JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS: 4 & 5/04

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN	**OFFICE OF UTILITIES REGULATION**	**APPELLANT**
AND	**THE MINISTER OF INDUSTRY COMMERCE & TECHNOLOGY**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**2ND RESPONDENT**
	AND	
BETWEEN	**OFFICE OF UTILITIES REGULATION**	**APPELLANT**
AND	**MOSSEL (JAMAICA) LTD (T/A DIGICEL)**	**RESPONDENT**
AND	**CABLE & WIRELESS JA. LTD**	**1st AFFECTED PARTY**
AND	**CENTENNIAL JA. LTD**	**2nd AFFECTED PARTY**

David Batts & Mrs. Suzanne Risden-Foster instructed by Livingston, Alexander & Levy for the appellant

Michael Hylton, Q.C., Solicitor General, Miss Cheryl Lewis & Kevin Powell for respondents The Minister & The Attorney General of Jamaica

Paul Beswick & Terrence Ballentyne instructed by Ballentyne, Beswick & Co., for respondent Mossel (Jamaica) Ltd

Dave Garcia & Miss Malaica Wong instructed by Myers, Fletcher & Gordon for first affected party.

Harold Brady instructed by Brady & Co., for second affected party

13th, 14th, 15th, 17th, 22nd, 27th March, 4th April, 2006 and 30th May, 2007

HARRISON, P.

These are appeals from the decision of Dukharan, J in the judicial review court on 15th December 2003 declaring that the Determination Notice of the appellant dated 22nd May 2002 was ultra vires and is quashed (Suit No. 2002/M074) and dismissing the appellant's motion that the Ministerial Direction No. 3 dated 9th April 2002 issued to the appellant was unlawful (Suit No. 2002/M 136) with costs to the respondent in each suit.

The facts are that on the 9th of April 2002 the Minister of Industry, Commerce and Technology ("The Minister") issued Ministerial Direction No. 3 on Interconnection and Competition under section 6 of the Telecommunications Act ("the Act") (amended on 11th April 2002 to substitute "section 6" for "section 10"). It reads:

"*Interconnection & Competition*

> ***WHEREAS*** *the Government of Jamaica seeking to ensure continued and sustainable investment in the telecommunications industry has introduced competition in the mobile telecommunications market.*
>
> ***WHEREAS*** *the introduction of competition in the telecommunications market and in the mobile market in particular has been successful and brought tremendous investment in Jamaica.*

WHEREAS *interconnection is one of the foundations of viable competition, which in turn is the main driver of growth and innovation in telecommunications markets.*

WHEREAS *interconnection is the single most important issue in the development of a competitive marketplace for telecommunication services.*

WHEREAS *at the heart of competition is allowing competitors to have the freedom to charge the prices they wish and the market determining the viability of competitors.*

RECOGNIZING *that interconnection is not only a regulatory issue but a policy issue as well.*

AND FURTHER RECOGNIZING *that interconnection policies that facilitate competition are pre-requisites to the successful development of a wide range of competitive services.*

THE OUR IS HEREBY DIRECTED *that as a matter of policy*

i) The OUR is not to intervene in the mobile (cellular) market by setting rates, tariffs or price caps on the interconnection or retail charges made by any mobile competitor.

ii) The OUR is to facilitate competition and investment for the new mobile carriers in Jamaica."

This Ministerial Direction was not followed by the Office of Utilities Regulation ("OUR") which regarded it as ultra vires and unlawful and therefore not binding.

As a consequence, on 22nd May 2002 the OUR issued a Determination Notice Interconnect Pricing (RIO-4), which included fixed to mobile (FTM)

termination rates for domestic calls and rates for incoming international calls. The significant determinations were numbers 1.1, 2.5, 2.6 and 2.8. The latter three read:

> "Determination 2.5
>
> The price of FTM calls shall continue to be set by participating mobile carriers, subject to a cap. The cap for domestic FTM calls shall be the sum of C&WJ's mobile termination costs plus the imputed cost of spectrum plus the retention for the fixed network costs, which includes an allowance for bad debt.
>
> Determination 2.6
>
> The following maximum termination charges shall be applicable as of July 1, 2002:
>
> J$6.838 per minute peak,
> J$5.593 per minute off-peak, and
> $4.349 per minute weekend
>
> ...
>
> Determination 2.8
>
> In the event international settlement rates no longer cover the costs of mobile termination plus fixed-retention costs, mobile termination charges on incoming international traffic shall be equal to the lesser of the weighted average settlement rates (across all countries) and the weighted average costs of mobile termination estimated to be J$5.351 per minute."

By letter dated 31st May 2002 the respondent Mossel (Jamaica) Ltd. ("Digicel"), requested a re-consideration of the Determination, as did Centennial Jamaica Ltd., the second party affected on 5th June 2002. The

dispute was then referred to the Appeal Tribunal, under the provisions of section 62 of the Act.

By originating notice of motion filed on 3rd July 2002 (Suit No. 2002/M074), pursuant to leave granted by Anderson, J., on 28th June 2002, Digicel applied for certiorari to quash the determination, (RIO 4) of 22nd May 2002, prohibiting the OUR from effecting its said decision, and sought several declarations that the said Determination was ultra vires its statutory powers under the Act.

The OUR, by originating motion filed on 30th October 2002 (Suit No. 2002/M136), pursuant to leave granted by James, J., on 30th October 2002 to apply for judicial review, sought:

> "1. A Declaration that the purported Ministerial Direction No. 3 dated the 9th day of April, 2002 issuing a directive to the Applicant 'not to intervene in the mobile (cellular) market by setting rates, tariffs or price caps on the interconnection or retail charges made by any mobile competitor' issued by the Minister of Industry Commerce and Technology to the Office of Utilities Regulation is unlawful, void and of no effect."

Added to the Suit No. 2002/M074 were Cable & Wireless Jamaica Ltd. as the 1st party affected and Centennial Digital Jamaica Ltd. ("Centennial") as the 2nd party affected.

Dukharan, J., found against the appellant resulting in these appeals.

There were sixteen grounds of appeal common to each appeal. They read:

"(1) The learned judge in the court below erred in law in that he failed to appreciate that the Minister's power to give general Directions as to Policy could not override express statutory provisions and in particular the power, duty and authority given by statute to the OUR.

(2) The learned judge of the court below failed to pay any or any due regard to Section 4 of the Office of Utilities Regulation Act and to Sections 3, 4, 29, 31, 32, 33, 30 and 46(2) of the Telecommunications Act 2000 which give the OUR the responsibility to regulate inter alia rates and charges.

(3) The learned judge of the court below failed to appreciate that the Telecommunications Act 2000 defined functions to include duties and powers and that on a true construction of Section 6 of the Act any Directions of a general nature as to policy must be compatible with the functions of the OUR under the Act.

(4) The learned judge of the court below failed to appreciate that the Minister's Direction prevented the OUR setting rates in the Mobile Cellular Market and therefore prevented the OUR from carrying out its functions under the Act.

(5) The learned judge of the court below failed to appreciate that the Minister's Direction was specific as to its prohibition against the OUR setting rates, tariffs or price caps on the interconnection or retail charges of any mobile competitor and ran counter to the statutory provisions which gave the OUR the responsibility to regulate, determine and/or intervene in respect of the terms and conditions of interconnection and to set rates, charges and/or price caps.

(6) The learned judge of the court below failed to appreciate that in issuing the said Ministerial

Direction the Minister misdirected himself in law, acted unlawfully and/or irrationally and/or for a purpose inconsistent with the provisions of the Act and consequently improper.

(7) The learned judge erred in law in that he failed to appreciate the distinction between a general direction as to policy in Section 6 of the Telecommunications Act 2000 and a Direction properly so called in Section 10 of the Telecommunications Act 2000. The judge failed to appreciate that a general direction as to Policy was to explain, amplify or supplement the functions granted to the OUR by the Act and ought not to prevent the OUR carrying out its statutory functions.

(8) The learned judge failed to appreciate that a 'general Direction as to Policy' within the meaning of Section 6 of the Telecommunications Act 2000 was akin to the word 'guidance' as used in the authority of ***Laker Airways Ltd. v Department of Trade [1977] 2 All ER 182*** and that it is to be distinguished from 'a Direction in writing' as used in Section 10(1) of the Telecommunications Act 2000.

(9) The court below erred in law and in fact in that it failed to pay any or any sufficient attention to the evidence of Mr. Winston Hay and in particular the following uncontradicted portions of that evidence:

1. The fact that the Ministerial Directive followed closely two (2) unsuccessful attempts by the Minister to influence the OUR's decision.

2. The fact that on or about the 24th May, 2002 the Minister telephoned Mr. Hay to say that the 4th cellular provider wanted Fixed to Mobile (FTM) rates maintained at current levels.

3. The fact that in a meeting on the 26th May, 2002 the Minister stated that the fourth cellular provider wanted FTM rates held at current levels and asked the OUR to do so. The OUR maintained that it had an obligation as regulator to make prices costs reflective. The Minister thereupon remarked that he would have to rethink the role of the OUR.

4. The Ministerial Direction was issued on the 9th April, 2002.

10. The learned judge below erred in law in that he failed to appreciate that the statutory objects include fair competition, protection of customers, encouraging economically efficient services and not competition simpliciter. The recitals to the Minister's Direction disclose that the purpose of the Direction ignored the statutory objects.

11. The Court erred in law in that it failed to appreciate that the Minister's Direction:

    a. Prohibited the OUR from carrying out its statutory function.
    b. Precluded the setting of charges and prices whether or not the mobile carrier was or became dominant.
    c. Usurped the statutory function of the OUR.
    d. Constituted a specific rather than a general direction.
    e. Revealed a failure by the Minister to consider the other objects of the Act being economic efficiency and protection of the customer from overcharging.
    f. Was the result of the Minister treating competition simpliciter as an objective

and ignoring the statutory imperative that competition had to be fair.

(12) The learned judge at first instance failed to pay any or any sufficient regard to the fact that the Minister's Direction contravened the spirit and intendment of the Policy Framework exhibited to the Minister's Affidavit which referred to an independent regulatory body independent of political control and which explained that the regulator was to protect consumers and ensure that economic efficiency is enhanced by a rate structure that appropriately reflects the underlying structure of costs.

(13) The learned trial judge failed to pay any or any sufficient regard to the evidence that in a calling party pays regime Fixed to Mobile rates if unregulated will result in unfair charges to the Fixed customer. The Minister's Direction will therefore have the effect of promoting monopoly tendencies not competition.

(14) The learned trial judge erred in law in that he failed to pay any or any sufficient regard to the definition of public interest contained in Section 3(a) of the Telecommunications Act 2000 and therefore that in so far as the Ministerial Direction was stated to be for the purpose of promoting investment it was not within the public interest as defined by the Act.

(15) The court at first instance erred in law in holding that the OUR was not entitled to issue its Determination Notice until the Minister's Decision was challenged in court.

(16) The learned judge at first instance erred in law in that he failed to appreciate that a collateral challenge to an Administrative action or decision can be raised by way of Defence."

The grounds of appeal following were peculiar to Appeal No. 5/2004 in Suit No. 2002/M074. They read:

> "(17) The learned trial judge failed to appreciate that Determinations 2.6 and 2.8 of May 2002 followed upon and were consistent with its Determination Notice of February 2001 (to which no objection was taken) and which stipulated that interconnection agreements would be modified in accordance with changes made in a continuing Reference Interconnection Offer Assessment Process. The Respondent entered into an Interconnection Agreement which provided for Amendment in accordance with the Continuing Reference Interconnection Offer Assessment process without demur.
>
> (18) The learned trial judge failed to appreciate that the Respondent agreed to have the Interconnection Agreement amended or changed by way of Continuing Reference Interconnection Assessment and that Determinations 2.6 and 2.8 ..."

The respondent Digicel filed a counter notice of appeal on 16th December 2005. The ground reads:

> "(i) That the Learned Trial Judge erred in law and in fact when he failed to make specific determinations of the reliefs sought in the Claimant's Notice of Motion."

The first affected party ("C & WJ") on 26th January 2004 filed a counter-notice of appeal. The grounds are:

> "i. The learned trial judge erred in failing to appreciate that the charges with which Determinations 2.6 and 2.8 were concerned were charges to be made by Cable & Wireless Jamaica Limited (the 1st Party Affected) as a

carrier of fixed line services, and not as a mobile carrier.

ii. The Minister's Direction precluded the intervention by the Appellant in the mobile market 'by setting rates, tariffs or price caps on the interconnection or retail charges made by any mobile competitor.'

iii. The Determination Notice issued by the Appellant did not and does not contravene the Minister's Direction."

Grounds 1 to 12 and 14 in Appeal No. 5/2004 and grounds a to l and n in Appeal No. 4/2004 will be considered together.

The main issues arising in this appeal are:

1. Was the Ministerial Direction of 9th May 2002 ultra vires the powers of the Minister and therefore unlawful and invalid?
2. Did that Direction seek to curtail the exercise by the OUR of its statutory functions, that is, its duties and powers, and was accordingly unlawful?
3. Was the Determination by the OUR, a valid exercise of its powers under the Act, which Determination it was statutorily obliged to make, despite the Ministerial Direction?

The OUR was established under the Office of Utilities Act on 25th April 1995 to regulate the provision of specified utility services, including telecommunication services. Paragraph 1 of the First Schedule to the Act designates telecommunication services as a specified service. The Act gives to

the OUR distinct and wide powers to determine "rates and fares" in specified services. Section 4(4) reads:

> "(4) The Office shall have power to determine, in accordance with the provisions of this Act, the rates or fares which may be charged in respect of the provisions of a prescribed utility service."

The Act which came into force on 1st March 2000 had as its objects, inter alia, the promotion and protection of the interest of the public, the protection of customers, the promotion of universal access to telecommunication services for all and the encouragement of economically efficient investment in Jamaica, in providing the specified service. A "specified service" means "a telecommunications service or such other service as may be prescribed" (section 2 of the Act). The "functions" of the OUR include "duties and powers".

The objects of the Act are recited in section 3 which reads:

> "3. The objects of this Act are –
>
> (a) to promote and protect the interest of the public by –
>
> (i) promoting fair and open competition in the provision of specified services and telecommunications equipment;
> (ii) promoting access to specified services;
> (iii) ensuring that services are provided to persons able to meet the financial and technical obligations in relation to those services;
> (iv) providing for the protection of customers;

(v) promoting the interests of customers, purchasers and other users (including, in particular, persons who are disabled or the elderly) in respect of the quality and variety of telecommunications services and equipment supplied;

(b) to promote universal access to telecommunications services for all persons in Jamaica, to the extent that it is reasonably practicable to provide such access;

(c) to facilitate the achievement of the objects referred to in paragraphs (a) and (b) in a manner consistent with Jamaica's international commitments in relation to the liberalization of telecommunications; and

(d) to promote the telecommunications industry in Jamaica by encouraging economically efficient investment in, and use of, infrastructure to provide specified services in Jamaica."

The OUR is specifically designated as the regulator under the Act. Section 4, inter alia, describing the functions of the OUR, inter alia, reads:

"4.-(1) The Office shall regulate telecommunications in accordance with this Act and for that purpose the Office shall –

(a) regulate specified services and facilities;

(b) receive and process applications for a licence under this Act and make such recommendations to the Minister in relation to the application as the Office considers necessary or desirable;

(c) promote the interests of customers, while having due regard to the interests of carriers and service providers;

(d) carry out, on its own initiative or at the request of any person, investigations in relation to a person's conduct as will enable it to determine whether and to what extent that person is acting in contravention of this Act;

(e) make available to the public, information concerning matters relating to the telecommunications industry;

(f) promote competition among carriers and service providers;

(g) advise the Minister on such matters relating to the provision of telecommunications services as it thinks fit or as may be requested by the Minister;

(h) determine whether a specified service is a voice service for the purposes of this Act;

(i) carry out such other functions as may be prescribed by or pursuant to this Act."

The Minister's powers in relation to the functions of the OUR, are delimited under section 6 of the Act. It reads:

> "6. The Minister may give to the Office <u>such directions of a general nature as to the policy</u> to be followed by the Office in the performance of its functions under this Act <u>as the Minister considers necessary in the public interest</u> and the Office shall give effect to those directions." (Emphasis added)

The OUR, in pursuit of its statutory regulatory functions, is specifically empowered to determine charges, costs, prices and price caps in certain circumstances.

Section 29 of the Act requires mandatory interconnection, between carriers, on request, and permits the OUR to determine relevant charges. The section reads:

> "29.-(1) Each carrier shall, upon request in accordance with this Part, permit interconnection of its public voice network with the public voice network of any other carrier for the provisions of voice services.
>
> (2) A public voice carrier shall provide interconnection in accordance with the following principles –
>
> (a) any-to-any connectivity shall be granted in such manner as to enable customers of each public voice network to complete calls to customers of another public voice network or to obtain services from such other network;
> (b) end-to-end operability shall be maintained in order to facilitate the provision of services by an interconnecting carrier to the customer notwithstanding that the customer is directly connected to a different network;
> (c) interconnecting carriers shall be equally responsible for establishing interconnection and doing so as quickly as is reasonably practicable.
>
> (3) Copies of all interconnection agreements shall be lodged with the Office which may object to any such agreement in the prescribed manner.
>
> (4) The Office may, either on its own initiative in assessing an interconnection agreement, or in resolving a dispute between operators, make a determination of the terms and conditions of call termination, including charges.

> (5) When making a determination of an operator's call termination charges, the office shall have regard to the principle of costs orientation, so, however, that if the operator is non-dominant then the Office may also consider reciprocity and other approaches.
>
> (6) For the purposes of subsection (5), 'reciprocity' means basing the non-dominant carrier's call termination charges on the call termination charges of another carrier." (Emphasis added)

Both sections 30 and 33 define the role of the OUR in determining the prices and costs that are payable in respect of a dominant carrier or a dominant public voice carrier. Section 30 inter alia reads:

> "30.-(1) Without prejudice to section 29, dominant public voice carrier shall provide interconnection in relation to a public voice network in accordance with the following principles:..."

The nature of the terms and conditions is thereafter recited.

Section 33 reads:

> "33.-(1) Where the Office is required to determine the prices at which interconnection is to be provided by a dominant carrier, it shall, in making that determination, be guided by the following principles:..."
> (Emphasis added)

Thereafter, the manner in which costs are determined and who should bear them is recited.

Subsection (2) is of general application. It reads:

> "(2) Where the Office has been unable to obtain cost information that it is reasonably satisfied is

> relevant and reliable, it may take into account comparable international benchmarks."

Note however, that it is the OUR, having considered submissions from the public and in consultation with the Fair Trading Commission, which is empowered to determine which public voice carrier is to be classified as a dominant public voice carrier (section 28).

Section 46 describes 'price caps' and specifically empowers the OUR to impose, monitor and enforce price caps. The section reads:

> "46-(1) In this Part –
>
> 'prescribed price caps' means such restrictions on the price of prescribed services as are prescribed in rules made under this section;
>
> 'prescribed services' means services to which prescribed price caps apply;
>
> 'price cap' means a restriction whereby the weighted aggregate price, calculated in the prescribed manner, for prescribed services shall not be greater than a specified price.
>
> (2) The Office shall make rules providing for the imposition, monitoring and enforcement of price caps." (Emphasis added)

The above sections 29, 30, 33 and 46 of the Act, clearly indicate that the OUR is specifically empowered to regulate and make the final determination of charges, prices, costs and price caps in its regulation of the telecommunication industry in respect of interconnection between public voice carriers. This is a statutory function imposed on the OUR for the benefit of the public, balancing the protection of "the interests of the customers, while having due regard to the

interests of carriers and service provides" in order to "facilitate competition and investment." This important function of the OUR as regulator, was also specifically conferred on it by section 4(4) of the OUR Act.

Any attempt therefore to prevent or preclude the OUR from performing its statutory functions conferred by either Act, would be unlawful, ultra vires and without legal effect.

The Ministerial Direction that:

> "The OUR is not to intervene in the mobile (cellular) market by setting rates, tariffs, or price caps on the interconnection or retail charges made by any mobile competitor."

is a definitive order which effectively sought to prevent the OUR from performing its specific statutory functions under the Act in respect of rates, price caps and charges.

The learned Solicitor General argued on behalf of the respondent Minister that the Ministerial Direction was of "a general nature relating to policy," it was not a specific direction. The Direction sought to instruct the OUR to "allow free competition by not intervening in the market to set rates, tariffs and price caps" – but "to adopt a more market-oriented approach as opposed to a more interventionist regulatory approach." He concluded that the Direction was compatible with the OUR's duty to promote competition, consumer interest and investment and did not prevent it from performing his statutory functions.

Counsel for Digicel (Appeal No. 5/04) also argued that the Ministerial Direction was of a general nature and not directed towards any specific mobile

service provider and therefore the OUR was bound to obey the Direction and comply with it, until a court rules otherwise.

Counsel for Oceanic Digital Jamaica Ltd., (formerly Centennial), the second party affected in Appeal No. 5/04 adopted the submissions of the latter counsel in that respect.

The learned trial judge in accepting similar submissions, at page 19 of his judgment, said:

> "... I am of the view that the reasons given by the Minister, taking into account the government's policy framework and the scope and objects of the Act; the direction was lawful. It was a direction of a general nature as to the policy to be followed by the OUR. There is no evidence of improper or irrelevant considerations on the part of the Minister.
> The Minister's Direction was issued validly."

I am unable to agree with these views of counsel and that finding of the learned trial judge.

The Ministerial Direction was purportedly issued under section 6 of the Act which confers on the Minister the power to give "directions of a general nature as to policy." I agree with the Solicitor General that "policy" is not defined in the Act, but in my view one must look at the objects and purpose of the Act in order to determine whether the direction was of a general or specific nature.

In my view, the policy of the Act is clearly stated in section 3 which outlines, comprehensively, the policy of the Act, where its objects are listed.

The aims and objects of the Act are, to promote and protect the interest of the public by promoting fair and open competition, access to specified

services, the protection of customers and providing specified services to persons, universal access to telecommunications for persons in Jamaica, to encourage economically efficient investment and to facilitate such objects consistent with Jamaica's international obligations in relation to the liberalization of the telecommunications industry. These are general statements of policy within which the Minister is confined.

"Part II Administration" of the Act in section 4, details the obligations of the OUR in the regulation of telecommunications under the Act, and specifically obliges the OUR in subsection (1)(i), to –

> "(1) ...
>
> (i) carry out such other functions as may be prescribed by or pursuant to this Act."

Any functions therefore that are designated under section 4 of the Act or any other section of the Act to be performed by the OUR, are specific statutory mandatory functions of the OUR. If therefore the Minister by his Direction, sought to prevent the OUR from performing any such specific functions, it would have been an unlawful act on the Minister's part, being devoid of statutory authorization.

Directions of a "general nature" are, prima facie, in contradistinction to those of a "specific nature," in ordinary English language. Words in a statute must be interpreted in their normal everyday usage, within the ambit of the specific statute. If the meaning of the words are clear, no extrinsic evidence or

document may be used to explain its meaning. The word "general" is defined in the Concise Oxford Dictionary as –

> "...affecting or concerning all or most people or things: not specialized or limited ... involving only the main features or elements and disregarding exceptions..."

The learned Solicitor General recognized from the above definition that "general therefore connotes a lack of specificity." With that I agree. I do not agree with him however, or with counsel for Digicel and Centennial, that the Ministerial Direction was "of a general nature as to policy."

The Minister pinpointed specific areas of the regulatory functions of the OUR, namely:

> (a) its powers to determine 'rates or fares' to be charged for a telecommunication service (section 4(4) of the OUR Act);
>
> (b) its powers to provide for the "imposition, monitoring and enforcement of price – caps (section 46(2) of the Telecommunications Act)
>
> (c) its powers to assess "the terms and conditions of call termination, including changes," in interconnection, whenever it becomes necessary (section 29 of the Act)
>
> (d) in respect of a dominant public voice carrier (if and when so declared by the OUR), its powers to assess on interconnection, the terms and conditions, including charges (section 30), the prices, costs and charges (section 33 of the Act)

and directed the OUR not to perform such specific functions in respect of any mobile competitor.

It was disingenuous of the Minister to preface the Direction with the phrase "as a matter of policy," to seek to convey that it was authorized by section 6 of the Act. A specific direction does not change its substance by the use of a label of "general."

If the Minister in the purported exercise of a discretionary power given by a statute exceeds his statutory powers or exercises it for a reason other than that for which the power was conferred, he acts ultra vires his powers and he is then subject to judicial review by the court. See ***Padfield et al v Minister of Agriculture Fisheries & Food et al*** [1968] 1 All E R 694. In that case the House of Lords set aside the decision of the Minister not to refer a complaint in respect of the price of milk to a committee set up under a statute to investigate such complaints, on the basis of his unfettered discretion whether or not to do so. Their Lordship held that it was unlawful being for the wrong reasons, and therefore ultra vires.

Judicial review is concerned, not with the merits of the decision but with the decision-making process, that is, the manner of its exercise. (***Chief Constable of the North Wales Police v Evans*** [1982] 3 All ER 141). If the decision exceeds the statutory powers, the court will examine it, declare it to be so and set it aside. The textbook writers are helpful in their treatment of the effect of the unlawful administrative decision.

The editors in Judicial Review of Administrative Action by deSmith Woolf and Jowell 5th edition, (1995) paragraph 6-001, at page 295 said:

> "An administrative decision is flawed if it is illegal. A decision is illegal if:
>
> (1) it contravenes or exceeds the terms of the power which authorises the making of the decision; or
> (2) it pursues an objective other than that for which the power to make the decision was conferred.
>
> The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the power in order to determine whether the decision falls within its 'four corners'. In so doing the courts enforce the rule of law, requiring administrative bodies to act within the bounds of the powers they have been given. They also act as guardians of Parliament's will seeking to ensure that the exercise of power is what Parliament intended."

In Administrative Law by Wade & Forsyth, 7th edition [1994] at page 43, it was said:

> "Any administrative act or order which is ultra vires or outside jurisdiction is void in law, i.e. deprived of legal effect. This is because in order to be valid it needs statutory authorisation, and if it is not within the powers given by the Act, it has no legal leg to stand on. The court will then quash it or declare it to be unlawful or prohibit any action to enforce it."

Further assistance is afforded us by ***Laker Airways Ltd. v Department of Trade*** [1977] 2 All E R 182. In that case the Court of Appeal (UK) declared that a new policy guidance issued by the Secretary of State for Trade in

purported exercise of his powers under the Civil Aviation Act ("CAA"), the effect of which would cancel the licence of the plaintiff which had been properly issued by the Civil Aviation Board was unlawful. The British Airways Board had previously asked the Authority to cancel the licence of the plaintiff on the ground of the reduction of air traffic and the Authority had refused. The Court held that the policy guidance of the Secretary of State contravened the statutory provisions, in that it would allow a monopoly to British Airways and was therefore ultra vires. In making a distinction between the guidance by the Secretary of State to the Authority in carrying out its functions to satisfy the objectives of the statute, and directions on the other hand, Lord Denning at page 187 said:

> "In my opinion the Secretary of State can give guidance by way of explanation or amplification of, or supplement to, the general objectives, but not so as to reverse or contradict them."

Section 3(2) of the CAA reads:

> "...the Secretary of State may from time to time, after consultation with the Authority, give guidance to the Authority in writing with respect to the performances of the functions conferred on it ... and it shall be the duty of the Authority to perform those functions in such manner as it considers is in accordance with the guidance for the time being given to it...."

In emphasizing the distinction, Lord Denning at page 188 said:

> "*Directions versus guidance*
> The word 'directions' in s 4 is in stark contrast with the word 'guidance' in s 3. It is used again in ss 24(2), (6)(b) and 28(2). It denotes an order or command which must be obeyed, even though it may

> be contrary to the general objectives and provisions of the Act. But the word 'guidance' in s 3 does not denote an order or command. It cannot be used so as to reverse or contradict the general objectives or provisions of the Act. It can only be used so as to explain, amplify or supplement them. So long as the 'guidance' given by the Secretary of State keeps within the due bounds of guidance, the authority is under a duty to follow his guidance. Even so, the authority is allowed some degree of flexibility. It is to perform its function 'in such a manner as it considers is in accordance with the guidance' so, whilst it is obliged to follow the guidance, the manner of doing so is for the authority itself. But, if the Secretary of State goes beyond the bounds of 'guidance', he exceeds his powers, and the authority is under no obligation to obey him."

It was noted that the CAA gave to the Secretary of State "exceptional powers to override the statutory requests as to licences," but only in circumstances "in time of war or great national emergency." This is not a feature of our Telecommunications Act.

I agree with counsel for the appellant that the use of the phrase "guidance to the Authority" in the ***Laker*** case is equated to the phrase "general directions as to policy" in the Act (Jamaica). Their Lordships all agreed that the Secretary of State could give "guidance" to the Authority in respect of the "general objectives" of the statute, but he could not "exercise powers of direction which he did not have and ... in a way which was not authorized by law. He acted ultra vires" (per Lord Justice Lawton).

In the instant case, the Minister, not only misdirected himself as to his powers under the Act, but also by the nature of the Ministerial Direction to the

OUR sought to pursue "an objective other than that for which the power to make the decision was conferred." (deSmith Woolf & Jowell, supra).

The affidavit of Winston C. Hay (former Director General of the OUR) dated 25th October 2002 details two instances on which the Minister indicated that the "fourth cellular provider [was requesting that] the FTM rates be maintained at the current level," that is, on 24th March 2002 and on 26th March 2002. In paragraph 33 he said:

> "33. On a Sunday evening, (I believe it was the evening of 24th March, 2002), I received a telephone call from Minister Paulwell. He said that the company most likely to become the fourth cellular provider wanted the FTM rates to be maintained at their current levels for the first two years of the licence, that is from March 2003 to February 2005, The company reportedly felt that only in that event would it be financially attractive to invest in the Jamaican telecommunications sector. The Minister asked if complying with that condition would be problematic. I explained that we had a commitment to revisit the FTM prices, had already begun the process of consultation with the stakeholders on the matter, and had given a commitment to issue a determination in the first week of May..."

He then referred in paragraph 34 to a second meeting two days later in the office of the Minister:

> "34. In that meeting the Minister again told us that the company bidding for the fourth mobile licence was requiring the FTM rates to be held at the current levels for the first two (2) years of the licence. I said that the OUR had an obligation under the Act to make prices cost reflective, and had given the existing service providers an undertaking to review certain provisions of the RIO, including FTM rates. I also suggested that it would be better for any potential

> investor to be clear about the regulatory regime in which he was about to invest, than for the impression to be created that prices, or any other regulated aspect of service provision, could be manipulated to conform with its wishes. The Minister said that the investment was of great importance to Jamaica, but would probably not be made if the FTM rates were lowered. He said also that he had discussed the matter with C&WJ and Digicel and both had said that they would not oppose retaining the existing FTM rates for a further three (3) years. I told him that we must necessarily operate on the basis of transparency and consistency and would not be able to bend those principles to satisfy the wishes of a potential investor. My colleagues supported my position."

The retort of the Minister, as reported by Winston Hay is significant. Hay said:

> "The Minister said he would have to rethink the role of the OUR in telecommunications and would discuss the matter further with me at an early date."

As a consequence the said Ministerial Direction was issued by the Minister on 9th April 2002 directing the OUR to refrain from intervening.

In response to the knowledge that the Ministerial Direction had been issued, Winston Hay, in a fax message dated 9th April 2002 to Courtney Jackson, expressed his disbelief, challenged its legality and observed that the functions of the OUR would be hindered, if it complied with the Direction. In a statement of utter disbelief and hopeless despair, Winston Hay was compelled to comment, "What a ting!"

The affidavit of the Minister, Phillip Paulwell dated 2nd January 2003, responded specifically to the complaints of Winston Hay. He said in paragraph 21:

> "21. I refer to paragraphs 33, 34 and 46(f) and (i) of the Affidavit of Winston Hay and say that I deny that I told Mr. Winston Hay that there was an agreement with Digicel and Cable & Wireless to retain the existing Fixed to Mobile (FTM) rates for a further period of three years. I also deny that the Ministerial Direction was issued to prevent the revision of FTM rates in response to pressure from Digicel, as alleged. With the existing interconnection rates, the growth rate in the cellular/mobile market was phenomenal. Therefore, I was interested in maintaining the existing climate, which had benefited all the players and increase competition."

The Minister did not deny the fact, as Winston Hay said, that he the Minister on two occasions that is, on 24th March 2003 and again on 26th March 2003, stated that the company likely to be the fourth cellular provider wished to have the fixed to mobile (FTM) rates remain at the then current rate.

A clear inference may be drawn that the Ministerial Direction at paragraph (1), that "The OUR ... not intervene in the mobile (cellular) market..." effectively sought to satisfy the wish in the Minister's statements of March 2003, that it was desired by the fourth cellular provider that the fixed to mobile rates remain unchanged. This was resisted by the OUR.

Furthermore, each of the recitals to the Ministerial Direction emphasizes variously, "sustainable investment ..." "introduction of competition ... and ...tremendous investment...", "...competitive marketplace...," "...the heart of competition...and...the viability of competitors..."and recognized that:

> "... interconnection policies that facilitate competition are pre-requisites to the successful development of a wide range of competitive services."

The Direction culminated in paragraph (ii), it reads:

> "(ii) The OUR is to facilitate competition and investment for the new mobile carriers in Jamaica."

I agree with counsel for the appellant that the "recitals" to the Direction made no mention whatsoever of the statutory objects such as "fair" competition, protection of customers and encouraging economically efficient services. The recitals clearly demonstrate the Minister's determination to elevate competition simpliciter disproportionately, to the exclusion of the other objects of the Act.

The objects in section 3 of the Act regard competition as one of the means in the wider object "to promote and protect the interest of the public."

It is my view that by the Direction, directed specifically to restrain the OUR from performing its statutory regulatory powers, and for the sole purpose of facilitating "competition and investment" only, and exclusively for "the new mobile carriers in Jamaica" without considering the public interest, the Minister was wrongfully pursuing "an objective other than that for which the power to make the decision was conferred." For the above reasons also the Direction was flawed for an unlawful purpose, and therefore illegal.

In the circumstances, the above grounds are not without merit.

Grounds 17 to 19 which concerned the validity of the Determination Notices Nos. 2.6 and 2.8 issued in May 2002 by the OUR may be considered together.

The learned trial judge had concluded that the Ministerial Direction having been declared to have been intra vires the Minister's powers, it was unnecessary

to consider in depth the arguments whether or not the OUR had the power to issue the said Notices. At page 36 of the record, he said:

> "The Determination Notice issued by the OUR contravenes the Direction and therefore cannot stand and ought no (sic) to have been issued."

and at page 37:

> "The Court having found the Direction to be *intra vires* the Minister's Powers the OUR acted in contravention of the Direction and therefore was in breach of the Ministerial Direction. It is therefore unnecessary to determine whether the OUR acted *ultra vires* its statutory mandate."

Counsel for the OUR argued that the Determination Notice of May 2002 was a part of a continuing reference interconnection offer (RIO) assessment process requiring approval of the OUR under the provisions of section 32 (4) of the Act. By this means the OUR regulates the basis for the terms of interconnection agreements between telecommunication carriers in order to ensure fair competition, the protection of customers and an efficient industry. The RIO approval process and the interconnection agreements process (section 29) are not entirely separate. A RIO can influence an interconnection agreement already entered into. In its Determination Notice previously issued in February 2001, the OUR had stipulated that interconnection agreements should include provision for amendments to accord with changes in a continuing RIO assessment process. Determination 2.6 concerns the termination rate for fixed to mobile calls ("FTM") for interconnection, which in a calling party pays regime

("CPP") is paid by the network from which the call originates. The price of FTM calls is fixed by the mobile operation. It was advisable that the OUR regulate this rate, in the view of Maurice Charvis, the expert advisor of OUR, to obviate the charging of the fixed network customer, by the mobile carrier of whatever the latter chooses. Determination 2.8 was equally reasonable and appropriate. It regulated the rates paid by C & WJ fixed network to Digicel, Centennial and C&WJ mobile for the termination of incoming international calls into their networks. C&WJ has the monopoly on access to international calls. The Determination was intended to encourage C&WJ to negotiate higher settlement rates paid by overseas carriers. He maintained that the OUR acted reasonably, took into account relevant information and expert advice and consequently the Court should not review the merits of its Determinations.

Counsel for Digicel, contended that the learned trial judge was wrong to rule that the declarations sought by Digicel, in respect of its challenge to the actions of the OUR, were academic. He submitted, that the OUR, engaged in an approval of RIO4, which is required to be filed by a dominant incumbent telecommunications carrier, C&WJ, pursuant to section 32 of the Act, was involved in a process different from an assessment of an interconnection agreement. The OUR therefore had no power to determine retail call termination charges for FTM or incoming international call charges for non-dominant carriers. The functions are separate and distinct. The OUR did not undertake any assessment of the interconnection agreement between C&WJ and Digicel

executed on 18th April 2001 and therefore had no jurisdiction to make any such Determination. The effect of Determination 2.6 was to "cap and reduce" the FTM charges of Digicel and the effect of Determination 2.8 was to reduce the termination rate of incoming international calls through C&WJ's international gateway and thereby change the rate contractually agreed between Digicel and C&WJ. The participation of Digicel in the consultative process was not an act of acquiescence by Digicel in any power of the OUR to amend the interconnection agreement between Digicel and C&WJ. By clause 23.1 any amendment of the latter agreement should be effected by agreement between the parties (there was none), or by the OUR exercising its powers under sections 29 or 34. It was not. Section 31 of the Act permits the OUR to act as arbitrator in determining each term and condition in the provision of interconnection services, if no governing RIO existed (RIO3 was then in place) or by agreement between the parties. No dispute existed and there was a tariff schedule in existence in respect of incoming international calls. Counsel further argued that no basis therefore existed to authorise the OUR to determine retail call termination charges for FTM or incoming international calls for non-dominant public voice carriers.

On this issue the Solicitor General argued that the OUR could not validly issue the Determination in spite of the fact that the Ministerial Direction was invalid, as the OUR and C&WJ contend. Nor could the OUR do so based on the agreement between Digicel and C&WJ, because the OUR's powers and decisions

were limited by statute. When the OUR caps the charges of the fixed line provider, it automatically caps the charges of the mobile competitor. Increasing the charges to the mobile provider's customers, to address this restriction, as C&WJ suggests, would affect the mobile provider negatively in the market. This would be contrary to policy. He said further that the Ministerial Direction, if intra vires, would preclude the OUR from fixing rates, thereby eliminating competition. The Determination was therefore invalid.

Counsel for Centennial, adopted the arguments of counsel for Digicel and said further that the RIO is an offer document the terms of which are accepted when an interconnection agreement is signed. Only the parties may amend the said agreement. The OUR had no power to alter such an agreement, unless it is making an assessment of the interconnection agreement under section 29(4) of the Act. The OUR was not doing so, therefore the Determination Notice which purported to fix price for FTM services which had already been effected by an interconnection agreement, was invalid.

In my view section 29(1) of the Act, which is contained in Part V and is headed "Interconnection", places an obligation on every public voice carrier to permit another such carrier to interconnect with the former's network, on request. It reads:

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

Section 29(3) requires that a copy of each interconnection agreement be lodged with the OUR for assessment. The OUR may make a determination thereof of the terms and conditions, "either on its own initiative, or in "resolving a dispute between operators," (section 29 (4). The OUR may object to the agreement. These are discretionary powers given to the OUR.

Section 32(1) permits any public voice carrier who wishes to do so, to lodge with the OUR a proposed reference interconnection offer (RIO), containing the terms under which it will permit interconnection with any other voice carrier. It reads:

> "32.-(1) Every dominant carrier shall, and any other carrier may, lodge with the Office a proposed reference interconnection offer setting out the terms and conditions upon which other carriers may interconnect with the public voice network of that dominant or other carrier for the provision of voice services." (Emphasis added)

No public voice carrier has been declared to be dominant. The OUR may so do under section 28(1) of the Act.

The OUR is required to approve the RIO lodged, in order to validate it as effective under the Act. Section 32(4) reads:

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

The OUR therefore has the power to make a determination, in approving a RIO in respect of its "terms and conditions," as required by section 32(1). "Terms and conditions" include, charges and prices.

Although the interconnection agreement (section 29), is a contract of agreement between two public voice carriers and the RIO (section 32), describing the terms and conditions under which interconnection may be effected, are essentially providing for two different functions, they are, of necessity, interrelated. Section 31 (a) provides:

> "31. Each term and condition in relation to the provision of interconnection services provided to each carrier shall be determined –
>
> (a) in accordance with the relevant references interconnection offer or any part thereof which is in effect in relation to the provision of those services;" (Emphasis added)

The affidavit evidence before the learned trial judge revealed that the OUR, at all the relevant times was mainly engaged in the assessment and approval of the RIO, filed at various times by C&WJ, in accordance with section 32(1) of the Act.

On 23rd August 2001 C&WJ submitted to the OUR pursuant to section 32 of the Act, RIO(4), for the approval of the OUR. As a consequence the OUR, on 30th October, 2001, issued its consultative document setting out its proposed modification of the existing RIO(3), in its consideration of the anticipated approval of RIO(4). The modifications related to (a) the retail retention rates by C&WJ fixed to mobile and (b) the retention rates of incoming international calls terminating in a mobile carrier network. The OUR requested information from the mobile carriers. They provided none.

Subsequently, on 22nd November 2001 in furtherance of the consideration of RIO(4) , the OUR issued a further determination in respect of (a) C&WJ's bad debt allowance and (b) a 100% increase in the rates chargeable by mobile carrier Digicel.

Previously, CW&J had issued RIOs, which the OUR, after the relevant consideration and modification, approved. On 30th March 2000 C&WJ had submitted its first RIO under the Act, then in force. The OUR consulted with the Fair Trading Commission (FTC) in accordance with section 5 of the Act, and also with parties in the industry, held discussions and issued to all parties a copy of its proposed rules. In September 2000 the OUR capped the tariff regime for FTM rates "until September 2001" at "$5.00 peak, $4.00 off-peak and $3.00 week-ends." C&WJ was then the only mobile service available. In February 2001, the OUR issued its Determination Notice, in approval of RIO(1), also providing for revision and modification of the RIO. On 18th April 2001 C&WJ issued to the OUR, a revised RIO(3) and entered into an interconnection agreement with Digicel, conforming with the current, RIO(3).

RIO(4) was therefore under consideration when on 18th December 2001 the OUR sent its assessment thereof in a consultative document to Digicel. The latter protested both to the Minister of Finance and the Private Sector Organization of Jamaica, in respect of some of the proposals in the said document. Thereafter, the Ministerial requests of 24th March 2002 and 26th

March 2002, to maintain the FTM rates "at current level," were made and the said Ministerial Direction issued on 9th April 2002.

The OUR, on 22nd May 2002, issued its Determination Notice in its consideration of RIO (4). This included determination 2.6 and 2.8, which are challenged. They read:

> "Determination 2.6
>
> The following maximum termination charges shall be applicable as of July 1, 2002.
> J$6.838 per minute
> J$5.593 per minute off peak and
> J$4.349 per minute weekend."

and

> "Determination 2.8
>
> In the event international settlement rates no longer cover the costs of mobile termination plus fixed retention costs, mobile termination charges on incoming international traffic shall be equal to the lesser of the weighted average settlement rates (across all countries) and the weighted average cost of mobile termination estimated to be J$5.351 per minute."

Both counsel for Digicel and Centennial argued that Determinations 2.6 and 2.8 were attempts by the OUR to regulate the mobile carriers, without the statutory authority to do so.

The provisions of section 32 of the Act, relevant to this issue reads:

> "32 – (1)... any ... carrier may, lodge with the Office a proposed reference interconnection offer setting out the terms and conditions upon which other carriers may interconnect with the public voice network of that ... carrier for the provision of voice services."

Because the "terms and conditions" include charges, and the OUR is required to approve a RIO filed (section 32(4)), it follows that the OUR is empowered under the Act to determine charges in approving a RIO. "Reference interconnection offer" (RIO) is defined in section 27 of the Act and reads:

> " 'reference interconnection offer' means an offer document setting out matters relating to the price and terms and conditions under which a public voice carrier will permit interconnection to its public voice network."

I do not agree with the submissions of counsel for Digicel that "... it was ... intended that non-dominant carriers should be permitted to exist in a regulatory free environment in relation to their termination charges." The OUR is mandated under section 4 of the Act to regulate specified services and facilities, in all their facets. Nowhere within the Act are any entities granted statutory exemptions. More specifically, non-dominant carriers are not exempt from the regulatory powers of the OUR.

Determination 2.6 was therefore a valid exercise of the powers of the OUR. It concerns the termination rates for FTM domestic calls. It is better understood by noting the preceding Determination 2.5 which reads:

> "Determination 2.5
>
> The price of FTM calls shall continue to be set by participating mobile carriers, subject to a cap. The cap for domestic FTM calls shall be the sum of C&WJ's mobile termination costs plus the costs which includes an allowance for bad debt."

It is accepted by all parties that, in Jamaica, the calling party pays regime (CPP) is operated. This means that the calling party is ultimately responsible to pay the charges for a call terminating in a mobile network, although it is the mobile network which sets the price. This system was explained, in the affidavit dated 7th November 2002 of Maurice Charvis, Director of Analysis and Research, then with the OUR. He has a M.Sc. in accounting and a B.Sc. in physics (UWI). He said at paragraph 13:

> "13. Determination 2.6 is concerned with the maximum charge allowable for mobile termination, that is where a call is made from a fixed line to a mobile instrument. In the absence of regulation the mobile carrier will be able to set artificially high tariffs which will adversely affect the customer connected to Cable & Wireless Jamaica's Fixed Network. This is because in Jamaica a 'calling party pays' regime applies unlike the USA or Canada. Under the Calling party pays regime the charge by the Mobile Network to the Fixed network will have to form part of the Fixed Networks bill to its customer. Unless therefore there is regulation of the charge, the Mobile Network would be allowed to make exorbitant charges to the fixed customer (who has no choice when he wishes to telephone a particular mobile customer). Furthermore, the possibility of increased charges to its customers will increase the risk of bad debts to the Fixed Network. This has been the experience in many jurisdictions around the world and it is well established and recommended that in a calling party pays regime maximum rates be set for Fixed to Mobile access charges. The Office notes that as regulators become aware of the pitfalls involved in leaving mobile termination unregulated in a calling party pays regime there is an increasing trend in the number of countries proposing regulations to address the issue. ..." (Emphasis added)

Determination 2.8 was also a valid exercise of the powers of the OUR, and concerned the rate paid by C&WJ fixed network to the mobile service providers for international calls terminating on the mobile service provider's network. In 2002, C&WJ enjoyed a monopoly on being the only gateway for international calls into Jamaica, and therefore it was necessary to regulate C&WJ. Maurice Charvis, in his said affidavit, at paragraph 14, explains the necessity for determination 2.8. He said:

> "The effect of regulation 2.8 is that in the event international settlement rates no longer cover the costs of mobile termination plus fixed retention costs, mobile termination charges on incoming international calls will be set at the lesser of the weighted average settlement rate (across all countries) and the weighted average cost of mobile termination estimated to be J$5.351 per minute. The international settlement rate is the maximum amount that the Fixed network is able to recover from the overseas calling party's network for the Incoming call to Jamaica from carriers such as AT&T, Sprint Worldcom and Teleglobe. The OUR had received information that international settlement rate agreements were about to be concluded which would be harmful to mobile carriers in that the rates were likely to be insufficient to cover fixed retention plus the costs of mobile termination. Determination 2.8 is designed to encourage C&WJ to negotiate higher international settlement as it ensures that in the event the rates negotiated are insufficient to cover those charges, C&WJ and not the mobile carrier will be the first party to suffer the consequence." (Emphasis added)

C&WJ was the only fixed line provider in Jamaica in 2002.

On the question of the validity of Determination Notices 2.6 and 2.8, the learned trial judge, at page 37 of the record, said:

> "The Court having found the Direction to be *intra vires* the Minister's Powers the OUR acted in contravention of the Direction and therefore was in breach of the Ministerial Direction. It is therefore unnecessary to determine whether the OUR acted *ultra vires* its statutory mandate."

With due respect to the learned trial judge, I also do not agree.

Having found, as I said earlier, that the Ministerial Direction of 9th April 2002 was ultra vires, unlawful, void and of no effect, the said Determination by the OUR would not to be in breach of any Ministerial Direction. However, even assuming that the said Direction was intra vires and valid, which it was not, the Determination Notices 2.6 and 2.8 by the OUR, would not have been in breach of the said Direction. Paragraph (1) of the Direction that –

> *"(i) The OUR is not to intervene in the mobile (cellular) market by setting rates, tariffs or price caps on the interconnection or retail charges made by any mobile competitor."*

is a directive prohibiting intervention by the OUR in respect of charges made by the mobile competitor "... on the interconnection or retail charges." Determination 2.6 is specifically concerned with the rate which the fixed line customer will be charged (although fixed by the mobile carrier) by its own fixed line carrier for interconnection of calls terminating in the mobile carriers network. It is not a cap on the charges a mobile carrier may make to its own customers for interconnection to the fixed line network. Similarly, Determination 2.8 is concerned with the rate paid by C&WJ fixed line network from the rate paid by the overseas carrier, the international settlement rate, to the mobile carriers for

incoming international calls termination in the mobile network. C&WJ enjoyed a monopoly on incoming international calls. All such international calls had to be routed through C&WJ, by interconnection with C&WJ's fixed line.

Both Determinations 2.6 and 2.8 were specific regulatory decisions in relation to the charges payable by C&WJ fixed line customers (FTM) and the retention charges by C&WJ in respect of incoming international calls. The Determinations by the OUR, as worded, are not "setting rates, tariffs, or price caps on interconnection or retail charges made by any mobile competitor."

Inevitably, because interconnection, being a mandatory obligation statutorily placed on each carrier (section 29 of the Act), results in the physical linking of the facilities of one carrier to the facilities of another for the interchange of voice messages, charging restrictions imposed on one carrier, may cause some effect on the functions of the other.

Determinations 2.6 and 2.8 by the OUR, imposed specifically on C&WJ in respect of the amount it would charge its fixed line customers, and the amount it would pay to mobile carriers from the settlement rates received from overseas carriers, cannot therefore be interpreted as amending or regulating the agreements between mobile carriers. No reference is made to such agreements. Neither may such Determinations be construed as an intervention in the "mobile (cellular) market," thereby contravening the Ministerial Direction of May 2002.

In the circumstances, grounds (a) to (n) in Appeal No 4/04 (M136) and grounds 1 to 14 in Appeal No 5/04 (M 074) as advanced by the appellant, are not without merit and consequently succeed.

Grounds (o) and 15 in Appeals Nos. 4/05 and 5/04, respectively, complain that the learned trial judge erred in finding that the OUR was precluded from issuing the Determinations 2.6 and 2.8 in disobedience to the Ministerial Direction until the issue had been decided by the Courts. The learned trial judge at page 36 of the record said:

> "Whether the OUR disagrees or not with the Minister's direction they are bound in law to give effect to the directions. They were not entitled to issue the Determination Notice until the Directions was challenged and set aside in a Review Court."

Regrettably, I respectfully disagree with the learned trial judge.

As I have demonstrated, the OUR, in accordance with section 32 of the Act, had the power, in approving a RIO of a carrier, to regulate the terms and conditions, including prices and charges of the carrier. The OUR in its Determinations 2.6 and 2.8 was approving RIO4. Any attempts to derail or prevent the OUR from performing its statutory functions would be unlawful. The OUR, as a statutory regulatory body need not obey and can ignore unlawful orders. The Ministerial Direction of May 2002 was ultra vires the Minister's powers and therefore unlawful. The order of a superior court of record of unlimited jurisdiction even if irregular, must be obeyed, until such order is set aside by a court. (See ***Isaac v Robertson*** [1985] A C 97 and ***Hadkinson v***

Hadkinson [1952] 2 All ER 567.) No Ministerial Order may be seen as capable of being so construed, moreso, if it is contrary to the statutory provision and therefore ultra vires.

The OUR was correct to issue its Determinations 2.6 and 2.8 in obedience to its statutory duties. There is merit in these grounds. Consequently, the arguments of counsel for Digicel to the contrary, in its ground XII, are without merit.

Grounds (f) and 16 maintained that the learned trial judge was in error in not appreciating that a collateral challenge to an administrative act may be raised by way of defence. Their Lordships in the House of Lords in ***Boddington v British Transport Police*** [1998] 2 WLR 639 held that in a criminal prosecution charging a breach of a byelaw, namely, smoking on trains, the defendant could challenge the legality of the decision to display "no smoking" signs in the trains. The headnote reads inter alia:

> "... a defendant was not precluded from raising in a criminal prosecution the contention that a byelaw or an administrative act undertaken pursuant to it was ultra vires and unlawful,..."

The byelaw was declared lawful. The appeal was dismissed.

In the instant case, the Ministerial Direction was ultra vires and unlawful. Its validity was properly raised by the appellant in challenge. Consequently, I do not agree with the Solicitor General that such a challenge would fail. Nor do I agree with counsel for Digicel that the collateral challenge "... is entirely

inapplicable as a defence..." in these circumstances. These grounds also succeed.

Grounds 17, 18 and 19 in Appeal No. 5/04 (M 074) may be considered together. The appellant therein contends that the learned trial judge failed to appreciate (presumably, in declining to consider and pronounce on the merits of the Determinations 2.6 and 2.8) that the said Determinations were consistent with a prior RIO in February 2001 which "stipulated that interconnection agreements would be modified in accordance with changes made in a continuing Reference Interconnection Offer Assessment Process." Further, that the respondent Digicel entered into an interconnection agreement and agreed that it would be amended to conform with the Continuing Reference Interconnection Offer Assessment process. Determinations 2.6 and 2.8 were a part of that process in which Digicel participated and acquiesced, and therefore the latter is estopped from objecting to the said Determinations.

The OUR, by its Determination Notice issued in February 2001, provided in Determination 2.2:

> "All interconnect agreements should include an expressed provision for modifications to take account of changes made to the RIO."

By an interconnection agreement dated 18th April 2001 between Digicel and C&WJ, the parties agreed that they could amend the agreement "to reflect the principles in the approved RIO." Paragraph 23 of the agreement reads:

> "... either party may seek to amend this Agreement by serving on the other a review notice if:

a) a material change occurs in the law or regulations governing telecommunications in Jamaica (including, without limitation, licence changes and court decisions that necessitate the amendment of this Agreement);

b) a material change occurs (including, without limitation, enforcement action by any regulatory authority and changes to the company constitution of the Parties) which affects or reasonably could be expected to affect the commercial or technical basis of this Agreement;

c) a revised RIO submitted by C&WJ is approved in whole or in part ..."

This provision for amendment of the interconnection agreement was purely a matter between the contracting parties, at their option. There was no statutory provision that a subsequent RIO could retroactively modify their prior agreement. On the contrary, an interconnection agreement being entered into is required to conform with the existing RIO. Section 31 of the Act provides:

> "31. Each term and condition in relation to the provision of interconnection services provided to each carrier shall be determined –
>
> (a) in accordance with the relevant references interconnection offer or any part thereof which is in effect in relation to the provision of those services;" (Emphasis added)

I am not of the view however, in agreement with the Solicitor General, that an agreement between Digicel and C&WJ could validate a Determination by the OUR, which was not authorized by the Act. Despite such agreement and

Digicel's full participation in, and agreement with the prior consultative process with the OUR, Digicel is not precluded from raising its objection as it has done, to the said Determination. These grounds 17, 18 and 19 therefore fail. The Determinations 2.6 and 2.8 being a part of the approval process of RIO4, within the provisions of section 32, stand valid on their own.

Although the findings above are sufficient to dispose of this appeal, several other issues of relevance were raised, which merit some treatment.

The respondent Digicel, in Appeal No. 5/04 complained in its "ground ix" that the OUR failed to consult with and refer the matter to the Fair Trading Commission, as it was obliged to, prior to its issue of Determinations 2.6 and 2.8.

Section 5 of the Act reads:

> "5. Where after consultation with the Fair Trading Commission the Office determines that a matter or any aspect thereof relating to the provision of specified services –
>
> (a) is of substantial competitive significance to the provision of specified services; and
>
> (b) falls within the functions of the Fair Trading Commission under the Fair Competition Act,
>
> the Office shall refer the matter to the Fair Trading Commission."

The said section permits the OUR to consult with the Fair Trading Commission ("the FTC") on a matter. Thereafter it is the OUR which has the duty to decide whether or not the matter "... is of substantial competitive significance" and is a matter to be dealt with by the FTC. Only then, after such a

decision is the OUR required to refer the matter to the FTC. The OUR did consult with the FTC in respect of RIO 3 and the FTC provided its comments thereon (see the affidavit of Maurice Charvis dated 17th February 2003). The OUR did consult with the FTC in respect of RIO4 dated 22nd May 2002 by sending a copy of the Determination to the FTC. (See paragraph 44 of the affidavit of Winston Hay dated 28th October 2002). In this latter instance the FTC did not respond with its comments. In neither instance did the FTC make any relevant comment to cause the OUR to make a determination as contemplated in section 5(a), namely, that the matter was "of substantial competitive significance". In that regard the OUR had sufficiently discharged the statutory requirements. In ***Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd*** [1972] 1 All ER 280, it was demonstrated that a failure of a body to respond could not be seen as a failure to consult. Donaldson, J at page 284 said:

> "If the invitation is once received, it matters not that it is not accepted and no advice is proferred. Were it otherwise organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation."

In the instant case, acting within the concept of fairness the OUR acted with propriety, and did consult with the FTC prior to the issuance of each of its determination of the RIO. The ground of complaint therefore fails.

Counsel for Digicel in its "ground x", also argued that the OUR in making a determination of charges in the context of cost orientation, is governed, by

implication by section 33(1) of the Act. It should not therefore, as it did, accept the cost model of a competitor namely, C&WJ, because by doing so the OUR was abdicating its functions and was thereby delegating its statutory obligations to C&WJ. The OUR, as a regulatory body, he said, should develop its own cost model by being "reasonably satisfied" that the cost information it is relying on is "relevant and reliable," and if not so convinced, it is "permitted to rely on international benchmarks."

It should be noted that section 33(1) is concerned with the fixing of prices by the OUR, in respect of "a dominant carrier." It reads:

> "33. (1) Where the Office is required to determine the prices at which interconnection is to be provided by a dominant carrier, it shall, in making that determination, be guided by the following principles ..." (Emphasis added)

Section 33(2) however enables the OUR to obtain and consider cost information generally, and if unsatisfied to resort to international benchmarks. The sub-section reads:

> "(2) Where the Office has been unable to obtain cost information that it is reasonably satisfied is relevant and reliable, it may take into account comparable international benchmarks."

Consequently, the OUR may properly examine and consider any cost information submitted by any carrier, and make its determination in accordance with the statute as to the reliability of the said information. (See the affidavit of Maurice Charvis dated 7th November 2002).

In the context of judicial review, provided that the OUR conforms to the statutory procedure, there is no basis for complaint. The review court may not generally concern itself with the merits of the decision. There is no proper basis for complaint on this ground.

Counsel also complained in "ground (xi)" that the OUR in making Determinations 2.6 and 2.8 acted unreasonably and arrived at a decision which no reasonable telecommunications regulatory body could.

This complaint is undisguisedly relying on the "Wednesbury unreasonableness" principle as the basis on which judicial review court should quash the Determination of the OUR (***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 K B 223). The courts will not usually regard a decision of an administrative body as so unreasonable requiring quashing unless the decision is regarded as reaching the level of absurdity. The editors of Administrative Law by Wade and Forsythe, 7th edition at page 401, in describing the relevant level of unreasonableness, said:

> "Taken by itself, the standard of unreasonableness is nominally pitched very high: 'so absurd that no sensible person could ever dream that it lay within the powers of the authority' (Lord Greene MR); 'so wrong that no reasonable person could sensibly take that view' (Lord Denning MR); so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' (Lord Diplock (*Counsel of Civil Service Unions v. Minister for the Civil Service* [1985] AC at 410)"

In my view, the OUR consulted, invited comments and entertained discussions, with the relevant parties. It was advised by its consultants and experts in the field of telecommunications and made its Determinations 2.6 and 2.8, thereafter. The OUR acted within the boundaries of procedural fairness and its statutory obligations. There is no merit in this ground.

The liberalization of the telecommunications industry in the context of the free market system was facilitated and governed by the provisions of the Telecommunications Act.

Regulatory control is the sine qua non of the free market system operating in the telecommunication industry, even within the concept that market forces should be allowed to predominate. The OUR Act created the regulatory body, the OUR, and gave it the power to regulate the said industry with specific statutory functions, since March 2000. The Minister himself recognized the successful effect of OUR's regulatory activities, when, in his letter dated 15th April 2002 to Courtney Jackson, Deputy Director General of the OUR, he admitted:

> "Competition has proven successful, as it has allowed Jamaica to have unprecedented growth in the mobile telecommunications market."

The Minister acted ultra vires his powers given under section 6 of the Act, which restricts his powers to "... directions of a general nature as to policy..." when by his Ministerial Direction dated 9th April 2002, he, in contravention of the Act gave to the OUR, a specific direction "not to intervene in the mobile

(cellular) market ..." He thereby sought to prevent the OUR from exercising one of the OUR's specific statutory functions given under sections 32 and 46 of the Act, by erroneously categorizing it as "a direction of a general nature as to policy" Such direction was ultra vires, unlawful and null and void.

The Determination of the OUR in May 2002 was a valid exercise of its statutory powers conferred by section 32 of the Act in approving RIO4. Such a decision cannot be described as so absurd to be classified as unreasonable in the Wednesbury sense. Judicial review may not go to quash such a decision. The learned trial judge was in error.

In all the circumstances and for the reasons expressed above, (1) the appeal in Appeal No. 4/04 should be allowed, the order of Dukharan, J., should be set aside, with costs to the appellant to be agreed or taxed. (2) the appeal in Appeal No. 5/04 should be allowed with costs to the appellant payable by the respondent Mossel (Jamaica) Ltd (T/A Digicel) and the 2nd party affected, Centennial Jamaica Ltd. to be agreed or taxed.

The counter-notice of appeal filed by the 1st party affected C&WJ in Appeal No. 5/04 is allowed with costs to C&WJ to be paid by the respondent Mossel (Jamaica) Ltd (T/A Digicel) and the 2nd party affected Centennial Jamaica Ltd. to be agreed or taxed. The counter-notice of appeal filed by the respondent Mossel (Jamaica) Ltd (T/A Digicel) in Appeal No. 5/04 is dismissed with costs to the appellant OUR and the 1st party affected to be paid by the respondent Mossel (Jamaica) Ltd (T/A Digicel) to be agreed or taxed.

COOKE, J.A.

I agree.

McCALLA, J.A.

I agree.

HARRISON, P.

ORDER

1. Appeal No. 4/04 allowed. Order of Dukharan, J. set aside. Costs to the appellant to be agreed or taxed.
2. Appeal No. 5/04 allowed. Costs to the appellant payable by the respondent Mossel (Jamaica) Ltd (T/A Digicel) and the 2nd Party affected Centennial Jamaica Ltd. to be agreed or taxed.
3. Counter-notice of appeal filed by 1st party affected Cable & Wireless Jamaica Ltd is allowed. Costs to Cable & Wireless Jamaica Ltd to be paid by the respondent Mossel (Jamaica) Ltd (T/A Digicel) and the 2nd party affected Centennial Jamaica Ltd. to be agreed or taxed.
4. Counter-notice of appeal filed by respondent Mossel (Jamaica) Ltd. (T/A Digicel) in Appeal No. 5/04 is dismissed. Costs to the appellant OUR and the 1st party affected Cable & Wireless Jamaica

Ltd. to be paid by the respondent Mossel (Jamaica) Ltd (T/A Digicel) to be agreed or taxed.