IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV 05568

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

Mr. Vincent Nelson Q.C., Mr. Ransford Braham and Mr. Gavin Goffe, instructed by Myers Fletcher & Gordon, Attorneys-at-Law for the Claimant. Mrs. Kamina Johnson-Smith, Attorney-at-Law, Senior Legal and Regulatory Counsel, attending on behalf of the Claimant.

Mr. Michael Hylton Q.C. and Mrs. Georgia Gibson-Henlin instructed by Henlin Gibson Henlin, Attorneys-at-Law for the Defendant.
Mr. Richard Fraser, Attorney-at-Law and Legal Counsel, and Mr. Jan Tjernell, General Counsel, attending on behalf of the Defendant.

Heard: **7th, 14th, 16th April, 22nd July, and September 2nd, 2010.**

APPLICATION FOR INTERLOCUTORY MANDATORY INJUNCTION - DISTINCTION BETWEEN PRINCIPLES AND GUIDELINES - FAIR COMPETITION ACT 1993 - THE TELECOMMUNICATIONS ACT 2000 - RELEVANT MARKET-ABUSE OF DOMINANT POSITION IN A MARKET-DISCRIMINATORY PRICING - EXPERT EVIDENCE -STAGE AT WHICH TO BE APPLIED FOR-PART 32 OF C.P.R., PART 17 - INTERIM REMEDIES, PART 30- AFFIDAVITS

IN CHAMBERS

Mangatal J:

1. The Claimant "Lime" and the Defendant "Digicel" are competitors in a number of the various markets comprising the telecommunications industry in Jamaica. This Claim was filed by Lime on the 26th of October 2009. It involves an allegation by Lime that Digicel is abusing its dominant position in the market for termination of telephone calls on Digicel's mobile network in Jamaica, within the meaning of sections 19 and 20 of the Fair Trading Competition Act 1993, "the Act". Lime

also alleges that as a result of its actions, Digicel is in breach of sub-sections 30(1)(i),(ii) of the Telecommunications Act, "the Telecoms Act" as the termination charges imposed by Digicel on Lime's business subscribers and the effective fixed to mobile termination rate imputed in the tariff offered by Digicel to its business subscribers are discriminatory and/or unreasonable .

2. The present application is for injunctive relief until trial. The application seeks orders that:

    1. *Permission is granted to the Claimant to rely on the expert witness report of Liam Colley contained in his Affidavit filed in this matter.*
    2. *The Defendant is restrained until the trial of this action whether by itself or by its directors, officers, servants agents or otherwise howsoever from charging a wholesale fixed to mobile termination rate which has the effect of treating the Claimant and/or its subscribers less favourably to terminate calls on the Defendant's mobile network than the Defendant charges its own fixed network subscribers to terminate calls on its mobile network.*
    3. *The Defendant shall forthwith and until further order of this Court, withdraw any direction, instruction, charging tariff, wholesale fixed to mobile termination rate or retail rate or discount which has the effect of treating the Claimant's business subscribers less favourably than the Defendant's business subscribers as to fixed to mobile calls.*
    4. *Costs to be costs in the claim.*

2A. **PRELIMINARY POINT-EXPERT REPORT** On the 7th of April Queen's Counsel Mr. Hylton on behalf of Digicel took a preliminary objection. This related to Lime's application seeking to rely upon the

expert witness report of Liam Colley contained in Affidavit form. It was submitted, amongst other matters, that the court's permission for the appointment of an expert is to be given at a case management conference in accordance with the general rule-Rule 32.6(2) of the Civil Procedure Rules 2002 "the C.P.R.". It was argued that the application to appoint the expert is premature. The matter, Mr. Hylton submitted, is still in its preliminary stages, and the issues that Mr. Colley has examined are mainly those that relate to the Claimant's case. Queen's Counsel Mr. Nelson countered by arguing that in urgent matters the Court can, and has ordered, that a party be permitted to rely upon an expert report prior to a case management conference.

3. I upheld the preliminary objection. Rule 32.6(2) of the C.P.R. states that the general rule is that the court's permission for the appointment of an expert is to be given at a case management conference. Provision is made for a number of other matters, including the right of the other party to put written questions to the expert, to be served with the report and copies of all written and supplementary instructions, and a note of any oral instructions. Additionally, the expert is supposed to certify that he or she has received no other instructions.

4. It seems to me that generally, it is contemplated that expert evidence is to be used for the purposes of trial, and the language of Rules 32.6, 32.15, and 32.16 support me in my view. Rule 32.2 headed "general duty of court and of parties" states that expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly (my emphasis). Further, under the more general rule, Rule 29.1 of Part 29, it is the court's power and duty to control the evidence to be given at any trial or hearing.

5. In my judgment, since it is no part of the court's function to engage in a mini-trial at the stage of an application for an interim injunction until trial, or to resolve the issues with any finality, generally speaking, it would not be appropriate for the court to require expert evidence at

this stage of the proceedings. The court is here concerned with identifying the issues and not with resolving them. Whether the court is required to determine if there are serious issues to be tried, or whether it is required to feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted, those appear to me to be matters that the court should ordinarily determine at this interlocutory stage without the need for opinion evidence, which is what expert evidence really is.

6. I see nothing in the application before me, which should require a departure from the norm or general rule, or from the related, though not identical rule that, the court's permission is to be given at a case management conference. I therefore refused the application set out at paragraph 1 of the Notice.

7. Further, I agreed with Mr. Hylton that Lime is not entitled to rely upon the Affidavit of Mr. Colley at all. This is because the whole thrust and purport of Mr. Colley's Affidavit is to give opinion evidence as an expert witness. Rule 30.3 governs the contents of Affidavits and Rule 17.3(1) speaks to the need for Affidavit evidence when applying for an interim remedy. When these Rules are read in conjunction, they do not appear to admit of opinion evidence, as opposed to evidence of facts. Only an expert is ordinarily permitted to give opinion evidence, and therefore, once the court has refused the application to appoint him, and to rely upon his report as an expert, the Affidavit is inadmissible on this application.

8. The Statements of Case, Affidavits, Exhibits, Authorities and Submissions which have been filed are long and detailed. However, I will attempt to summarize the relevant facts and issues. I wish to thank the Attorneys representing both parties for their invaluable assistance in that regard, and generally for the high level of preparation and thoroughness.

9. The Particulars of Claim summarize the basis of the claim by Lime and this application is supported by the Affidavits of William George Houston, filed on the 26th of October 2009 and 2nd March 2010 respectively. Mr. Houston indicates in his 2nd Affidavit that he is Lime's Managing Director and that Lime's principal business is the provision of telecommunication services. These include voice telephony services over its fixed and mobile network in the territory of Jamaica.

10. Digicel has filed a Defence to the Claim and in response to this application, has filed the Affidavits of Jan Tjernell sworn to respectively on the 27 January and 16 March, 2010. Mr. Tjernell states that he is the General Counsel for the Digicel Group of Companies, which Group includes the Defendant Digicel. Mr. Tjernell indicates that Digicel is and has been since 2001, amongst other things, a wireless telecommunications provider in Jamaica.

BACKGROUND TO THE CLAIM

11. In Jamaica, there are fixed network operators and mobile network operators. The largest fixed network operator is Lime and the largest mobile network operator is Digicel. Call origination is the technical term used to describe the process by which a telephone call is sent from a fixed to mobile network, when the caller dials a number. Call termination is the technical term used to describe the process by which a telephone call is received on a fixed or mobile network so that it may in turn be received by the called party. Mobile call termination refers to the process by which a call is received on a mobile network so that it may in turn be received by a mobile telephone subscriber.

12. In order for a call to be sent from one caller to another, it must be originated on the network of the operator to which the caller subscribes (for example, Lime's fixed network) and then sent to and terminated

on the network of the operator to which the called party subscribes(for example, Digicel's mobile network).

13. Customers expect to be able to make calls from their fixed line or mobile phone to any other retail customer irrespective of the service provider to which the receiving party subscribes (e.g.) Lime to Digicel fixed or mobile or vice versa).

14. Network operators enter into contractual arrangements with each other for the provision of access to each other's networks. This is required under section 29 of the Telecoms Act. According to Mr. Houston, under those arrangements the terminating network operator charges a price for each call terminated on its network, known as a mobile call termination rate. According to Mr. Tjernell, compensation for terminating a call on a mobile network does not operate in that manner. He states that in Jamaica, the mobile operator is compensated for terminating Lime's fixed to mobile calls (FTM) by an amount which represents the balance of the retail revenues received from the calling party after Lime has deducted its costs of originating the call and transmitting it to the mobile operator. Mr. Tjernell says this is known as the fixed origination regime and that there is no mobile termination rate in the circumstances.

15. In Jamaica, the telecommunications industry operates a "calling party pays" ("C.P.P.") system which means that the entire cost of the call is paid for by the party originating the call. Termination rates are paid by the originating network operator to the terminating operator.

16. Usually the mobile network operators set different prices for terminating day-time, evening and weekend minutes. There are hundreds of millions of minutes terminated on the networks of the mobile network operators each year. Therefore, subject to traffic volumes, changes of a fraction of a dollar in the rates may make a difference of many millions of dollars in the income and expenditure of the mobile network operators.

17. According to Mr. Houston, all mobile networks have 100 per cent share of the market for termination of calls on their own network. Therefore, there is an absolute barrier to entry to such mobile networks which precludes the possibility of any other undertaking providing mobile call termination services on those individual mobile networks. Mr. Tjernell in his Affidavit indicates that it is current technological limitations which generally restrict the functionality of mobile handsets to offer call termination service on a single network.

18. The OUR, acting pursuant to sections 27 and 28 of the Telecoms Act, by Determination Notice dated 2nd September 2004 declared all mobile providers, including Lime and Digicel, to be dominant in the market to terminate calls on their respective mobile networks. Digicel sought a reconsideration of this decision by the OUR. The OUR subsequently confirmed the decision on 1 May 2007. Digicel lodged an appeal under section 62(1) of the Telecoms Act. The appeal resulted in a temporary stay of the Determination and a subsequent undertaking by the OUR that it would not rely upon its decision until the hearing of the appeal. At the time of hearing this application, the appeal had not yet been heard. It was heard on 12-16 May 2010, and on 31 May 2010, the Telecommunications Appeal Tribunal handed down its decision.

19. I had reserved my decision in relation to this injunction application on the 16th April 2010. By the consent of the parties, the decision the Tribunal was put before me. The Tribunal confirmed the OUR's determination that Digicel is dominant on its mobile network.

20. There is in existence an Interconnection Agreement between Lime and Digicel dated 18 April 2001. In May 2008 Digicel added its Fixed Wireless Broadband (WBB) Services to the Interconnection Agreement with Lime. Digicel thereafter effectively became an operator of a fixed line service.

21. In or about May 2008 Digicel formally launched its fixed line services to business customers only. The retail rate set by Digicel for calls from

its fixed line business customers to its mobile network was set, and still is J$4.00 per minute.

22. In or about December 2008 Digicel informed Lime that effective 1 January 2009 it would increase the retail peak rate charged by Lime to its fixed customers for calls to Digicel's mobile customers from J$7.00 per minute to J$8.50 and reduce the off-peak and weekend rates from J$7.00 to J $6.50 per minute.

23. By letter dated 5th December 2008, Lime wrote to the OUR, seeking the OUR's action with regard to, amongst other matters, what it alleged was a discriminatory pricing policy being implemented by Digicel.

24. By letter dated December 17 2008, the OUR responded to Lime's letter and indicated, amongst other matters, that the rates proposed by Digicel were below the rates approved by the OUR, and that the OUR therefore had no objection to them. In relation to the allegation about discriminatory pricing, the OUR closed its letter stating that that "is a matter which you may wish to take up with the Fair Trading Commission or via a private remedy given the current limitations on that agency."

25. By letter dated February 27 2009, Lime formally made a complaint about Digicel's alleged anti-competitive practices. I shall return to this letter later in this judgment.

LIME'S CASE

26. Lime claims that for the purposes of sections 19 and 20 of the Act, and these proceedings there are two relevant "markets" in the telecoms industry. The first is the Market to Terminate a Call on Digicel's Mobile Network. The Second is the retail market for business customers to originate calls from a fixed or mobile network in Jamaica, otherwise called the Domestic Market for Voice Origination Services to Business Customers.

27. Digicel is dominant in the Market to Terminate a Call on Digicel's Mobile Network. Reliance is placed by Lime on the OUR's Determination Notice dated the 2nd November 2004. Lime states that this determination was supported by the FTC.

28. As at September 2008 Digicel had approximately 1,900,000 mobile network subscribers. Lime states that in terms of the Domestic Voice Origination Market, Digicel represents at least 65% of all fixed and mobile subscribers. It claims that the effect of this share of subscribers is that a high proportion of business customers' calls terminate on the Digicel mobile network. Lime states that the market to terminate calls on Digicel's mobile network and the market for the origination of business customer calls have a close associative link.

29. Digicel has set a retail rate of J$4.00 per minute for business customers to call from Digicel fixed to Digicel mobile networks. However, it has set termination rates of between J$6.56 and J$4.83 per minute (depending whether the call is peak or off-peak) payable by LIME when LIME's customers (including business customers) call the Digicel mobile network. LIME indicates that if it were to charge J$4.00 per minute to its fixed business customers for calling customers on the Digicel mobile network, LIME would have to pay Digicel between J$6.56 and J$4.83 for such calls while receiving J$4.00 per minute from its customers. In addition to losing up to J$2.56 per minute on each call, LIME would also forego its costs of originating the call which range from J$1.35 to J$1.94 per minute. It is Lime's position that peak traffic accounts for approximately 60% of the overall traffic from Lime's fixed to Digicel's mobile network. The decrease in the off-peak rate was therefore purely cosmetic and does not ameliorate the impact on the fixed to mobile termination rates to Lime's fixed line customers. According to Lime, this is what is called a margin/price squeeze in competition law.

30. It is Lime's case that Digicel's conduct in setting high rates for the termination of fixed line calls from other networks to call Digicel's network, while setting low rates for business subscribers calling from Digicel's fixed network to Digicel's mobile network is an abuse of a dominant position within the meaning of section 20 of the Fair Competition Act. It is also argued that Section 48 of the Fair Competition Act gives Lime a cause of action in respect of an abuse of a dominant position which causes it loss.

31. Lime avers that there is a presumption that loss will result if there is a margin squeeze. LIME has suffered loss and apprehends significant losses from the margin squeeze.

32. Further, pursuant to section 30 of the Telecommunications Act 2000, Digicel being dominant on its mobile network, is required to provide interconnection on a non-discriminatory basis. Section 67 gives LIME a cause of action in respect of a breach of section 30.

33. Digicel ought to be prohibited by an interlocutory injunction from abusing its dominant position by way of margin squeeze and/or for charging discriminatory prices.

DIGICEL'S CASE

34. In its Defence, Digicel denies that it has abused any dominant position or that it is in breach of either the Act or the Telecoms Act. Lime's allegations and complaints about Digicel's strategy for entry into the fixed telecommunications sector for business customers must be seen against the backdrop of its "own historic and enduring incumbency in the provision of fixed line services in Jamaica, where it has only recently begun to experience competition from the Defendant and others, and where for the first time what it has termed its most valuable (i.e. profitable) customers have begun to be offered and exercised a competitive choice with a consequent and inevitable

reduction in the Claimant's revenues." Paragraph 19 of Mr. Tjernell's 1st Affidavit.

35. Digicel claims that DfDm (Digicel Fixed to Mobile) rate is a typical and perfectly legitimate way of competing for customer business where business customers in particular are buying a number of services and where Digicel is seeking to overcome advantages held by Lime.

36. Digicel states that its rates for interconnection or retail services were not calculated to and do not impede the maintenance or development of competition. Rather, they were essential for Digicel to penetrate Lime's monopolised fixed telecommunications sector for business customers and were effectively mandated by the bargaining power of the target business customers.

37. Any difference between the retail rates for its fixed wireless service, when compared to its interconnection charges for mobile termination, is not intended to produce, and does not actually result in a price squeeze, such as to impede the maintenance or development of effective competition or to lead to the demise or elimination of Lime.

38. It is Digicel's case that furthermore, its rates have encouraged and will continue to encourage the development of competition and increased choices for fixed line business customers. That Digicel's penetration of and the resulting competition within the monopolised fixed telecommunications sector as a result of reduced pricing, has and will continue to benefit the sector as a whole.

39. Digicel denies that the markets as alleged by Lime exist. It also denies that there is sufficient nexus between them, or that Digicel is dominant in any of them. Digicel also denies that any of its actions, including the setting of interconnection or retail rates, amount to an abuse of a dominant position.

40. It is Digicel's contention that the Act does not create an unqualified private cause of action in respect of loss occasioned by anti-competitive conduct. It also denies that it is in breach of the Telecoms Act.

APPLICATION BY LIME FOR ADMISSION OF FRESH EVIDENCE - AFFIDAVIT AND F.T.C. STAFF REPORT

41. Up to the time when I reserved judgment in April, there had been no report forthcoming or in evidence before me from the FTC in response to Lime's letter dated 27th February 2009 referred to in paragraph 26 above. On the 22nd of July, the earliest date when Counsel and I could conveniently reconvene, Lime made an application to be permitted to rely upon the evidence of Mrs. Kamina Johnson-Smith, contained in her Affidavit filed on June 29 2010. This Affidavit has exhibited to it, a letter from the FTC dated June 23, 2010 referring to Lime's complaint of 27th February 2009, and enclosing a document headed "Staff Report".

42. Mr. Hylton indicated that Digicel is not challenging the fact that the Court has power to consider fresh evidence at this stage, prior to handing down my decision. I do not intend therefore to discuss the cases such as **Charlesworth v. Relay** [1999] 4 All E.R. 397, and **Ladd v. Marshall** [1954] 3 All E.R. 745 which were cited by Lime's Attorneys. He indicated that he was not objecting to the Court looking at the Affidavit of Mrs. Johnson -Smith and its exhibits in order to determine admissibility. Digicel also had no objection to evidence being given of the fact that there has been a response from the FTC to Lime's letter of complaint. However, Mr. Hylton's submission was that this Report ought not to be admitted at this stage and he indicated that, even if this Report had been available prior to the hearing, he would still have been objecting to its admissibility. He indicated further, that in the event that my ruling is that the Report is admissible and ought to be admitted into evidence, then I should allow the parties to make further submissions before ruling on the injunction application. Based upon the fact that there is no objection to evidence as to the fact of the response from the FTC to Lime, I therefore intend to admit the Affidavit of Mrs. Johnson-Smith and the copy of the letter from the

FTC dated June 23 2010 and to focus my attention on the admissibility of the Report.

43. I must say, I found the submissions made on behalf of Lime on this point somewhat hard to follow. Contrary to Lime's submission that, (at paragraph 19 of their written submissions), the evidence is not being relied upon for the truth of the conclusions arrived at by the Commission, it seems fairly obvious that Lime wish to rely upon the contents of the Report for their truth, not just for the fact that a Report exists or that Mrs. Johnson-Smith received it. It appears to me that Lime does want to rely upon the conclusions of the Report in this interlocutory application. Even if it is not the conclusions that Lime is relying on, and I am hard pressed to accept that, but only other parts such as definitions of the market, obviously it is not Mrs. Johnson-Smith's evidence alone that is being relied upon, but the contents of the Report itself.

44. I agree with Digicel's submission that this document, which is headed "Staff Report", is not, nor does it purport to be, a decision or a finding by the FTC under section 21 of the Act. I am bolstered in my view, based on the wording of the Report itself, as well as of the letter to Lime under which it was enclosed, dated June 23, 2010. This letter, which is under the signature of the Executive Director of the F.T.C. Mr. David Miller, states that "The Staff of the Fair Trading Commission has completed its investigation into the matter at caption and forwards the enclosed report"(My emphasis). I also find support in our Court of Appeal's decision in **Jamaica Stock Exchange v. Fair Trading Commission** S.C.C.A. 92/97 decided January 29, 2001, unreported. At page 72, the Court held that the FTC was "performing the functions of complainant and adjudicator .....in breach of the rule of natural justice". It seems to me that this decision of the Court of Appeal would, at the very least, require the FTC to be very clear and precise about exactly what function it was performing under the Act. Whilst the FTC

has the power under the Act to carry out investigations based on complaints or on its own initiative, it also has the power to hold hearings, make findings and issue directions based on those findings. I accept Mr. Hylton's statement that the FTC have not notified Digicel of any finding; that is to be distinguished from merely sending a copy of this Report to Digicel. All that the FTC's letter indicates is that the Report will be forwarded to Digicel and a number of other bodies. Nor has the FTC issued any directions to Digicel as it would be required to do under section 21. It is hard to imagine that a finding of the FTC under section 21 could be communicated in this way. I therefore reject Lime's submission (at paragraph 20) that "the Commission has notified Digicel of its finding and this fact must not only be relevant but also be of significant weight" (my emphasis).

45. I am therefore of the view that this Report falls into a different category from a finding of a tribunal or expert administrative body. So what exactly is the nature of this Report? In my view it consists largely of opinion evidence, as opposed to evidence of the relevant facts. If this report is to be admissible at any stage of the proceedings, then that stage would be the trial stage. In that regard, it would have to gain admissibility on the basis that it is an expert report. It does not at this stage purport to be an expert report. In any event, I have already ruled that any expert report application has to fulfil the requirements of Part 32 of the C.P.R and should be made at the case management conference. My ruling is that this Report is not admissible at this juncture as the Court ought not to engage in a "mini-trial" at the hearing of this interlocutory application.

THE GRANT OF INTERLOCUTORY INJUNCTIONS.

46. In Jamaica, our courts have accepted and held upon numerous occasions that before an interlocutory injunction, or interim injunction until trial, is granted, the court should have in mind the considerations

set out by the House of Lords in **American Cyanamid v. Ethicon** [1975] 1 All E.R. 504, at PAGES 510-511.

The guidelines provided in **American Cyanamid** include:

(a) **Whether there is a serious issue to be tried. If there is, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the injunction.**

(b) **The Balance of Convenience- Including whether damages would be an adequate remedy.** If there is a serious issue to be tried, the court should then consider whether the applicant would be adequately compensated by an award of damages at the trial for the loss he would have suffered as a result of the defendant continuing to do what was sought to be stopped, or altered. If damages would be an adequate remedy, and the defendant would be in a financial position to pay them, normally no injunction should be granted.

If damages would not provide an adequate remedy for the applicant, then the court must consider whether the defendant would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented or affected in doing so between the time of the application and of the trial. If damages would be an adequate remedy and the plaintiff would be in a position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.

(c) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of the general balance of convenience arises.

(d) Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

47. There is no dispute about the fact that what is being sought in this case is a mandatory injunction until trial. As to sub-paragraphs (a) to (d) above, there is also agreement that those are relevant matters for the Court's consideration on the granting of an interlocutory mandatory injunction. See also per Lord Hoffman at paragraphs 16-19 of **NCB v. Olint** [2009] 1 W.L.R. 1405. However, there have been important points of departure between the Attorneys-at law for Lime and for Digicel in relation to the true purport of the recent Jamaican decision on this issue emanating from the Privy Council in **N.C.B. v. Olint.**

48. Under their submissions indexed, "**Serious issue to be tried/ High Degree of Assurance**, Digicel's Attorneys have referred to and relied upon a number of authorities, including **NCB v. Olint**. In **NCB v. Olint**, the Privy Council warned that the Court should not engage in "box-ticking" in relation to mandatory or prohibitory interlocutory injunctions.

49. In **NCB v. Olint** , Lord Hoffman at paragraphs 20 and 21 indicated that arguments over whether an injunction should be classified as prohibitory or mandatory are barren. Mr. Hylton on behalf of Digicel submitted that what Lord Hoffman was saying was barren was the argument about the distinction between mandatory and prohibitory, and not the distinction itself. He submitted that in cases where the matter is borderline, where there may be a reasonable debate about whether the form of interim injunction is mandatory or prohibitory, the court ought not to spend time considering arguments about that issue, but rather should look at the consequences of the actual injunction if granted or refused. On the other hand, in a case where there is no dispute as to whether the injunction is mandatory or not, then the normal consequence of the mandatory injunction would be that the Court would not grant it unless it felt a high degree of assurance that at the trial it will appear that the injunction was rightly granted. It is only if the case is an exceptional one that the Court will be prepared to grant

the relief without experiencing this high degree of assurance. It would appear that Digicel's Attorneys were arguing that it is at the stage when considering whether there is a serious issue to be tried that Lime must show that it has a clear case, so that the Court can feel a high degree of assurance that the claim will succeed at trial.

50. Mr. Hylton referred me to the decision of Hoffman J. himself (as he then was), in **Films Rover** where Lord Hoffman had earlier also made an analysis of whether certain arguments were barren.

51. In their original submissions and in their submissions in Reply, Lime have taken a different approach:

(Lime's original submissions)

> "57...(b) In deciding whether granting or withholding an injunction is more likely to produce a just result, the court should take whatever course seems likely to cause the least irremediable prejudice to one party or the other, whether or not the injunction is prohibitory or mandatory. Among the matters which the court may take into account are the prejudice which the claimant may suffer if an injunction is not granted or which the defendant may suffer if it is, the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking, and the likelihood that the injunction will turn out to have been wrongly granted or withheld: **National Commercial Bank Jamaica Ltd. V. Olint Corp** [2009] 1 W.L.R. 1405 (P.C.)"

(Submissions in Reply, paragraphs 2, and 4- 8)

> "...2. ...Notwithstanding the Defendant's assertion that it is not indulging in "box-ticking" that is precisely what the Defendant is inviting the Court to do . Neither Films Rover International v. Cannon Film Sales Ltd nor NCB v. Olint support the proposition that at the "serious issue to be tried" stage the court

must "have a high degree of assurance" where an interlocutory mandatory injunction is involved. A judge hearing an application for an interlocutory mandatory injunction must apply exactly the same tests as he would in the case of an application for an interlocutory prohibitory injunction, not some different or more exacting test; nor is the fact that the relief sought is mandatory a ground for refusing relief; but in the application of the normal tests, often, but not always, the fact that the relief sought is mandatory will tilt the balance when considering irremediable damage.....

4. It is to be noted that in Films Rover Hoffman J granted the interlocutory mandatory injunction even though the plaintiff did not establish a "high degree of assurance". The learned judge found that the facts of the case involved "substantial risk of a special kind of injustice" and this weighed heavily in the balance mitigating any risk of injustice arising from the fact that the injunction may have been mandatory. There are two "special" or "exceptional" reasons in the instant case for giving substantially less weight to the argument that what is in issue is a mandatory injunction and therefore requires a "high degree of assurance".

5. The first reason is that The Fair Competition Act 1993 was enacted "To provide for the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica with a view to providing consumers with competitive prices and product choices"see Infochannel Limited v. Telecommunications of Jamaica, p. 256 D-E, ... In VIP Communications Limited v. Office of Communications[2007] CAT 12, the Competition Appeals Tribunal stated at para. 104:

" We were referred to Hounslow LBC v. Twickenham and Shepherd Homes v. Sandham ....and it was submitted that the principles set out

in those cases concerning the granting of mandatory injunctions at an interim stage equally applied to making an order under Rule 61 of the Tribunal rules. It is not necessary for the purposes of this decision for us to come to a conclusion as to the merits of those submissions. However, it seems to us that there may be significant differences between the circumstances of those cases and a competition case where the public interest including the position of consumers is of paramount importance."

6. This approach is consonant with Comet Radiovision Services v. Farnell-Tandberg .....

7. The second reason can also be found in Comet where Goulding J states at p. 235 d-f:

> *...Counsel for the defendants submits, for a number of reasons, that nevertheless no interlocutory injunction ought to be pronounced but that matters should be left to remain as they are until the trial of the action. He emphasizes in that connection that, although negatively worded, the order which is sought has the effect of a mandatory injunction and that in interlocutory proceedings mandatory injunctions are sparingly given. I do not find that submission one of great weight. It seems to me that if the Act is susceptible of interlocutory enforcement at all, as I think it must have been intended to be, any injunction will be of mandatory effect, and indeed the whole scheme of the Act to order people to supply goods that they may be unwilling to supply seems to me* ***to take one rather out of the ordinary sphere in which injunctions operate.*** *I do not think that the mere objection that the order would be of mandatory character takes one very far.*

8. The scheme of section 48 of The Fair Competition Act clearly envisages that a cause of action will not arise until a party has suffered loss. It is at that stage that it will be seeking to have the abuse of the dominant position mandatorily prohibited."

52. In my judgment, Mr. Hylton is correct that what Lord Hoffman was stating in the **NCB v. Olint** case is that the argument, in other words, semantics, about whether an

> interlocutory injunction is prohibitory or mandatory are barren. In **Films Rover**, Lord Hoffman in my view expressed himself in greater detail than in **NCB v. Olint.** He made a clear distinction between the application of principles and guidelines. Whether an interlocutory injunction is prohibitory or mandatory, the same fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if the court should turn out to be wrong in the sense described by Lord Hoffman in **Films Rover**, or which seems likely to cause the least irremediable prejudice to one party or the other. However, Lord Hoffman was not saying that the guidelines as to prohibitory or mandatory injunctions are barren or to be abandoned.

53. At page 780, of **Films Rover** Lord Hoffman referred with approval to the judgment of Megarry J. in **Shepherd Homes Ltd. v. Sandham** , which was itself approved in the English Court of Appeal's decision in **Locobail International Finance Ltd v. Agroexport, The Seahawk** [1986] 1 All E.R. 402.

55. I think that there has been some amount of confusion, and understandably so, in this area. In my judgment, a part of this confusion has resulted from attempts at over-simplification. In our jurisdiction, as well as in others, up to, and prior to **NCB v. Olint**, Courts have followed, (perhaps, as it turns out, at their peril), the advice of Phillips L.J. sitting in the English Court of Appeal in **Zocholl Group Ltd. v. Mercury Communications Ltd** [1998] FSR 354, where having cited from the judgment of Hoffman J in **Films Rover** , he said at p.366:

> *I would concur with this passage as providing detailed guidance to the approach of the court when considering an application to grant a mandatory interlocutory injunction. A more concise summary, which I would commend as being all the citation that should in future be necessary, is the following passage in the judgment of Chadwick J. in* ***Nottingham Building Society v. Eurodynamic Systems*** *[1993] FSR 468 at 474.* (My emphasis.)

56. The exact wording of the passage from Chadwick J.'s judgment is instructive, but for present purposes, I need not set it out here. Suffice it to say that a close analysis of that passage reveals that between the second and third step outlined by Chadwick J., a step which Lord Hoffman emphasized in **NCB v. Olint** and in **Films Rover**, has been skipped over. That is the crucial step of looking at the particular facts and circumstances of the case, irrespective of an unchallengeable label of "mandatory interlocutory injunction", to see what the consequences of the grant or refusal of the injunction are likely to be. To examine the particular case to see whether the granting of the injunction would or would not carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. Therefore, following this "more concise summary" may well lead, or have lead, to an incorrect or incomplete analysis of the justice of the situation. Or at any rate, to an approach that differs from that advised by Lord Hoffman.

57. For an informative discussion of the **NCB v. Olint** case and interlocutory mandatory injunctions, reference can be made to the unreported decision of McDonald -Bishop J. in Claim No. 2010 HCV 0794, **Mammee Bay Club(1987) Limited v. New Wave** heard March 25 and April 23, 2010.

58. I think it might be useful for me to summarise my understanding of the governing considerations in this area of the law:

    (a) Whether an interlocutory injunction is prohibitory or mandatory, the same fundamental principle is that the

court should take whichever course appears to carry the lower risk of injustice if it should turn out that the court turns out to be wrong in the sense described by Lord Hoffman in **Films Rover**, or which seems likely to cause the least irremediable prejudice to one party or the other.

(b) Whether an interlocutory injunction is prohibitory or mandatory, the Claimant must demonstrate that there is a serious issue to be tried before any injunction will be granted. All of the other considerations such as the balance of convenience, including the adequacy of damages as a remedy, and the desirability of preserving the status quo as described in **American Cyanamid** apply.

(c) There is no usefulness to be derived from arguments based on semantics as to whether an injunction is prohibitory or mandatory. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. What matters is what the practical consequences of the actual injunction are likely to be. One of the reasons for this is that some of the factors normally associated with mandatory injunctions, may not necessarily exist in a particular case. For example, "there is sometimes a sense in which a mandatory injunction is needed to preserve the status quo". In other situations, for example in charter party withdrawal cases, although the injunctions may be negative in form, they may be mandatory in effect-see per Hoffman J. page 782 **Films Rover**. So there is no 'magic' in the label, and so where it is difficult to discern whether

the injunction is mandatory or prohibitory, time should not be wasted on hammering out a classification.

(d) As opposed to the applicable principle involved in the granting or refusal of interlocutory injunctions, there are guidelines in relation to both prohibitory and mandatory injunctions and these guidelines differ.

(e) In relation to prohibitory interlocutory injunctions, the guidelines are as set out in **American Cyanamid** -page 782-**Films Rover**.

(f) In relation to mandatory interlocutory injunctions, the guideline is as set out in **Shepherd Homes** as approved in **Locabail**, which in a normal case, require the court to feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted. This is a higher standard than is required for a prohibitory injunction.-page 782-**Films Rover.**

(g) Both sets of guidelines recognise the existence of exceptions.

(h) In cases where there can be no dispute as to whether the term mandatory aptly describes the injunction, in other words, where the injunction is indisputably mandatory, the very same fundamental principle or question of substance set out in paragraph (a) above, applies. That is, the court must consider whether the injustice that would be caused to the defendant if the claimant was granted an injunction and later failed at trial outweighs the injustice that would be caused to the plaintiff if an injunction was refused and he succeeded at trial. This application of the fundamental principle requires an analysis of the facts of the particular case (My emphasis).

(i) The application of the same fundamental principle will determine whether the case is "normal" and therefore within the guideline or "exceptional" and therefore requiring special treatment.

(j) There is no assumption to be made by the Court that the fact that an injunction is indisputably mandatory means that its grant is more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking some course of action. This is often so, but is not to be assumed because "this is no more than a generalisation"-per Lord Hoffman paragraph 19 G in **NCB v. Olint**. So the Court must not engage in "Box-ticking".

(k) In relation to prohibitory injunctions, there are exceptional circumstances where the plaintiff is required to show more than an arguable case, or serious issue to be tried.

(l) In relation to mandatory injunctions, there are exceptional circumstances where the plaintiff can succeed in obtaining the court's order for a mandatory interlocutory injunction, even though the court does not feel the high degree of assurance about the claimant's chances of establishing his right at trial. One such exceptional situation is where it appears to the court that the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it.

(m) In **NCB v. Olint**, the Privy Council was not criticizing the acknowledgement in a clear case that an interlocutory injunction is mandatory as opposed to prohibitory. What was being said is that the analysis (indeed the same holds

true for prohibitory injunctions), must not stop there. The Court must not just say : "This is a case involving an application for an interlocutory mandatory injunction and therefore the applicant is required to satisfy me of a high degree of assurance". That would be "Box-ticking". The criticism was about simply lunging into the guideline set out in **Shepherd Homes**, not about the existence and appropriate application of the guideline itself(my emphasis).

(n) If it appears that the interlocutory mandatory injunction is likely to cause irremediable injustice or more grave injustice to the Defendant than to the Claimant if granted(which is the 'normal' case of the mandatory injunction) , then the Court will look to see whether it feels a high degree of assurance that it will appear at the trial that the injunction was rightly granted. The reason for desiring this feeling of a high degree of assurance is that if felt, the less will be the overall risk of injustice if the injunction is granted. It will look not only to see whether there is a serious issue to be tried, but beyond that, to see whether it feels that high degree of assurance. In other words, in those circumstances, the Court may legitimately apply the test for 'normal' interlocutory mandatory injunctions set out in **Shepherd Homes**.

(o) If on the other hand, after recognizing that the application is for the mandatory interlocutory injunction, and examining on the particular facts, the consequences of granting or withholding the injunction, the Court takes the view that granting the injunction is not likely to cause irremediable prejudice or greater prejudice to the Defendant than to the Claimant, or withholding the

> injunction is likely to carry a greater risk of injustice than granting it, even though the Court does not feel a high degree of assurance about the Claimant's chances of establishing his right, the Court , subject to other aspects of the discretion, if satisfied that there is a serious issue to be tried, may grant the mandatory interlocutory injunction. In other words, not feeling that high degree of assurance would not be a ground for refusing to grant the injunction. Something less will do.

59. I agree with Mr. Nelson that Digicel's Attorneys' approach does amount to "box-ticking" because what they have done is to say that the "high degree of assurance" guideline applies, (see paragraph 12 of the Written Submissions) by taking it as a given that there is "the high likelihood that irremediable prejudice will be caused to the defendant if the applicant ultimately fails at trial" without and before turning to the actual facts and circumstances and examining the consequences of the granting or refusal of the injunction to see where the greater risk of injustice lies. (My emphasis). Further, the question of the Court considering whether it feels a high degree of assurance does not in my judgment arise at the juncture where the Court considers whether there is a serious issue to be tried. The Court only has to consider this if and when at a later stage, having found that there is a serious issue to be tried, it comes to the conclusion that the granting of the injunction is likely to cause or carry a greater risk of injustice to the Defendant than to the Claimant if it refuses to grant the injunction.

60. Lime's lawyers in their original submissions concentrated on saying and examining the facts to show that granting the injunction would cause less irremediable harm to Digicel, and would cause the least injustice. However, in their Reply, they now for the first time refer to "two *special* or *exceptional* reasons in the instant case for giving substantially less weight to the argument that what is in issue is a

mandatory injunction and therefore requires a *high degree of assurance"*. This represents two different approaches by Lime, but both asserting that this case falls into the exceptional category.

61. I now therefore turn to an application of the Law to the facts of this case. The first question I ask myself is whether there are serious issues to be tried.

Serious Issue To Be Tried

62. In oral submissions Mr. Hylton candidly indicated that in his view there clearly are. Some of these issues are to my mind the following:

(a) What is the correct definition of the relevant market;

(b). Is Digicel dominant in the relevant market;

(c). Does Digicel's pricing strategy amount to abusive conduct within the meaning of the Fair Competition Act ;

(d). Is it the Court or the Fair Trading Commission or both that has the power to make the determination whether an enterprise has abused or is abusing a dominant position in a market-see sections 21 and 49 of the Fair Competition Act;

(e). Is there a private cause of action for abuse of a dominant position;-see section 48 of the Fair Competition Act;

(f). Are the actions of Digicel which Lime complains of, in breach of sub-sections of the Telecommunications Act? Are the termination charges imposed by Digicel on Lime's business subscribers and the effective fixed to mobile termination rate imputed in the tariff offered by Digicel to its business subscribers discriminatory and/or unreasonable?

BALANCE OF CONVENIENCE

63. I now go on to consider the balance of convenience generally, including the adequacy of damages as a remedy. I am of the view that damages may not be an adequate remedy for Lime, but not because Lime's business will be 'absolutely destroyed or ruined" as contemplated in **J. Lyons v. Wilkins** [1896] 1 Ch. 811, upon which Lime relied. It is clear

that monetary loss and loss of profits is part of what Lime may be at risk of suffering. Therefore this loss seems capable of being compensated by an award of damages. But can it adequately be so compensated? Damages may not put Lime in as good a position in all respects as if it had obtained an injunction. It will be exceedingly difficult to calculate the damages in the present circumstances; there are many possible variables that can have an effect on the relevant market and consumer behaviour. If Lime were not to be granted the injunction but it wins its claim at trial, it will be difficult to assess what would have happened in the market if Digicel had not been able to continue its present price structure. On the other hand, if Lime were granted the injunction but fails at trial, it will be difficult to assess what Digicel could have achieved in the relevant market but for the injunction. I am therefore of the view that damages may not provide an adequate remedy for Digicel either. I am satisfied that both Lime and Digicel would be in a financial position to pay damages if damages did provide an adequate remedy. However, since in my view damages may not be satisfactory as a remedy for Lime in the sense of leaving it in as good a position as if the injunctive relief were to be granted, I have gone on to consider other factors relevant to the exercise of my discretion. As Lord Hoffman indicated at paragraph 17 of **NCB v. Olint**, " in practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy...".

64. As stated by Lord Diplock in **American Cyanamid**, where other factors appear to be evenly balanced, it is a counsel of prudence to preserve the status quo. The reason that it is a counsel of prudence is because maintenance of the status quo will normally cause less disruption, and all other things being finely poised, less injustice. See also paragraphs C-D of page 140 of **Garden Cottages.** Lime's application has been filed at a time when Digicel has already established its business enterprise in relation to its DfDm rates, differentials, and charges. Maintenance of the

status quo that existed before these proceedings were instituted points in the direction of refusing the injunction.

PRINCIPLE APPLIED - EXAMINATION OF THE PARTICULAR CIRCUMSTANCES OF THE CASE TO SEE WHERE THE GREATER RISK OF INJUSTICE LIES IF THE COURT SHOULD TURN OUT TO BE 'WRONG'-RELATIVE CONSEQUENCES TO PARTIES

65. If the interlocutory mandatory injunction is granted in this case, Digicel will be forced to desist from a commercial activity which it has been engaging in since May 2008 and that is in fact the existing status quo. That activity involved competing with Lime by adding to its enterprise, fixed line services to business customers and then offering to its own fixed network business customers making calls to Digicel's mobile network, retail rates that are substantially lower than the wholesale termination rates charged to Lime's fixed line customers for calls terminating on Digicel's mobile network. This differential was according to Lime widened by Digicel in January 2009 when Digicel increased the peak retail charges but reduced the off-peak charges for calls from Lime's fixed network. As Digicel indicates, this competition has not been "behind-the scenes"; there has been open competition. It is important to have in the forefront the consideration that consumers generally benefit from vigorous, lawful, and fair competition. It is unfair competitive practices that the Fair Competition Act aims at preventing. If, as Mr. Tjernell states in Paragraph 42 of his first Affidavit, by this injunction Digicel is forced to significantly increase well publicized and long established prices for valued corporate subscribers, one can see where Digicel could be exposed to reputational damage. On the other hand, if the form of compliance with the injunction is that, as Lime's Attorneys for the first time, in their Reply, suggest could be done, instead of increasing prices to its business customers, Digicel simply reduced the rate it charges LIME to send calls to Digicel's network, then there may well be no greater sum

being charged to third parties and no contracts may necessarily need to be broken by Digicel. However, that may well mean that Digicel would be renieging on advertising promises made and any express offers made to customers of significant savings over the rates charged by Lime if they switch over to Digicel's services. This may well have adverse effects on Digicel's reputation. Additionally, even if the form this takes is that Digicel reduces the rate it charges Lime, the consequence of the granting of the injunction will mean that Digicel will be required to take a new positive step in which it may clearly lose whatever competitive advantage it had vis-à-vis Lime in respect of fixed line business customers. This new step and risk of loss of competitive advantage must be seen against the backdrop that Lime is the largest fixed network operator(see paragraph 6 of Mr. Houston's 2nd Affidavit) and has been so for many years. Prior to the phased liberalisation of such services from 2000 onwards, and indeed in respect of most telecommunications services generally, it is not in dispute that Lime had the actual or virtual monopoly. In other words, the risk of loss of this competitive advantage aimed at winning new fixed customers may be a more weighty factor because of Lime's previous and current position of strength in the fixed telephone line business as Digicel "seeks to overcome inertia as well as other incumbency advantages held by" Lime -paragraph 43a. of the Defence. I also bear in mind that in addition, Lime would essentially have achieved at this interim stage, the whole of the relief which it seeks at trial by way of injunction. It is true as Lime's Attorneys point out, that the permanent injunction is not the only relief sought. In addition to other remedies, Lime is also seeking to obtain at trial a number of declarations and damages. However, the injustice of that likely effect of achieving at this interim stage, all that it wishes to obtain by way of permanent injunction, gains perspective and may readily be seen, from the fact that the issues involved in this case are complex. Lime candidly

admits in paragraph 17 of its original submissions , that case law in relation to abuse of a dominant position under the Act does not exist. In other words, to paraphrase the words of Richards J. in paragraph 18 of **AAH Pharmaceuticals**, Digicel's practice or pricing mechanism may raise, and indeed almost certainly does raise, complex competition issues going to the whole way in which telephony services may be organised and offered in this country. As Harrison JA pointed out in the **Infochannel** case, and Hoffman J. pointed out at page 781 of **Films Rover**, "An order requiring someone to do something is usually perceived as a more intrusive exercise of the coercive power of the state than an order requiring him temporarily to refrain from action." It seems to me that there is a fairly developed risk of injustice where we are in a complex and ,(at least locally), unchartered area of the law.

66. On the other hand, it does seem to me that the matters set out in paragraph 39 of Mr. Houston's Affidavit, are somewhat far-fetched. I have difficulty accepting, on the evidence, that if Lime does not obtain the injunction, Digicel's DfDm pricing would cause Lime to no longer have a financially viable fixed telephony market or that there would likely be any substantial loss of jobs. Lime clearly has a large breadth of operations and customers in the telecommunications industry, including fixed and mobile telecommunication operations in Jamaica. Lime itself has stated in paragraph 43 of Mr. Houston's Affidavit, that it is a financially sound company with assets in excess of $48 Billion. It is difficult to accept that Lime would suffer irremediable loss if the injunction is not granted. According to Mr. Houston, in September 2008 Lime had 370,000 fixed line customers- paragraph 19 of his 2nd Affidavit. Digicel has been competing against Lime in the fixed line business since May 2008. According to Mr. Tjernell's evidence, in paragraph 5 of his 2nd Affidavit, Digicel has less than 400 fixed line customers. This has not been disputed by Lime. It is hard to see Lime suffering the type of extensive loss of business argued for, and such as

to put it in a position where it is likely to suffer harm beyond repair. I can certainly see a rational argument that a risk exists of customers switching from Lime's Fixed network to Digicel's Fixed network and that once a customer is lost, it is difficult to get him back-see paragraph 37 of Mr. Houston's Second Affidavit. However, on the totality of the evidence before me, it is difficult to assess, or to accept, that there is a substantial likelihood and high risk of significant switching. In his First Affidavit at paragraph 24, Mr. Tjernell asserts that Lime is not displaced by Digicel, it remains an alternative provider, and that it also remains a default provider. In other words, Digicel's evidence is that there is a sharing of these business customers, rather than any elimination of Lime. See paragraphs 64 -72 in **AAH Pharmaceuticals**.

OTHER FACTORS RELEVANT TO EXERCISE OF DISCRETION.

THIRD PARTIES' INTERESTS

67. I have taken into account a number of other factors. As Digicel's Attorneys indicate in their written submissions, "the world did not stand still while Lime considered whether to institute these proceedings". Digicel has entered into a number of contracts with third parties If Digicel were forced to increase its price to its business customers and the injunction is ultimately found not to be justified, the ultimate losers will be the business customers themselves. The immediate impact would be on existing business customers of Digicel. However, the wider impact would be on business customers as a whole. This would mean they would lose the benefit of lower prices. Even if the way in which the injunction ordered took the form of ordering Digicel to reduce the price to Lime's customers, rather than increasing the price to its own fixed customers, to the extent that Digicel would no longer be offering services at a lesser price, these customers would lose the competitive choice that Digicel's present pricing mechanism offers. These effects upon third parties and risks of

injustice to them are matters which the court ought to take into account - see **Garden Cottage v. Milk Marketing Board** and the local judgment of Brooks J. in **Tropical Mushrooms Ltd. v. St. Thomas Parish Council** Claim No. 2008 HCV 2663, delivered August 12 2008, at page 8.

DELAY

68. As stated in Gee on Commercial Injunctions, 5th Edition, at paragraph 2.019:

> *...as a general principle on an application for an interim injunction the applicant should apply promptly, and the court should consider delay as a discretionary matter which needs to be looked at...."*

See also the judgment of Harrison J., as he then was, in the local decision **Osmond Hemans and anor v. St. Andrew developers** (1993) 30 J.L.R. 290 ,at page 296.

69. Lime did not file this application until October 2009. In my judgment, Lime ought to have filed for this injunction at an earlier stage. At latest, it ought to have applied for this injunction from around February 2009 when it wrote its detailed letter to the F.T.C. Lime has indicated a number of reasons for the time lapse between May 2008 and October 2009. However, it seems to me that at the stage when Lime wrote its detailed 6 page letter to the O.U.R. alleging that Digicel was employing a discriminatory pricing policy, this claim could have been filed. By the time Digicel penned its detailed 17 page letter to the Fair Trading Commission, which included reference to relevant authorities, and the assertion (at page 8) that it believed that Digicel had "within the past few months, approached 25 customers of LIME who cumulatively earn LIME revenue in excess of $1 billion", it seems to me that they had in hand sufficient allegations and information to come to the court and seek its urgent assistance. Neither the fact that Lime "considered it prudent to seek expert advice to analyze the economic effect of Digicel's conduct and (that) it took some time to properly instruct and obtain the expert advice"-paragraph 35 of Mr. Houston's Affidavit, nor

the reporting of the matters of complaint to the OUR or the FTC should have stopped Lime from making this application earlier- see the comments of Richards J. in **AAH Pharmaceuticals** at paragraph 77. See also paragraphs 46 and 47. This is particularly so if indeed Lime was apprehensive that Digicel's actions threatened to eliminate Lime as a competitor in the fixed voice origination market and to further establish super dominance in the mobile voice origination market, allegations which it makes a number of times in the letter to the F.T.C. It is not a question of simply imposing time constraints upon this application by Lime. What is at stake, and what was at stake, is the building up of the very real potential prejudice to Digicel and to third parties because in the meantime Digicel was openly marketing its fixed wireless service to business customers and entering into contracts with third parties. As Richards J. stated in **AAH Pharmaceuticals**, at paragraph 77, "It is a strong thing for the court to interfere by interim injunction in the conduct of business, particularly on the scale proposed in this case." The application should therefore be made promptly.

IMPRECISE TERMS OF THE INJUNCTION SOUGHT

70. I am also of the view that the terms of the injunction being sought are imprecise and vague and may well prove difficult to enforce. The relief being sought is capable of multiple interpretations, and indeed, it is only during their submissions in Reply, that Lime's Attorneys suggested expressly that what could be done is for Digicel to reduce the rate it charges Lime to send calls to Digicel's network, as opposed to Digicel increasing prices to Digicel fixed line business customers or third parties. However, this imprecision may well in the result leave Digicel in a state of uncertainty as to what exactly it must do in order to comply with the injunction. In my view there would be real difficulties and uncertainty in granting the injunction in the terms sought. It is also not difficult to see that it may call for repeated intervention by the

court based upon changes in economic conditions in whatever may be the relevant market/s and in the business dealings between the parties. However, though a factor, this is not the most weighty of the matters which I have taken into account as I am not entirely convinced that this is an insurmountable difficulty.

WHERE LIES GREATER RISK OF INJUSTICE

71. Based on my analysis of the particular facts and circumstances, and weighing the relevant factors in the balance, I am of the view that granting the injunction appears to carry a higher risk of injustice (if Lime is wrong) than refusing to grant it(if Lime is right). This type of relief that is being sought therefore falls within the "normal" category of mandatory injunctions and I would be reluctant to essentially, run that risk of higher injustice, unless it could be reduced by my feeling a high degree of assurance that at the trial it will appear that the injunction was rightly granted. I therefore reject Lime's submission that it would suffer the greater irreparable harm if the injunction is refused.

SPECIAL OR EXCEPTIONAL REASONS?

72. However, Lime has submitted that there are two other special or exceptional reasons why the Court should not be required to feel a high degree of assurance. In that regard, Lime has relied upon paragraph 104 of the decision of the United Kingdom Competition Appeals Tribunal in *VIP Communications Limited v. Office of Communications* [2007] CAT 12. However, I agree with Mr. Hylton that this was a decision of a specialist tribunal, and not a Court, and I say that respectfully. This impacts upon the nature of the analysis which the Tribunal expressly engaged in. Further, what the Tribunal was required to do was to decide whether to grant an injunction having considered specific matters set out in Rule 61 of the Tribunal Rules. This Rule is set out in paragraph 93 of the decision. The remarks at paragraph 104 upon which Lime relies do in my view appear to have

been obiter, or beyond the ratio of the Tribunal's decision. Indeed, the Tribunal made it clear that they were not deciding upon the merits of Counsel's submissions that the " principles (set out in **Shepherd Homes**)...concerning the granting of mandatory injunctions at an interim stage equally applied to making an order under Rule 61....." . In any event, the statement by the tribunal that "there may be significant differences between the circumstances of those cases and a competition case where the public interest including the position of consumers is of paramount importance", must I think be viewed against the backdrop that the Tribunal is expressly empowered by Rule 61 (2) (b) to grant relief "protecting the public interest". I do not in any event consider that a statement by the Tribunal simply that there may be differences in the circumstances of the cases in any way adds up to a pronouncement, or even a statement, that a competition case, based upon applicable legislation, is such as to constitute an exceptional case.

73. I also think it is relevant and interesting to note that by virtue of the Tribunal's Rule 61(6) (c), the party applying, is required to state the "factual and legal grounds establishing a prima facie case for the granting of interim relief by the tribunal" (my emphasis). It is trite law that the test of a "prima facie case" is a higher and more stringent test than the test set out in **Cyanamid** of "a serious issue to be tried". See also paragraphs 101 and 103 of the Tribunal's decision. So in other words, the starting point for this Tribunal was already higher than simply a serious issue to be tried.

74. However, Lime also submits that because the scheme of section 48 of the Act clearly envisages that a cause of action will not arise until a party has suffered loss, it is at that stage that it will be seeking to have the abuse of the dominant position mandatorily prohibited. Reliance is placed by Lime on the **Comet** case where Goulding J. stated that, as the Statute under consideration in the case before him, if susceptible of interlocutory enforcement at all, any injunction would be of mandatory

effect. Further, the whole scheme of the Act was to order people to supply goods that they may be unwilling to supply. Gould J. considered that those factors combined to take the case rather out of the sphere in which injunctions operate. I do not think that **Comet** can correctly be said to have established any guidelines as to an exceptional situation. The decision is a first instance decision and makes no reference to the **Shepherd Homes** case, although it was decided after **Shepherd Homes**, which has been accepted and approved in many subsequent cases. This includes acceptance by our Court of Appeal in **Infochannel v. Cable and Wireless** and by the Privy Council in **NCB v. Olint.** In any event, one does not have to do any great in-depth analysis of the facts in the **Comet** case, to see that what Gould J. was really in essence finding, was that he had a high degree of assurance that at trial the Plaintiff would succeed. At pages 234-235 Gould J. to my mind was clearly expressing the view that he felt a high degree of assurance that the factual substratum required under the Act existed in the case before him, hence his stating at page 235, letter c, that "...the plaintiff has so far made out his case". See also pages 234h-235g. Further, it seems clear to me that what Gould J. expressly grappled with was a submission,(and he appears to have considered the matter along those lines); that interlocutory mandatory injunctions are sparingly given, hence his statement at page 235 letter e that "I do not think the mere objection that the order would be of a mandatory character takes one very far." This is to my mind casts a focus which differs from that of analyzing the criteria necessary for the granting of the interlocutory mandatory injunction.

75. In **AAH Pharmaceuticals Ltd. v. Pfizer Ltd.** [2007] E.W.H.C.565, a first instance English decision cited by Digicel's Attorneys, Richards J. rejected a submission by Counsel that where Article 82 of the EC Treaty or section 18 of the U.K. Competition Act were engaged, it was likely that a mandatory order would be sought, and therefore that the

approach should be the same as with applications for prohibitory injunctions. See paragraphs 51-57 of the decision. At paragraph 57, Richards J. stated:

> *For my part I am satisfied that the decision of the Court of Appeal in* ***Zocholl****.... Requires me to adopt the approach stated by Chadwick J.* (in **Nottingham**). *I can see no logical reason why the fact that mandatory orders may be more common in cases under art 28(* perhaps this is a typo, and he meant article 82?) *than in other cases calls for a different and exceptional approach.*

I agree with the reasoning expressed by Richards J.

76. Where the case is one in which withholding the mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it, that is not the "normal" case. I would accept that there may be other exceptional reasons for properly granting a mandatory injunction without the high degree of assurance under discussion. This is because I accept that it is unwise to attempt to fetter the discretion of the court by laying down any rules that would have the effect of limiting the flexibility of the remedy and also that there may be many other special factors to be taken into account in the particular circumstances of individual cases-see per Lord Diplock in **American Cyanamid** [1975] 1 All E.R. 504, at pages 510 and 511 and Hoffman J. in **Films Rover** [1986] 3 All E.R. 772 at 782.

77. In **Films Rover** what Lord Hoffman did was to grant the interlocutory mandatory injunction because he thought the case fell within the exceptional situation where there was a much greater risk of injustice by withholding an injunction than by granting it. The "substantial risk of a special kind of injustice" which Hoffman J. found to exist was that "denial of the injunction may enable a party to achieve a commercial objective by a calculated disregard of the basic principle of civil society that 'men perform their covenants made'-page 785. That factor, which Hoffman J. described as a "qualitative consideration" was but one amongst several which were taken into account, such as the fact that

the Defendant would be required only to perform one relatively simple operation and that it would be difficult to see how performing it could cause uncompensatable loss to the Defendant.

78. I do not find in either the Tribunal's decision in the **VIP Communications** case, or in **Comet**, firm or fertile ground for accepting that because this is a competition case under the Act, which has as one of its purposes the protection of the public and consumers, or assuming, but without so deciding, that mandatory orders may be more common under the Act than in other cases, it calls for a different or exceptional approach. I also find no basis upon which to identify a special risk of injustice along the lines found by Lord Hoffman in **Films Rover.**

APPLICATION OF GUIDELINES - WHETHER HIGH DEGREE OF ASSURANCE-CASE FALLING WITHIN "NORMAL" CATEGORY OF MANDATORY INJUNCTIONS

79. As stated earlier in this judgment, by Determination Notice dated the 2nd of September 2004 the OUR declared Digicel to be dominant in the market to Terminate a call on Digicel 's Mobile Network. Digicel sought a reconsideration of this decision by the OUR but the OUR subsequently confirmed the decision on 1 May 2007. Digicel lodged an appeal under section 62(1) of the Telecommunications Act. In its decision, the Tribunal confirmed the OUR's determination that Digicel is dominant on its mobile network.

80. I am not aware whether any further proceedings have been taken by Digicel in relation to the Tribunal's decision. However, in paragraph 26 of its Defence, Digicel states that Lime was not entitled to rely upon the Determination Notice as evidence or proof in these proceedings that there is a market to terminate a Call on Digicel's Mobile Network. So Digicel will be contesting that finding at trial. At paragraph 22, Digicel

makes the point that there is neither a "Market to Terminate a Call on Digicel's Mobile Network", nor a "Domestic Market for Voice Origination Services to Business Customers". Let us assume that the decision of the Tribunal is accepted and/or shared by the court, i.e. that there is a separate market for terminating calls on Digicel's mobile network and that Digicel is dominant in that market based on "the absence of supply-side and demand-side substitute" (see paragraph 58 of the OUR's conclusions, referred to at paragraph 7 of the Telecommunications Appeals Tribunal's decision). Indeed, it may be, and it is not for me to decide at this stage, subject to differences in the provisions of the Competition legislation, that as Richards J. indicated at paragraph 62 of the **AAH Pharmaceuticals** case, whilst the Court may not be bound by the approach of the OUR, or the Telecommunications Appeal's Tribunal decision, it may be bound to take note of the approach and decisions. In my judgment, it would still in any event remain open to Digicel to argue the issue as to what is the relevant market in relation to Lime's complaints and to sustain its averment that Lime has not defined what they say is the relevant market. For example, in the letter to the FTC from LIME dated 27 February 2009, at page 10, in the second paragraph of that letter, Lime refers to a number of different markets, i.e. the mobile voice origination market, and the fixed voice origination market, and the possibility of the FTC reviewing these two origination services and deeming them to be one market. As regards the matter of whether by its actions, Digicel is in breach of the Telecoms Act, the question of whether by its termination rates charged to Lime's business customers for calls terminating on Digicel's mobile network, Digicel is acting on a discriminatory or unreasonable basis, these are quite complex questions and I cannot say that I feel a high degree of assurance that Lime is likely to succeed in establishing its claim at trial. In the same way, I really cannot say that I feel a high degree of assurance that

Digicel will make out its Defence successfully at trial either. The most I can say is that , to use the words of Richards J. in **AAH Parmaceuticals**, paragraphs 58-62, Lime has a "seriously arguable case" upon these issues, i.e. relevant market, dominance, and whether discriminatory practices.

81. However, in relation to the question of abuse of dominant position, whilst I am satisfied that there is a serious issue to be tried, I do not feel the high degree of assurance that is necessary in order to achieve justice. It does seem to me that on the question of abuse of dominance the trial court will have a number of complicated issues to unravel and will have to determine, for example, what if any guidance decisions dealing with Article 86 or 82 of the European Commission Treaty, section 18 of the Competition Act 1998 (U.K.), and European Directives and regulations provide in interpreting the provisions of the Act , given differences in the language and provisions involved. Perhaps more fundamentally, the language of sections 21 and 49 of the Fair Competition Act in combination will call for consideration of a not insubstantial issue. That is as to whether it is for the Fair Trading Commission to make a finding whether an enterprise has abused or is abusing a dominant position before the Supreme Court's role, which is described as an appellate role in relation to such a finding, comes into play. It would not be odd for the law to so require since the area of competition law is a highly specialized one. The trial court is also the appropriate place for the court to grapple with questions about what, if any, private causes of action are created under the two Acts. These are all difficult questions of fact and law which call for "detailed argument and mature considerations" -page 510, **American Cyanamid** and I am unable at this stage to say that I feel a high degree of assurance that either party will succeed in establishing their arguments on this score at trial. To use a slang term, these matters seem very much "up for grabs".

82. All told, I do not feel the necessary level of assurance that Lime will be successful in establishing its rights at trial, and this is a case in which I think that the risk of injustice to Digicel, and to third parties, if Lime was granted the interlocutory injunction, outweighs the risk of injustice that would be caused to Lime if the injunction is refused. There are no other exceptional, unusual, or extenuating circumstances or factors to place on the side of the scales that would point in the direction of granting the interim relief. In those circumstances, since I do not feel this high degree of assurance that Lime will ultimately establish its rights at trial, there is no reduction in the risk which I have already assessed of injustice if the injunction is granted.

83. In all the circumstances, I am of the view that justice would be best served by refusing the application for the interlocutory injunction.

84. With regard to the Notice of Application for Court Orders filed by Lime on the 16th July 2010(the application regarding the FTC's Staff Report), the Affidavit of Mrs. Kamina Johnson-Smith sworn to on the 29th of June 2010 and the letter exhibited as "KJS1" are admitted into evidence on this interlocutory hearing, but the Staff Report of the FTC is ruled inadmissible at this stage.

85. The Notice of Application for Court orders filed by Lime on the 26th October 2009 is dismissed. I believe that the appropriate order is for costs to be the Defendant Digicel's costs in the cause, to be taxed if not agreed or otherwise ascertained. I will hear from the parties further on the question of costs and also, this being a commercial case, whether it is appropriate to order an expedited trial.