomy is reiterated by Mr T. Cowaloosur senior executive (cellular) of MT in a second memorandum dated 24 April 1996 and addressed to the TA **(Document D2.9, Document D3.17)** above.

250. Thirdly, it is therefore not surprising that paragraph 7(a) and (b) replicate the above commitments of MT and set them down as conditions. Under section 5(c) of the 1988 Act, the TA which was empowered to issue licences, had also the power to set such conditions. This is clear from the judgment of the Judicial Committee of the Privy Council in the appeal of Emtel from the refusal of leave in an application for mandamus against the Authority. Indeed at paragraph 37 of the judgment [1999 PRV 56], their Lordships hold

"*In deciding what terms or conditions to impose on the grant of a licence the Authority enjoyed a wide discretion, provided it had regard to the public interest and any directions of the Minister. It had power to modify licences. No where in the Act* (the Telecommunications Act 1988) *is there any indication that the Authority lacked power to license competing operators of mobile telephone services if it judged it to be in the public interest to do so or if it was directed by the Minister to do so.* ***If it had power to license such competitors, it plainly had power to impose what it considered to be appropriate conditions to regulate competition between licensees."*** **(Emphasis added)**

251. Furthermore, the Authority makes it clear in no uncertain terms that paragraph 7(a) and (b) are "*conditions to be met"* **(Document P366)**.

252. Much has been made in the course of the trial that the conditions are not inserted in the GSM licence granted to Cellplus. It is noted that the two "*conditions to be met"* are directed towards MT and Cellplus and not to Cellplus alone and it was therefore fit and proper for the TA to impose them in the communiqué which would have brought them to the attention of all including MT.

253. Fourthly it is obvious that in 1996 in the absence of any existing competition law, the TA as the regulatory body was regulating competition in the telecommunications sector by imposing conditions. This is an example of what Professor Ian Walden in his book entitled **Telecommunications Law and Regulation (Fourth Edition)** at page 20 describes as "*proactive* ex ante *regulatory intervention in the operation of the telecommunications market to achieve a competitive market."* Although the 1988 Act has no provisions concerning unfair competition, yet as held by their Lordships in the Privy Council case, there is no restriction as to the type of conditions that the TA may impose and it did choose to regulate the market by imposing conditions.

254. Fifthly, MT and Cellplus did understand paragraph 7(a) and (b) as conditions. Mr Pillay in Court admitted that he was disappointed with the imposition of the two conditions. He sought legal advice and requested the TA to amend paragraph 7(a) by removing the without the grace period provision and to remove altogether paragraph 7(b). He only succeeded in having paragraph 7(b) amended to read that MT should provide such documentary evidence such as audited accounts and reports to show that Cellplus is keeping its accounts separate from MT and that it is not benefiting from any cross subsidisation from MT **(Document D3.33)**.

THE PURPORT OF CONDITIONS 7 (a) AND (b)

255. Condition 7(a) is to the effect that the Interconnection Agreement between MT and Cellplus should be on the same terms as those offered to Emtel, without, however, any grace period as was previously granted to Emtel. The purpose of condition 7(a) is to prevent that Cellplus obtains an unfair advantage on Emtel by not paying interconnection charges at all or to a lesser level to MT, its parent company.

256. Condition 7(b) as amended directs MT "*to furnish to the Authority such documentary evidence as audited accounts and reports showing that Cellplus Mobile Communications Ltd is keeping its accounts separate from Mauritius Telecom and that it is not benefiting from any cross subsidy from Mauritius Telecom".*

257. Mr D. Basset SC submits that condition 7(b) as amended does not impose a prohibition on cross-subsidisation. Rather it imposes an obligation to provide accounts and reports to show that Cellplus is not benefiting from cross subsidisation. Accordingly it is failure to provide the accounts and reports that constitutes a breach of the condition, which breach, if any, would have been the concern of the TA only.

258. Contrary to the submission of Mr D. Basset SC, it is clear and it was understood by all parties that condition 7(b) prohibited that Cellplus benefit from any cross-subsidy from MT and that the manner in which the TA was to ensure that such prohibition was complied with, is to require that audited accounts and reports be furnished to show that cross-subsidisation was not happening. Indeed in its memorandum to the TA dated 24 April 1996 **(Document D2.9 Document D3.17)**, MT writes that it was fully aware "*that questions* (had) *been raised by interested parties relating to the needs of having separate accounts* ***in order to avoid cross-subsidisation of services..***"

259. The question then arises as to what sort of cross-subsidy was condition 7(b) prohibiting. It is the contention of MT and Cellplus that by the fact that the TA required that Cellplus keep separate accounts, condition 7(b) aims at an accounting cross-subsidy and not an economic cross-subsidy as contended by Emtel. Mr D. Basset SC also submits that the evidence shows that in 1996, the TA never addressed its mind to economic cross-subsidy or to costs of capital. Mr D. Basset SC refers to the testimony of Mr Thomas. Whilst Mr Thomas agrees that a regulator who is examining a dominance issue, will look at and consider costs of capital, he is of the view that in 1996, "*it would be very difficult to impose that level of regulatory remedy…"* **(VOLUME III Page 6905)**

260. Indeed the correspondence exchanged between MT and the TA in the months preceding the grant of the GSM licence does not bear specific mention of costs of capital. However although costs of capital is not mentioned, yet the evidence on record shows that the TA, MT and Cellplus understood the principle and all the implications including the economic and financial ones of the prohibition against cross-subsidisation between related parties.

261. Mr Dabeesing representing the TA was cross examined by Mr Brealey QC on the two memoranda submitted by MT on 16 November 1995 and 24 April 1996 respectively **(Documents D2.8, D3.11)**. Mr Dabeesing agrees that in the memorandum dated 24 April 1996, both MT and Cellplus represented that Cellplus would be commercially autonomous. He also agrees that when MT represented that it would "*ensure that its subsidiary company pays for all services at commercial rates",* he would understand as a regulator that services such as advertising, renting of premises and loans would be at commercial rates **(VOLUME III page 6214)**. Also, as highlighted by Mr Brealey QC in his submissions, Mr Dabeesing agrees with Mr Forrest and stated that his interpretation of the licence conditions is that all transactions between Cellplus and MT should be done on an arm's length basis. The arm's length principle means that the prices charged between related parties must be the same as if the parties are unrelated. It therefore implies that MT would charge for its services at commercial rates including loans.

262. The undertaking of both MT and Cellplus in the memorandum of 24 April 1996 that commercial rates for all services and infrastructure would apply goes a long way to show that MT was well aware and understood the arms' length principle. Mr Pillay indeed agrees that financial benefits can take various forms; they may be cash grants, soft loans and other favourable forms of finance. In June 2001, Cellplus had an overdraft in the form of an intercompany debt with MT amounting to Rs 370 million on an interest free basis. Mr Pillay agrees that the Rs 370 million interest free overdraft is an advantage to Cellplus because it reduces Cellplus' operating costs. However, Mr Pillay does not agree that this is a subsidy.

263. The evidence therefore establishes clearly that the objective of condition 7(b) is not to assess whether Cellplus' revenues matched its expenses but whether as a subsidiary of MT, it was benefiting from financial assistance from MT. Therefore, Mr Halpin's approach in considering an accounting cross-subsidy is not consonant with the requirement of condition 7(b). Mr Dabeesing's answer to a question by Mr D. Basset SC that the Authority only envisaged accounting cross-subsidy and not economic cross-subsidy is contrary to the objective of Government as stated in the press communiqué, of "*encouraging fair and healthy competition among all operators…"* **(Document P366 and D3.23)**.

264. The purport of conditions 7(a) and (b) is to prohibit that Cellplus benefits from an economic and financial cross-subsidisation by MT.

HAS CELLPLUS BENEFITED FROM CROSS-SUBSIDISATION FROM MT?

265. As regards condition 7(a), a comparison of the interconnection Agreements between MT and Emtel on the one hand and Cellplus and MT on the other supports Mr Leung Yin Ko's testimony that the Interconnection Agreement of 31 March 1997 between MT and Cellplus was on paper on the same terms and conditions as that between MT and Emtel.

266. However the point made by Mr Brealey QC in his cross examination of Mr Gopalen Perumal Mooroogen, the finance manager of MT and of Mr Thomas is that MT did not require Cellplus to pay the interconnection fees in the same manner as it did for Emtel. Mr Mooroogen agreed that MT did not raise any invoice for Cellplus. The amount for interconnect fees was computed at the end of each month and included in the intercompany balances. However the intercompany balances were not identified line by line **(Volume 3 page 6462)**. Emtel on the other hand received invoices at the end of each month and had to settle them within the required period of 60 days failing which it would have to pay the surcharge **(Documents P428, P429, P430 and P431).**

267. Whether the intercompany balances afforded a financial advantage to Cellplus and constitute an economic cross-subsidy between MT and Cellplus, Mr Forrest gave his expert evidence. Therefore the question whether MT and Cellplus breached condition 7(a) must also be considered in the light of Emtel's allegation of cross-subsidisation.

268. MT and Cellplus have in the course of the trial emphasised that Cellplus did keep separate accounts from MT and also did pay for the use of MT infrastructure. Indeed the financial statements of Cellplus show costs of use of MT infrastructure are charged to Cellplus. Although use of MT infrastructure is an instance of cross-subsidy invoked by Emtel in its pleadings, the intercompany debt and lease arrangement that Cellplus held with MT constitute the real focus of Emtel's contention that Cellplus was cross-subsidised by MT.

269. The financial benefit to Cellplus from the intercompany debt or payables and from the lease arrangements with MT has been fully analysed by Mr Forrest. I take note that Mr Forrest's calculations and conclusions are based on uncontroverted evidence from Cellplus and also from its financial statements. The calculations and conclusions of Mr Forrest have not been seriously challenged to the extent that the main argument of MT and Cellplus is that the cross-subsidy envisaged by condition 7(b) does not cover the costs of capital and also to the extent that it has not been shown that Cellplus has not benefited at all or to a lesser extent from the intercompany debt or payables and lease arrangements. I therefore accept

Mr Forrest's calculations and conclusions which show that the intercompany accounts or intercompany payables allowed Cellplus to benefit from a longer time to settle bills and from additional financing costs of Rs 148 million until the debt was converted into shareholders loan in April 2000 and December 2002 and that the 10 year lease arrangements allowed Cellplus to benefit from financing costs of about Rs 581 million. The cross-subsidisation of Cellplus by MT has therefore been proved.

270. Mr Thomas agrees that Cellplus benefited from a financial cross subsidy. He explains it in the following terms: "*So the accounting separation remedy would have had a full cost of capital applied to it …..if you bring that period shorter and shorter, yes there clearly is cross-subsidy going on because in the early years when its start-up* (it is unable) *to cover all of its cost of capital. So to that extent I agree with Mr Forrest's analysis."*

271. Mr Halplin's also acknowledged that commercial banks do not lend at 0% interest and that Cellplus was benefiting from being a member of the MT group.

272. Mr Mooroogen's explanation as to how MT decided to fund the GSM project by means of intercompany payables also shows the clear intention to benefit not only MT but also Cellplus. Mr Mooroogen states that Cellplus was a subsidiary of MT and "*the finance was managed at group level"* (**VOLUME III page 6481)**. Mr Mooroogen also states that MT was at the relevant time profitable and "*sitting on almost 500 to 600 million at the end of the year, cash in hand"* **(VOLUME III Page 6340)**. MT was paying tax on the profits. On the other hand, Cellplus would initially incur losses for four to five years. In order to benefit from tax allowances on capital investments, MT decided to make and keep the investment on behalf of Cellplus and Cellplus would operate as an operating company and not holding the investment. As regards the benefit to Cellplus, although Mr Mooroogen repeatedly denies that the intercompany payable was akin to an overdraft, yet he agrees that if Cellplus had gone to a commercial bank and requested for an unsecured overdraft facility of Rs 300 million at 0% interest with no fixed repayment date, such a request would "*of course not be accepted"* **(VOLUME III page 6483)**.

273. Indeed in my view, the recourse by MT to finance the operational expenses of Cellplus by the intercompany debt or payables exemplifies the type of conduct that condition 7(b) expressly prohibits. As put to Mr Mooroogen by Mr Brealey QC, Cellplus as a subsidiary of MT was paying for finance at uncommercial rates, which constitutes a clear breach of the condition against cross-subsidisation. The effect was that MT was bankrolling Cellplus in its operations when the conditions at paragraph 7 were designed expressly to put a stop to this

bankroll. The breaches were so obvious that they can only be described as intentional breaches.

274. As regards the lease arrangement to cover the capital expenses made by MT on behalf of Cellplus, Mr Forrest's analysis shows how the lease spread over a period of ten years at 15% interest translates into a yearly interest of 1.5% which is clearly below the rate of interest commercially charged. The analysis of Mr Forrest on this score stands unrebutted and must therefore be accepted.

275. Mr Halpin assimilates the permanent funding of Cellplus by MT via the intercompany debt to quasi capital whilst Mr Mooroogen likens it to equity. However it has been shown by Mr Forrest that an analysis of the ten year plan of Cellplus at its launch **(Document D3.51)** reveals that the target rate of return on the investments after six to eight years of losses was 1.3% which in Mr Forrest's view, well below that which an investor would expect which is therefore akin to a cross-subsidy. I agree with the view of Mr Forrest.

276. Now, it is submitted on behalf of MT that the "*faute"* alleged by Emtel can only be committed by Cellplus and that MT cannot be liable for the "*faute"* of Cellpus unless the requirements of article 1384 for "*responsabilité du fait d'autrui"* are satisfied. To my mind, Emtel's claim is correctly based on article 1382. Not only in paragraph 17 of the SOC, Emtel pleads that MT and Cellplus acted in concert and that it suffered damages from the concerted actions of MT and Cellplus but also on the evidence adduced which has been dealt with above, the condition against cross-subsidisation is addressed and directed against both MT and Cellplus and both MT and Cellplus have equal and shared responsibility to comply with the condition.

277. For the reasons stated above, I find that MT and Cellplus breached the condition against cross-subsidisation which they implicitly agreed to comply with and which was stated by the TA as "*conditions to be met"* when Cellplus was granted the GSM licence. Both MT and Cellplus have intentionally made use of unfair means leading to a "*rupture d'égalité dans les moyens de la concurrence…."* and have committed an "*acte fautif".*

EMTEL'S CASE AGAINST THE AUTHORITY

278. Emtel's case against ICTA is that ICTA is liable for the failure of the TA to ensure that the conditions of the licence issued to Cellplus as set out in the Press Communiqué were complied with and to effectively prevent cross-subsidisation over the claim period.

279. Before considering Emtel's case against ICTA, it is appropriate to examine the objections in law raised on behalf of the Authority.

280. It is submitted on behalf of ICTA that it cannot be held liable for the "*faute"* if any, of the TA to the extent that under the 1988 Act, the TA was not established as a body corporate but was a department of the Government. Accordingly, the Minister of Telecommunication who pursuant to section 68 of the Constitution, had the responsibility of the department, should be answerable for the acts of the TA. Whether ICTA should be liable for the acts of the TA during the claim period was considered in the interlocutory judgment handed down on 11 July 2011 and I then ruled that pursuant to the transitional provisions under section 29(1) of the 1998 Act and section 51(1) of the 2001 Act, ICTA should be held liable for the tortious acts, if any, of the two regulatory bodies which preceded it. ICTA appealed but without success.

281. Alternatively in the event that it is found that it should be liable for the acts of its two predecessors, it is submitted on behalf of ICTA that in the light of the defence of good faith which is available to officers of the Authority in the exercise of their functions under section 22 of the 1998 Act and section 45 of the 2001 Act, the absence of good faith or bad faith should be specifically pleaded by Emtel and Emtel has not done so. The reply of Emtel is that it has pleaded at paragraph 16 of the SOC that the TA has shown bias towards MT and tolerance of the tortious acts of MT and Cellplus. In my view, what is required of every pleading is that it states clearly and distinctly all matters of fact that are necessary to sustain the plaint, plea or counterclaim as the case may be **(Supreme Court Rules 2000 Rule 13 (1)).** The allegations of bias and tolerance made under paragraph 16 of the SOC, if proved, may be serious enough to constitute bad faith and even "*faute lourde".* The submission therefore fails.

282. It is also submitted on behalf of ICTA that the present action is null and void for having been instituted in breach of the requirements laid down under section 4(1)(b) and 4(2)(a) of the Public Officers' Protection Act. Section 4(1) (b) requires a civil action against a public officer in the performance of his public duty to be entered within 2 years of the act or omission which gives rise to the action. Section 4(2)(a) requires one month's notice to be given prior to the institution of the proceedings. As far back as November 1996, Emtel had served a notice on the TA to ensure compliance by MT and Cellplus of the conditions of the licence **(Document P384)**. The notice was followed by judicial review proceedings entered by Emtel. The point of non compliance with the provisions of the Public Officers Protection Act

cannot be seriously made as all parties had ample notice of Emtel's complaint of unfair competition.

283. The last point in law taken on behalf of ICTA is that the delay in the hearing of the present matter has worked unfairly towards it and has deprived it of its right to a fair hearing within a reasonable time guaranteed by section 10(8) of the Constitution. It is submitted that with the passage of time, Messrs Makoonlall and Beharee who were officers of the TA, have been unable to assist the TA. That the hearing of the present case has been delayed over such a long period of time is definitely a matter of great concern. However, as I stated above, all the parties have had recourse to the correspondence exchanged by the parties at the relevant time and a complete and good understanding of the circumstances of the case can be gathered from the documentary evidence. ICTA has chosen not to call Messrs Makoonlall and Beharee who have not even tried to depone from the documents produced. It cannot be said in these circumstances that ICTA has been deprived of a fair hearing.

284. Turning to the alleged breach by the TA, it is submitted on behalf of Emtel that the failure of the TA to take action to effectively prevent cross subsidisation over the claim period constitutes a "*faute lourde".*

285. That the TA failed to take any action to prevent cross subsidisation of Cellplus by MT is clearly established by the following:

286. It is not disputed that on 18 January 1997 in arbitration proceedings between Emtel and Cellplus, Mr Mooroogen admitted that Cellplus had been operating commercially since September 1996 but that no interconnection agreement had yet been worked out between Cellplus and MT. Mr Mooroogen also admitted that no interconnection fee had then been paid by Cellplus to MT **(Document P388)**.

287. By a notice dated 28 November 1996, Emtel had called upon the TA (1) to appoint an independent auditor to verify and monitor on an ongoing basis that Cellplus was keeping separate accounts from MT and that it was not benefiting from any cross subsidisation, and to communicate to Emtel any report made by the auditor, (2) to make available to Emtel a copy of the Interconnection Agreement between MT and Cellplus so as to ensure that it is on the same terms as those offered by MT to Emtel and (3) to ensure that interconnection fees are in fact paid by Cellplus to MT **(Document P384).**

288. On 19 March 1997, Emtel wrote what Mr Brealey QC termed a "*cri du coeur"* letter to the TA **(Document P392)**. Emtel drew the attention of the TA to the conditions of the licence of Cellplus. It appears that Emtel was not aware then that condition 7(b) had been amended since 17 February 1997 **(Document D3.33)**. Emtel observed that Cellplus had not yet entered into an interconnection agreement with MT and was not paying interconnection fees at all. Emtel also observed that it had had to reduce its charges to uneconomic levels to meet the highly subsidised prices practised by Cellplus. Emtel further observed that the TA had sought a long postponement in the judicial review proceedings entered by it. Emtel wrote "*Unless a prompt end is put to the shortfall in revenue sustained by Emtel (being the direct result of Emtel having had to reduce its charges to uneconomic levels in order to meet the highly subsidized prices practised by Cellplus), the very future of Emtel will be in jeopardy."* Emtel urged the TA to ensure that the rules were obeyed and to ascertain that MT and Cellplus were complying with the conditions of the licence.

289. The above letter does not seem to have been answered by the TA let alone to have prompted any action on the part of the TA. On the other hand, the stand of the TA in Court is clear and is contrary to the inaction of the TA during the claim period. Mr Dabeesing admits that as a regulator, if a person operates a mobile telecommunication service without a licence, he will apply the offences section. Also if a licensee fails to comply with the conditions of the licence, he will apply the offences section of the law, revoke the licence and eventually take the offender to Court. Mr Dabeesing also admits that the TA had assumed a greater responsibility to ensure compliance when it modified condition 7(b) by deleting the requirement of an independent auditor.

290. It is submitted on behalf of Emtel that the failure of the TA to ensure compliance with the licence condition amounts to a "*faute lourde".* In support of this submission, reference is made to a decision of the Conseil d'Etat on 30 November 2001. The Conseil d'Etat held that in a case of a bank facing difficulties, the French regulatory authority in failing to impose more stringent terms and delays upon the directors of the bank that would have been required in the circumstances, had committed a "*faute lourde."* The following extract from the decision is cited on behalf of Emtel

"*Mais considérant qu'alors que par lettre du 6 octobre 1987, la Commission bancaire avait demandé au président-directeur général de la banque qu'une augmentation de capital de 50 millions de francs fût réalisée "dans les meilleurs délais", elle a ensuite réduit de moitié le montant de l'augmentation de capital prescrite et a accordé à la banque un délai pour le réaliser allant jusqu'à la fin mai 1988; qu'eu égard au caractère urgent que présentait,*

comme l'avait souligné le rapport d'inspection du 5 mai 1987, le rétablissement de la solvabilité de la Saudi Lebanese Bank, ***la Commission bancaire****, si elle pouvait légitimement choisir de négocier avec les dirigeants une stratégie permettant le rétablissement de leur banque plutôt que d'engager sur le champ une procédure juridictionnelle,* ***aurait dû toutefois adresser à ces dirigeants des prescriptions plus fermes et assortir celles-ci de délais contraignants; … que ces carences sont constitutives d'une faute lourde de nature à engager la responsabilité de l'Etat" (Emphasis added)***

291. To my mind, there is no doubt that the context in which conditions 7(a) and (b) came into being put upon the TA a responsibility to ensure compliance with the conditions which it had itself set. Instead, the TA completely disregarded its responsibility, failed to administer "*des prescriptions plus fermes"* and shown tolerance of the breach of the conditions. In these circumstances, it can only be concluded that it has committed a "*faute lourde".*

EMTEL'S CASE AGAINST THE MINISTRY OF TELECOMMUNICATIONS

292. Emtel's case against the Ministry is that the Minister and/or the agents and/or the *préposés* of the Ministry have failed to ensure that the direction of the Ministry to the TA be complied with.

293. It is the contention of Emtel that it can be inferred from the circumstances surrounding and leading to the grant of the GSM licence that directions were given by the Minister or the Ministry of Telecommunications to the TA to attach conditions 7(a) and (b) to Cellplus' licence. Emtel draws attention to the following:

294. Firstly, the evidence adduced shows the involvement of the Minister in the granting of the GSM licence. This is Emtel submits, not surprising in view of the importance of Cellplus' entry in the mobile telephony sector and also of the introduction of GSM technology. Furthermore, Government was committed to the liberalisation of the sector and therefore had a special interest in its development.

295. Secondly, there is evidence to the effect that in matters of any importance in relation to the telecommunication sector, the TA sought and acted on directions from the Ministry. Thus on 24 April 1996, the Permanent Secretary of the Ministry of Information and Telecommunications wrote to the Temporary Manager of the TA and informed the latter that the Minister had directed that MT be granted five years' exclusive rights in the operation of

the GSM Cellular mobile telephone **(Document D1.23)**. Therefore, in a matter of such importance as the granting of the GSM licence, it can be inferred that the Ministry would give directions.

296. Thirdly, indeed in matters of lesser importance such as the increase in the number of base stations, according to Mr Currimjee, the TA sought directions from the Ministry. Therefore in Emtel's contention, "*it would be unthinkable that it would not have sought approval of the Ministry on a matter of such capital and national importance as the issuing of a mobile licence to the historic national operator."*

297. Fourthly, the close relationship between the Ministry and the TA is evidenced in correspondence sent by MT on 29 April 1996 to the Ministry in connection with the application for the GSM licence **(Document D3.18)**. Mr Pillay explained that the letter was addressed to the Ministry because "*the Permanent Secretary of the Ministry might have been wearing the hat of the Chairman of the Telecom Authority at the time."*

298. It is however submitted on behalf of the Ministry that the evidence on record is to the effect that no direction was given by either the Ministry or the Minister or the "*préposés"* of the Ministry. Mr Dabeesing stated in Court that no direction was given by the Ministry on the issue of licensing conditions. Mr L. Aujayeb, Acting Assistant Solicitor General, for the Ministry also refers to the testimony of Mr Pillay that he suggested that the TA "*appoint an independent party that would go through* (MT's) *accounts or the account of Cellplus ….."*

299. In the light of the clear denial of any direction having been given and also in the light of the testimony of Mr Pillay, it would not be appropriate to make inferences that the Ministry gave directions although the Ministry did exercise great influence on the decisions of the TA. The "*faute"* of the Ministry has therefore not been established.

DAMAGES AND THE CAUSAL LINK

300. For Emtel's claim under article 1382 to succeed, it must not only to prove an "*acte fautif"* but also that it has suffered damages and that there is a causal link between the "*acte fautif"* and the damages. Professeur Yves Serra in the article referred to above explains the requirements of proving the damages and the causal link as follows at **paragraphs 102** and **116**

102. " *…L'examen de la jurisprudence permet d'observer que, d'une manière constante et non équivoque, les tribunaux expriment la necessité d'un préjudice pour que l'action en concurrence déloyale puisse prospérer. Après avoir indiqué que l'action en concurrence déloyale trouve son fondement dans les articles 1382 et 1383 du code civil, la Cour de Cassation rappelle que ces textes "*impliquent nécessairement l'existence ….. d'un préjudice souffert par le demandeur" *(Cass. Com. 23 mars 1965, préc. supra, no 67)* ou encore qu'ils "impliquent non seulement l'existence d'une faute commise par le défendeur mais aussi celle d'un préjudice souffert par le demandeur" (*Cass. Com. 19 juill. 1976).*

……..

116. "*Le demandeur dans le domaine de l'action en concurrence déloyale doit, selon le droit commun de la responsabilité civile, démontrer l'existence d'un lien de causalité entre la faute – les agissements déloyaux et le préjudice dont il souffre."*

The Characteristics of the Damages

301. Furthermore, the damages suffered must constitute "*un préjudice direct et certain"* i.e they must be of a direct consequence of the "*acte fautif*" and must not be hypothetical and they must also be ascertainable. Professeur Yves Serra writes at **paragraphs 104** and **105** of the same article cited above:

104. "*De la même manière que dans le droit commun,* ***le préjudice dans le domaine de l'action en concurrence déloyale peut être matériel ou moral et ne devrait normalement ouvrir droit à réparation que s'il est direct et certain****, non purement éventuel sa constatation relevant du pouvoir souverain des juges du fond (V. Cass. Com. 21 nov. 1972, D. 1973, somm. 55. Cass. Com 25 avr. 1983 [no 82-11.050], Bull. civ. IV, no 123; pour une étude détaillée, V. P. le TOURNEAU, op. cit. [1998, Litec], nos 235 et s.)."*

105. *"L'examen de la jurisprudence permet de constater une diversification du préjudice réparable par l'action en concurrence déloyale. Dans la conception classique, le préjudice qui résulte d'un acte de concurrence déloyale s'exprime par une perte de clientèle ou perte de "contrats" (CA Paris, 21 juin 1989, RDPI 1990. 52), un détournement de clientèle étant provoqué au détriment de la victime des agissements déloyaux. Préjudice qui se traduit par une baisse du chiffre d'affaires, lui-même représentatif du volume de la clientèle.*

……..

Dans cette perspective, il est nécessaire que le préjudice causé par les agissements déloyaux présente un certain degré de certitude rejoignant, par là, le droit commun de la responsabilité civile. En ce sens, certaines decisions, de plus en plus rares il est vrai, refusent de prendre en consideration des préjudices purement hypothétiques (v CA Paris, 15 juin 1983…"

302. It is submitted on behalf of Emtel that although "*the loss of customers or profits would generally be the manifestation and the required proof of material damage in unfair competition cases",* French doctrine and case law recognise now that a "*trouble commercial"* may amount to damages that can be compensated. It is indeed so. Professeur Serra explains the principle and then the acts that can constitute "*trouble commercial'* at **paragraph 107**

"*L'évolution de la jurisprudence permet de penser que doit être considérée comme dépassée l'idée selon laquelle le détournement ou la perte serait la manifestation unique et obligatoire de l'existence d'un préjudice matériel en matière de concurrence déloyale……..****la jurisprudence accepte de réparer en matière de concurrence déloyale des préjudices autres que la perte ou le détournement de clientèle……..****Ces préjudices sont très divers mais, pour l'essentiel, ils constituent des atteintes à des éléments attractifs de clientèle ou à la capacité de concurrence ou à la capacité de concurrence de la victime des agissements déloyaux.* ***La jurisprudence en fournit de nombreux exemples:- trouble commercial provoquant la déstabilisation de la stratégie commercial de l'entreprise……..dimunition ou perte d'un avantage concurrentiel……relative à la perte d'un avantage concurrentiel …..dépréciation d'un signe distinctif……."*** **(Emphasis added)**

Operational Expenses and Tariffs

303. In the course of the evidence, Emtel has been able to demonstrate that financial costs constitute an operational expense. Thus, the financial statements of Cellplus show interest on shareholder's loan as an item of operating expenses **(Documents D3.57 to D3.59)**. Also, Mr Pillay and Mr Halpin agree that interest and finance costs are operating expenses.

304. Mr Pillay as well confirms that if operating costs are reduced, lesser tariffs can be charged. Mr Pillay also confirms that the tariffs charged by Cellplus were set on a basis of a three year grace period during which Cellplus would not pay interconnection fees **(Document D3.51)**. Mr Mooroogen agrees that higher interest and finance costs will reflect on the tariffs just as lower interest and finance costs will also reflect on the tariffs.

305. Therefore, I find it proved that Cellplus having benefited from financial cross-subsidy, was able to lower its operating expenses and offer lower tariffs.

Were the tariffs of Cellplus at its launch unreasonable ?

306. The question which then arises is whether the lower tariffs which Cellplus practised at its launch were unreasonable and commercially not sustainable for if the lower tariffs were reasonable, it cannot be said that Emtel suffered a "*trouble commercial".*

307. Mr Thomas' analysis of the tariffs of Cellplus from the perspectives of the Competition Act 2007 and the CCM Guidelines is dealt with at paragraphs 144 to 149 above. Mr Thomas' conclusion was that Cellplus was not engaged in predatory pricing. I have considered the analysis of Mr Thomas in the light of all the evidence on the issue of pricing. I am of the view that his analysis cannot be retained and relied upon in the circumstances of the present case. Firstly, as stated above, the Competition Act and the CCM Guidelines were not in force at the period of the claim. Secondly, I take the view that the below AVC test proposed in the CCM Guidelines set too low a threshold for fixing the reasonable tariffs. As explained at paragraphs 153 to 161 above by Mr Forrest whose testimony on the question I accept, the AVC test does not allow for fixed costs of infrastructure which in the telecommunications sector are according to the evidence, not only quite substantial but must also keep pace with technology and be renewed fairly quickly.

308. Indeed on being cross-examined by Mr Brealey QC, Mr Pillay agrees that from the perspective of MT, the tariffs should be cost based and accordingly, operation costs, fixed costs and costs of capital should be recovered. And Mr Pillay agrees that operation costs would cover salaries, interconnection fees and maintenance costs whilst costs of capital would cover costs of remunerating investors either in the form of equity or debt investment. Mr Thomas also agrees with Mr Brealey QC that a commercially sustainable tariff need to take into account the direct costs including interconnection costs and the indirect costa such as costs of capital.

309. Mr Forrest's analysis of the tariffs of Emtel and those of Cellplus at its launch is dealt with at paragraphs 165 to 186. Mr Forrest concludes that the tariffs of Emtel were reasonable and those of Cellplus were unreasonable.

310. In coming to the conclusion that the average domestic per minute tariff of Emtel at the time of the launch by Cellplus of its GSM service was reasonable, Mr Forrest calculated the domestic airtime FAC per minute. Mr Forrest has explained the reasons underlying his approach of taking into consideration the full economic costs of providing a one minute domestic call. I find that the reasons advanced by Mr Forrest are commercially realistic and

cogent. The approach that full economic costs must be recovered is also supported by Mr Pillay and Mr Thomas.

311. Mr Forrest has also set down in detail his FAC calculations based on data from Emtel's management accounts. Mr Thomas views the use made by Mr Forrest of the accounting data from the point of view of a regulator and levels several criticisms at the methodology resorted to by Mr Forrest.

312. In the view of Mr Thomas, Mr Forrest uses a simplistic approach and does not make the necessary economic adjustments to the accounting data. Thus Mr Forrest makes use of net book values (NBV) rather than modern equivalent asset values (MEAV). Subscriber acquisition costs are not treated as investments and spread over an appropriate period. Accounting depreciation rather than economic depreciation which would spread cost more evenly, is resorted to. Other figures for cost of capital are available. Mr Forrest has used a "residual FAC approach" instead of allocating costs to all services using appropriate cost allocation drivers. Lastly, Mr Forrest uses a 6 month smoothing to present his FAC analysis, which has the effect of increasing it.

313. The above criticisms have been dealt with in the written submissions of Emtel. It is submitted on behalf of Emtel that granted the criticisms regarding net book values, depreciation of subscriber acquisition costs, depreciation profiles used and cost of capital are warranted, which Emtel does not admit, yet the incidence on the domestic FAC per minute would not be of great consequence. Also Mr Thomas does not provide an alternative FAC analysis which could then shed more light on the validity of the criticisms made.

314. On the other hand, it is submitted that the "residual FAC approach" of Mr Forrest to assess the reasonableness of tariffs is pragmatic and is appropriate. Firstly, Mr Forrest's approach in relying on the components of total economic cost as set out in paragraph 5.3 of P744 and not on the total costs and total revenue is pragmatic and suited to assessing the reasonableness of tariffs as required for this claim. It would be unrealistic to use the methodology suggested by Mr Thomas which would have taken a few years and cost million of pounds. Secondly, Mr Forrest rightly focuses his economic cost analysis on the domestic airtime and subscription tariffs, which together constitute the largest portion of Emtel's revenue.

315. Mr Forrest's use of a 6 month smoothing to present the FAC does not in my view, have any incidence on Emtel's domestic FAC per minute at the launch of the GSM service by Cellplus. Its incidence on the loss suffered by Emtel will be dealt with later.

316. Mr Forrest checks the reasonableness of Emtel's tariffs not only from its domestic FAC per minute but also from the efficiency and profitability of Emtel and from benchmarking with international tariffs.

317. In my view, Mr Forrest has shown that he has carried out a thorough analysis of the reasonableness of Emtel's tariffs and has justified all the considerations that he took into account. I find that I can rely on his analysis that Emtel's tariffs in October 1996 were reasonable.

318. As regards his analysis of Cellplus' tariffs, Mr Forrest readily accepts the errors pointed out to him by Mr Basset SC and highlighted at paragraphs 181 to 185 above. However in the view of Mr Forrest, the errors bear little impact on his conclusion that the domestic FAC per minute of Cellplus is well above the tariffs charged and that therefore the tariffs of Cellplus at the launch of its GSM service were unreasonable. Updated calculations of Cellplus' FAC which take into account the errors highlighted are provided at Appendix A of P 752. The domestic FAC per minute in the year ending June 1997 was Rs 8.1; it went down to Rs 5.0 in the following year and in the year ending June 2002 was Rs 1.9.

319. Mr Forrest also takes into account that Cellplus made a loss over the claim period without accounting for finance costs and also that Cellplus benefited from a high level of cross-subsidy from MT and concludes that Cellplus' tariffs cannot be reasonable.

320. The preponderance of evidence adduced establishes that the tariffs of Cellplus were unreasonable and were based on the cross-subsidy that Cellplus was benefiting from MT. Indeed when being cross-examined, Mr Pillay agrees that the tariffs proposed and practised by Cellplus were based on the assumption that Cellplus was to benefit from a three year grace period during which it would not have to pay interconnect fees. This was why it was important for Cellplus to benefit from the three year grace period **(VOLUME III page 6759).**

321. Furthermore although Mr Pillay insists that the tariffs were cost based, no attempt has been made by Cellplus to show that the tariffs of Cellplus were in fact cost based. On the other hand, Mr Mooroogen readily admits that the tariffs of Cellplus in October 1996 were fixed in 1995 and are the same that appear in the ten year financial forecasts at D2.27 when MT

was expecting a three year period of grace for interconnection fees **(VOLUME III page 6406)**.

Emtel's response to the lower tariffs of Cellplus

322. The evidence adduced shows that there is no disagreement that in order not to lose its customers, Emtel had to reduce its tariffs to match those of Cellplus. Mr Currimjee explains so. Mr Dabeesing agrees that from a commercial perspective, Emtel was compelled to lower its tariffs. MT recognises that Emtel "*was compelled to lower same* (tariffs) *as a result of Cellplus' entry in the market"* **(Document D3.34)**.

323. The loss of tariff income invoked by Emtel has therefore a direct link with the breach of condition against cross subsidisation set down in the GSM licence of Cellplus. It also constitutes a "*préjudice certain."*

324. It was put to Mr Forrest in cross-examination by Mr Chetty SC that in the scenario of a wrong having been committed, the damages to Emtel are the costs incurred "(*1*) *to retain its bank of subscribers; (2) to develop its bank of subscribers; (3) to generate earnings from its bank of subscribers; and (4) to generate earnings from a bigger bank of subscribers"* **(VOLUME III page 5806)**. Mr Forrest disagrees that there is a cost of retaining customers and reiterates that the damages are between what Emtel would have earned had tariffs not fallen sharply in October 1996 and what it actually earned i.e an economic loss. In any event, no evidence was adduced in support of this alternative economic loss.

EMTEL'S CASE OF ECONOMIC LOSS

325. Emtel claims an economic loss. Such economic loss clearly, in my view, amounts to an "*atteinte……à la capacité de concurrence de la victime des agissements déloyaux"* and to a "*trouble commercial"* that are liable to be compensated under article 1382.

326. Furthermore, Article 1149 of the Code Civil provides as follows:

"*Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé sauf les exceptions et modifications ci-après."*

THE CALCULATION OF AN ECONOMIC LOSS

327. As observed by Mr Chetty SC, very few Mauritian cases have dealt with economic loss for tort.

328. However, Mr Chetty SC refers me to a very interesting article entitled **L'Évaluation des Préjudices Économiques** by Professeur Maurice Nussenbaum and published in the **Revue de Droit Bancaire et Financier – Revue Bimestrielle Lexis Nexis Jurisclasseur - Mai - Juin 2013.** Professeur Nussenbaum is a professor of finance at l'Université Paris IX Dauphine and an "*expert financier agréé par la Cour de Cassation."* The article sheds light on a few of the principles underlying the calculation of economic loss.

329. Professeur Nussenbaum highlights the following:

Firstly, economic loss is loss sustained in connection with an economic activity. It is assessed by an analysis of the economic situation resulting from a tortious act and that which would have been "*but for"* the tortious act. Professeur Nussenbaum writes at paragraph 5.

"*La catégorie spécifique de préjudice que l'on qualifie d'économique n'existe pas en droit français.*

On retient cependant généralement la définition suivante:

Un préjudice économique est lié à une activité économique de production ou de service (distincts de l'atteinte à une chose ou une personne ou consécutive à une telle atteinte).

D'une manière générale, on traduit économiquement cet écart entre situation normale et situation réelle par des écarts de flux économiques.

……..

L'analyse de l'écart entre la situation réelle et la situation normale permet de déterminer des coûts supplémentaires et un manque à gagner".

Secondly, the finding of and assessment of an economic loss are within the province of the Court. On the role of the Court, Professeur Nussenbaum writes at paragraph 8

"*Il revient au juge de décider à partir des analyses factuelles (qui peuvent être menées par l'expert)*

- *de l'existence d'un lien direct entre faute et préjudice ,*
- *de la nature des préjudices: coûts subis et/ou manques à gagner,*
- *de l'horizon temporel: passé ou futur et nombre d'années à prendre en compte.*

Thirdly, economic models of the situation "*but for"* are resorted to in appropriate cases. On economic models, Professeur Nussenbaum writes at paragraph 9.

"*La situation de référence est souvent difficile à définir de manière unique. En matière de concurrence il s'agit de définir un scénario contrefactuel pour lequel on peut se référér à des invariants comme par exemple la perte de parts de marché par rapport à ce qu'elle était auparavant ou bien encore par rapport à la part de marché futur lorsque la situation aura été retablie.*

On peut également se referer à la situation de sociétés comparables non affectées par le même préjudice. Lorsque ces références empiriques ne sont pas disponibles, il convient alors de construire un modèle de reference.

La modélisation peut s'appuyer sur différentes techniques:
- Comptable: par comparaison avec des prévisions budgétaires à conditions d'établir que ces dernières sont pertinentes.
- Économique: en simulant les conditions normales de marché (prix, part de marché….)
- Économétrique et statistique pour effectuer des projections ou rechercher des projections des éléments comparables.

On voit donc que le juge aura nécessairement à examiner la pertinence et la fiabilité des démonstrations qui lui sont présentées afin de retenir ce qui doit constituer la situation de référence pour établir le préjudice*."* **(Emphasis added)**

Fourthly, the "*but for"* scenario is often speculative. Professeur Nussenbaum writes at paragraph 16

'

"*Le plus souvent celle-ci s'avère "speculative" par nature puisqu'il faut décrier ce qui serait passé en l'absence de préjudice.*

Sa définition doit être validée juridiquement car il s'agit de dire ce qui serait passé en l'absence de faute. C'est-à-dire ce que la victime était en droit d'attendre. Il s'agit de définir une situation contrefactuelle et même si l'expert peut apporter des éléments de fait notamment par comparaison ou par modélisation, il revient au juge de l'analyser."

At paragraph 17 Professeur Nussenbaum states:

"*Les approches modélisées sont controversées."*

Fifthly, at paragraphs 19 and 20, Professeur Nussenbaum expresses the view that there may be uncertainty as to the exact quantum of damages.

"*De manière assez fréquente, un préjudice certain peut présenter des incertitudes quant à la mesure du* quantum *des dommages.*

En effet, si le préjudice doit être certain, la mesure de son quantum peut-être incertaine et aléatoire.

De quelles alternatives dispose-t-on?

On peut retenir une des options suivantes:

- *La partie certaine du* quantum *mais on risqué ainsi de minorer les dommages,*
- *Le* quantum *le plus probable,*
- *Le* quantum *le plus probable diminué d'un abatement pour incertitude.*

Dans ce context, qui doit être penalisé par l'incertitude de la mesure?

En toute logique, le défendeur ne devrait pas bénéficier de l'incertitude dès lors qu'il ne fournit pas toutes les informations utiles. Le système français d'administration de la preuve, bénéficie cependant dans les faits, souvent au défendeur car la charge de la preuve revient au demandeur et la collaboration du défendeur à la manifestation de la vérité peut être limitée.

De notre point de vue dès lors que la faute est établie, les effets de l'incertitude devraient être partagés ce qui signifie qu'ils devraient en partie bénéficier à la victime. Comment parvenir à un tel résultat? En mettant à contribution également le défendeur afin qu'il fournisse, lui aussi la preuve contraire."

The views of Professeur Nussenbaum are very pertinent and relevant when examining and assessing the reliability of an economic model of loss of income.

EMTEL'S ECONOMIC LOSS

330. The calculation of Emtel's economic loss by Mr Forrest is dealt with at paragraphs 191 to 217 above.

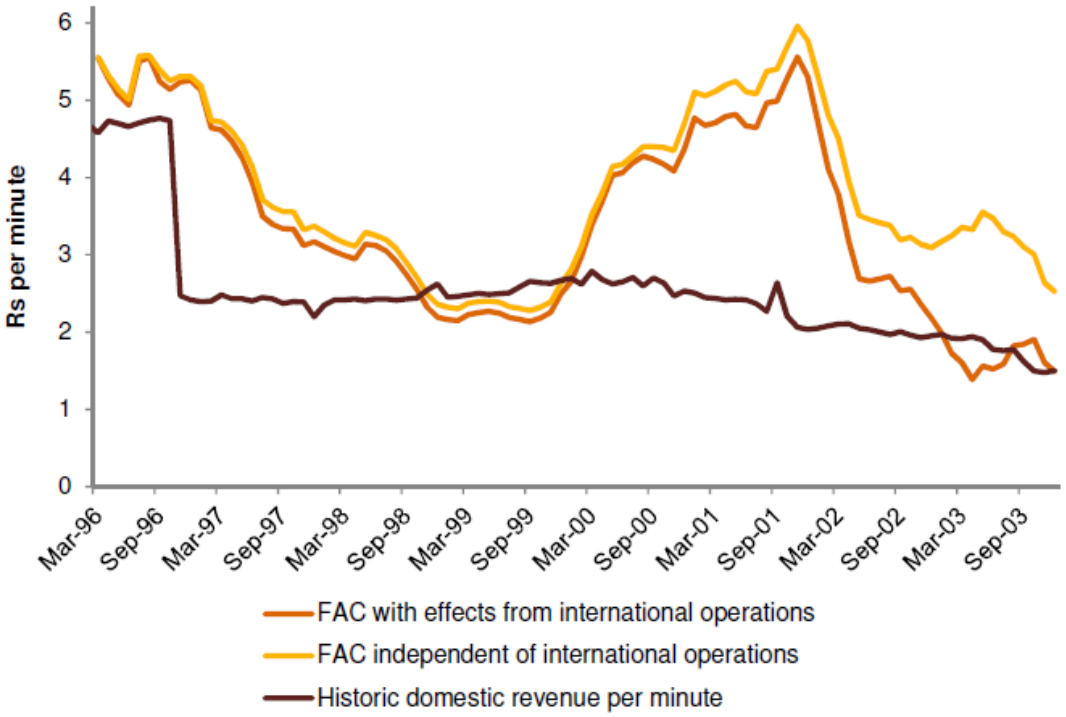
331. I have considered carefully the chart of the reasonable tariffs path which is at the heart of Mr Forrest's calculations and the different assumptions underlying it in the light of the evidence in this case.

332. As regards the starting point of the path of reasonable tariffs, I take into account that Mr Forrest made a comprehensive analysis of the average domestic tariff of Emtel. The analysis is dealt with at paragraphs 165 to 177 above. To sum up, the analysis took into consideration that the weighted average domestic airtime tariff of Rs 4.87 per minute was then below Emtel's FAC of providing domestic calls, which was Rs 5.40 per minute for the year to August 1996. Emtel was then making a profit margin of 16% in 1995, which was below that of international peers (27%) and MT at the time (25%). Emtel was according to the evidence, efficient in relation to equipment purchases, and efficient in both staffing and operational costs when compared to those of Cellplus. Emtel's tariffs were considerably below international cellular tariffs in 1996 prior to the drop in tariffs. To my mind, the conclusion of Mr Forrest that the starting point of the path of reasonable tariffs should be Emtel's average domestic airtime per minute is well reasoned and cogent and I can rely on this conclusion.

333. On the other hand, Mr Forrest's analysis as to the point at which the path of reasonable tariffs stops which is in his view towards the end of 2002 and which also marks the end of the claim period is not free from difficulty. The reasons why Mr Forrest concludes that prices became reasonable again towards the end of the year 2002 are set out at paragraph 197 above.

334. I bear in mind all the considerations that Mr Forrest took into account. One of the considerations is that towards the end of 2002, the lines of costs and revenues were becoming closer as shown in **Document P744 Figure 5.2.**

Figure 5.2 Domestic revenue per minute and Domestic airtime FAC per minute



Source: Emtel

335. The above chart is based on data from Emtel's management accounts. The chart is however drawn on a six month trailing average of the domestic revenue per minute and of the domestic FAC per minute of Emtel.

336. Using the same data as Mr Forrest, Mr Thomas replicates the chart at Figure 5.2 but on a month to month basis. The replicated chart of Mr Thomas is at **Exhibit DT 64.**

Exhibit DT64: Comparison of Emtel's total revenue, total economic costs and average operational costs per domestic airtime minute

Source: Analysis of supporting data to Figure 5.2 of Mr Forrest's First Report (file "FAC (shared with KPMG).xlsx")

337. At **Document P744** page 32 paragraphs 5.18 and 5.21, Mr Forrest gives his interpretation of Figure 5.2

"5.18 Figure 5.2 shows how Emtel's FAC per minute measure varied over time. It fell during the 1998-1999 period as subscribers and call volumes grew, but as operational costs were held reasonably steady. The domestic airtime FAC per minute measure rose over the period 2000 to 2001 largely as a consequence of GSM investment. From 2002 the total economic costs remained relatively constant, but considerable subscriber and call volume growth brought down the domestic airtime FAC per minute."

"5.21 Figure 5.2 shows that Emtel's domestic tariff was considerably below its FAC, from the point when Cellplus entered the Mauritius mobile telecommunications market until 2003, with the exception of a period from October 1998 to December 1999 when Emtel was controlling costs at the end of its analogue network life. …."

338. Mr Thomas explains the replicated chart and divides it into two periods. The first period starts in 1994 and ends in 1999. In Mr Thomas' view, up to the end of 1996, Emtel was broadly earning per minute an amount that fell just under the FAC i.e including cost of

capital. When Cellplus enters the market, the revenue line goes down but less dramatically than in Figure 5.2. In Mr Thomas' further view, the replicated chart shows that Emtel reacts well to Cellplus' entry. In March 1998, revenue starts to exceed operational costs. The revenue line crosses the FAC line in July/ August 1998 and stays as such until September to December 1998. (**VOLUME III page 6893).**

339. The second period on Mr Thomas' replicated chart starts in 1999. At this point in time, Emtel effectively makes losses. Mr Thomas is of the view that this is not surprising as Emtel was rolling out its GSM network. At **Exhibit DT 65** Mr Thomas draws a chart to show Emtel's unit costs per domestic airtime minute from June 1994 to December 2003. Depreciation costs in the wake of the writing off of the analogue network went up. Operating and other costs presumably in connection with the introduction of the GSM also went up. It can be seen therefore that the total economic costs line and the total operational costs line are significantly higher than the total average revenue line. Mr Thomas interprets the second period as being entirely consistent with the start up phase of the GSM.

340. Mr Thomas concludes that Emtel did suffer losses in the early period after Cellplus' entry but it reacted well in reducing its costs to the extent that by the end of 1998, it was actually making more profits which compensated for the losses that it incurred in the prior period. The argument that subsequent profits made up for previous loss of income cannot hold. It does not take into consideration for example the action taken by Emtel to remedy its financial situation in 1998.

341. It is noted that both Mr Forrest and Mr Thomas express the view that as from 1999, the rolling out of the GSM network by Emtel had an incidence on its FAC and by implication on the losses incurred by it since the level of revenue did not significantly go down between 1998 and 2002. The preponderance of evidence therefore points to the fact that losses incurred by Emtel as from 1999 were at least partly as a result of its switching to GSM technology, investing in the network and promoting the new technology.

342. Figure 5.2 also shows that by September 1998 the domestic revenue per minute has caught up with the domestic airtime FAC per minute. To my mind, this is a strong indication that tariffs were then matching fully allocated costs and were therefore reasonable. By the end of 1998, Emtel was recouping its FAC and this is so until December 1999 when total economic costs and operational expenses go up because as explained by Mr Forrest and Mr Thomas, Emtel was investing in the GSM technology.

343. Another indication that tariffs might have fallen to a reasonable level earlier than the end of 2002 is the admission of Mr Forrest on being cross-examined by Mr Basset SC that in 2003, the counterfactual tariff is higher than the actual tariff **(VOLUME II page 5973).**

344. The evidence on record shows on a balance of probabilities that tariffs have become reasonable by the end of 1998 marking the end of the claim period.

345. Mr Forrest makes the point that the counterfactual model should disregard the use of hindsight. Thus, he does not take into account the consequential effects of economies of scale during the claim period when the increased number of subscribers and the increased call volumes reduced the costs of providing mobile telecommunications services more quickly than expected. True it is that the counterfactual model is to project the reasonable tariffs path had Cellplus not cut the mobile tariffs prevailing in October 1996 by half. However, on the evidence adduced, there are many added reasons apart from lower tariffs which could explain the increased number of subscribers and the increased call volumes which brought down the economic costs of a domestic call per minute and therefore set the reasonable tariff at about the end of 1998. These reasons must be taken into account when assessing the economic loss.

346. One of the possible reasons is that Cellplus effected a soft commercial launch in March/ April 1996 and already had 4000 subscribers at the end of August 1996. By the end of August 1996, Cellplus had achieved a 30% of the market share, thus in my view, bringing forward and accelerating the networks effect. The number of mobile subscribers which was 21,000 in 1996 rose to 62,000 in 1998; the penetration rate of mobile telephony which was 1.8% in 1996 rose to 5.3% in 1998 **(Mobile Statistics Table 26 Document D2.2A).**

347. Another possible reason is the effect of the new GSM technology. Furthermore, the introduction of the new technology was also given great publicity - and at times aggressive - and press coverage as can be seen from the numerous press cuttings produced by Emtel.

348. If 1998 marks the end of the claim period, then the glide of reasonable tariffs path was not as gentle as suggested by Mr Forrest thus impacting on the calculations on the loss by Mr Forrest. Mr Thomas who agrees that Emtel suffered losses until the end of 1998 albeit he is of the view that Emtel recouped its losses thereafter, does not propose any counterfactual for the assessment of the economic loss. Professeur Nussenbaum suggests that in a case where the economic loss has been proved but the quantum is uncertain, then the defendant

should be required to give its assessment "*mis à contribution."* However, our system knows no such requirement and it is for the plaintiff to prove its case.

349. Otherwise, I have carefully considered the other aspects of the assessment of the quantum of loss made by Mr Forrest in the counterfactual model. Mr Forrest explains that he has taken care not to overstate the claim of Emtel and has adopted a conservative approach. Thus, Mr Forrest conservatively assumes that the market would have continued to grow at the rate prior to Cellplus' entry when in fact the market grew at a higher rate when the tariffs dropped. Mr Forrest adopts the growth rate of 4.39% which is the rate over the 26 months leading to March 1996. The growth rate of 4.39% ends in February 1996 and is in my view reasonable as it does not take into account Cellplus' soft launch activities which started in March 1996. The growth rate of 4.39 % also does not take into account the period between 1990 to 1994 as the market was in its infancy, handsets were expensive and the networks effect small. This was also the period when Emtel experienced difficulties in spreading its network.

350. I have also carefully considered all the steps undertaken by Mr Forrest as set out in paragraphs 191 to 217 above and I am satisfied that since Mr Forrest has been conservative in his approach and also since the first step in the glide of tariffs in the counterfactual is a 10% fall, I can still rely on the calculations of Mr Forrest for the loss of tariff income suffered by Emtel in the counterfactual case for the years 1996 to 1998.

351. The calculations of Emtel's loss by Mr Forrest - in the market share loss scenario - are set out in **Document P744 at page 86 Table 10.4.** In the light of the evidence establishing that Cellplus started its commercial activities before it actually obtained its licence on 5 September 1996 albeit the licence was backdated to March 1996, I find that an award for damages for the period of March 1996 to August 1996 is reasonable and just and the case of the market share loss has been made out.

352. Should compensatory interests be awarded? Mr Forrest also provides a set of calculations based on losses in each year separately using simple interest at the statutory rate which was 11% up to February 2004 and 8% as from February 2004 and an alternative set of calculations based on compound interest i.e the calculations include interest on previously calculated interest amounts.

353. On the award of damages with interest "*dommages-intérêts",* article 1153 of the Code Civil provides as follows:

Art. 1153 *(L. no 75-619 du 11 juill. 1975) "Dans les obligations qui se bornent au paiement d'une certaine somme, les dommages-intérêts resultant du retard dans l'exécution ne consistent jamais que dans la condamnation aux intétêts au taux légal, sauf les règles particulières au commerce et au cautionnement.*

Ces dommages et intérêts sont dus sans que le créancier soit tenu de justifier d'aucune perte.

Il ne sont dus que du jour de la sommation de payer, excepté dans le cas où la loi les fait courir de plein droit.

Le créancier auquel son débiteur en retard a causé, par sa mauvaise foi, un préjudice indépendant de ce retard, peut obtenir des dommages et intérêts distincts des intérêts moratoires de la créance."

Article 1153 in its alinéa 3 is to the effect that save in instances provided by law, an award for interest for delay in settling the amount due ("*intérêts moratoires")* runs as from when the award for damages is made. I read from the **Méga Code Civil 2003 article 1153 note 19**

19. Créances indemnitaires. *Tant en matière délictuelle qu'en matière contractuelle, la créance de reparation ne peut produire d'intérêts moratoires que du jour où elle est allouée judiciairement. Civ. 1re, 16 mars 1966: Bull. Civ. I, no 190. Dans le même sens, V. par exemple: Civ. 3e, 17 juin 1975: Bull. Civ. III, no 203. 17 juill. 1975: Bull. Civ. III, no 261 (decision réservant le cas du préjudice distinct).*

354. However, the same article in its alinéa 4 provides that where the defendant has on account of his bad faith caused to the claimant a loss distinct and separate from the loss resulting from the delay in settling an amount due, an award in compensatory damages with interest may be made. An extensive explanation of Article 1153 alinéa 4 in the French Civil Code - which is in similar terms - is given in **Juris Classeur Civil Art 1146 à 1155 Fasc 20** at **note 38**

38. – Dérogations tenant à la nature du préjudice et au comportement du débiteur.

…….

Ce n'est que dans l'hypothèse où est constaté un préjudice «indépendant de retard» que des dommages et intétêts supplémentaires sont envisageables. On parle alors de dommages et intérêt compensatoires, dont le montant dépend de l'étendue du préjudice souverainement apprécié par les tribunaux.

……

L'allocation de dommages et intérêts compensatoires sur la base de l'alinéa 4 de l'article 1153, est subordonnée à la réunion de deux conditions visées par le texte.

D'une part, le créancier doit faire la preuve d'un «préjudice indépendant du retard». Autrement dit, le demandeur doit démontrer avoir subi un préjudice spécial, distinct de la seule privation de la somme d'argent à l'échéance (Cass. 1re civ., 14 mars 2000: Juris-Data no 2000-001067,……

……

Il peut être constitué par le fait d'avoir été obligé de faire des «frais et des démarches» (Cass. 1re civ., 9 déc. 1970: Bull. civ.I, no 325), le fait d'avoir été privé d'un fonds de roulement important (Cass. 1re civ., 6 nov. 1963: Bull. Civ. I, no 481), le fait d'avoir fait l'object d'une saisie de ses biens (Cass. Req., 7 mai 1872: DP 1873, I, p.40).

.

……..

D'autre part, le créancier doit faire la preuve de la «mauvaise foi» du débiteur. La conception jurisprudentielle de la mauvaise foi a évolué au fil du temps. Au lendemain de la loi du 1900, les tribunaux se contentaient d'une faute quelconque (Cass civ., 16 juin 1903: D. 19003, I, p. 407). Par la suite, la mauvaise foi a été définie comme le refus délibéré d'exécuter son obligation monétaire, en ayant conscience du préjudice cause par cette attitude. Autrement dit, on exigeait du créancier, qu'il établisse l'intention de nuire de son débiteur (cass. Civ., 7 mai 1924, préc. – Cass. Com., 24 avt. 1969: Bull. Civ. IV, no 143). A l'heure actuelle, il semble que la jurisprudence adopte une conception médiane en exigeant la demonstration d'une faute caractérisée du débiteur (lenteurs exagérées, résistance abusive, passivité…circonstance qui ne traduisent pas nécessairement une intention de nuire au débiteur). ***Par exemple, la mauvaise foi est caractérisée lorsque le débiteur oppose une résistance ou utilise des moyens purement dilatoires, notamment par l'abus de voies de recours (Cass. 1re civ., 9 déc, 1970: JCP G 1971, II, 16920, note M.D.P.S).*** *De même, est de mauvaise foi le débiteur qui «connaissait la situation exacte et avait volontairement différé le paiement» (Cass. 1er civ., 13 avr. 1983: JCP G 1983, IV, p. 193).* ***(Emphasis added)***

355. In the present matter, Mr Currimjee has explained how the drop in tariffs resulted in a reduction in revenue for Emtel in the years 1997 and 1998. Emtel therefore had to seek loan and overdraft facilities and also sell its stake in Bharati Cellular. The testimony of Mr Currimjee is dealt with in more details at paragraphs 223 to 226 above. Emtel has therefore proved "*un préjudice indépendant de ce retard".*

356. Furthermore, the chequered history of the present claim was highlighted in the judgment of the Court of Civil Appeal in the two appeals brought by MT and Cellplus from an interlocutory judgment **(2015 SCJ 169).** There is no need for me to repeat it here. After the decision of the Judicial Committee of the Privy Council in the year 2000, it would at least be expected that the Authority, MT and Cellplus would have taken heed of the observations therein and proceeded at least to a narrowing down of the issues but it did not happen. I therefore find that "*mauvaise foi"* has also been proved and that compensatory damages

with interest pursuant to article 1153 alinéa 4 are warranted and that the interest should run as from the date of the tortious act.

357. On the other hand, the requirements of article 1154 – which allows for compound interest, called *anatocisme* - have not been satisfied since compound interest is capitalisation of interest and is chargeable only on interest due and demandable.

358. The amounts of damages at simple interest for the period 1996 to December 1998 are set out as follows at **Document P744** at page 86 table 10.4:

(i) March 1996 to August 1996 – Rs 11,360,637
(ii) September 1996 to December 1996 – Rs 59,545,150
(iii) January 1997 to December 1997 – Rs 254,762,004
(iv) January 1998 to December 1998 – Rs 228,472,109

359. Should the Authority, MT and Cellplus be held liable *in solidum* for the damages caused to Emtel? The following principles on *"obligation"* in solidum" can be read in **Juris Classeur Civil Art 1197 à 1216 fasc 30 verbo Solidarité**

2o Responsabilité civile

(a) Coauteurs d'un même dommage

7. – Conditions. – *Pour que les coauteurs d'un même dommage soient tenus in solidum, il faut que chaque coauteur soit à l'origine d'un fait générateur lié au dommage unique subi par la victime par un lien de causalité. Il faut donc plusieurs faits générateurs; conjugés qui soient à l'origine d'un même dommage. Le fait générateur peut être qualifié de complexe car il résulte de la combinaison d'un ensemble de faits générateurs individuels. La nature du fait générateur dont chaque coauteur est à l'origine est sans importance. Le fait générateur en cause peut être délictuel, extracontractuel ou contractuel. Il peut être volontaire ou involontaire. Il peut être subjectif ou objectif. Toutes les combinaisons sont admises en jurisprudence. (M. Planiol et G. Ripert par P. Esmein, Traité pratique de droit civil fraçais, t. VI, Les Obligations, 1re partie: LGDJ, 2e éd. 1952, no 685. – F. Terré, Ph. Simler et Y. Lequette, op, cit., no 1262. – G. Viney, P. Jourdain et S. Carval, Traité de droit civil ss dir. De J. Ghestin, Les conditions de la responsabilité: LGDJ, 4e éd. 2013, no 420).*

360. It has been amply proved that although the act giving rise to liability "*fait générateur"* differs *quoad* the Authority, MT and Cellplus, yet the breach of licence conditions on the part of MT and Cellplus on the one hand and the tolerance shown on the part of the Authority together caused Emtel's loss. The Authority, MT and Cellplus should therefore be held jointly liable.

361. For the reasons given above, I order defendants nos 1, 2 and 3 to pay to the plaintiff company jointly and in solido, the total amount of Rs 554,139,900 (Rs 11,360,637 + Rs 59,545,150 + Rs 254,762,004 + Rs 228, 472,109) with interests and costs. The plaint against defendant no 4 is dismissed.

A. F. Chui Yew Cheong
Judge

09 August 2017

For Plaintiff	**:**	**Mr T. Koenig, S.A.** **Mr M. Brealey, Q.C. (of the English Bar) together with** **Mr A. Moollan S.C.** **Miss E. De Speville, of Counsel**
For Defendant No. 1	**:**	**Mr Attorney R. Rajroop** **Mr K. Trilochun of Counsel together with** **Mr A. Kallee, of Counsel** **Miss H. Mahamoodally, of Counsel** **Miss D. Ramdewar, of Counsel**
For Defendant No. 2	**:**	**Mr A. Robert, S.A.** **Mr R. Chetty, S.C together with** **Mr Y. Reesaul, of Counsel** **Mr N. Parsooramen, of Counsel** **Miss V. Govinden, of Counsel**
For Defendant No. 3	**:**	**Mr A. Robert, S.A.** **Mr D. Basset, S.C. together with** **Mr G. Basset, of Counsel** **Mr H. Dhanjee, of Counsel** **Mr N. Patten, of Counsel**
For Defendant No. 4	**:**	**Chief State Attorney** **Mr L. Aujayeb, Ag. Assistant Solicitor General** **together with Miss R. S. Appanna, State Counsel** **Miss K Dwarka-Davay, State Counsel**