

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M. 074/2002

**In the matter of the Telecommunications Act
2000**

AND

**In the matter of a Regulatory Determination By
The Office of Utilities Regulations Pursuant to
Section 29(4), or 30,31,32 or 33 of the
Telecommunications Act**

BETWEEN	MOSSEL JAMAICA LTD (T/A DIGICEL)	APPLICANT
A N D	OFFICE OF UTILITIES REGULATIONS	RESPONDENT
A N D	CABLE & WIRELESS JAMAICA LIMITED	1ST PARTY AFFECTED
A N D	CENTENNIAL DIGITAL JAMAICA LIMITED	2ND PARTY AFFECTED

**Paul Beswick and Terrence Ballentyne instructed by
Miss Althea Grant of Ballentyne, Beswick & Co.
for the Applicant.**

**David Batts and Mrs. Susan Riden-Foster instructed
by Livingston, Alexander & Levy for the Respondent.**

**Derek Jones, David Garcia and Miss Malaki Wong
instructed by Myers, Fletcher & Gordon for 1st Party
Affected.**

**Miss Dorothy Lightbourne and Harold Brady instructed
By Frank Williams of Brady & Co. for 2nd Party Affected.**

A N D

SUIT NO. 136 of 2002

**In the matter of an Application by the Office of
Utilities Regulations**

A N D

**In the matter of the Office of Utilities Regulations
Act (1995) as Amended by the Office of Utilities
Regulations (Amendment) Act 2000**

A N D

**In the matter of Ministerial Directions No. 3
Issued by the Minister of Industry, Commerce
& Technology dated April 9 2002**

**BETWEEN THE OFFICE OF UTILITIES APPLICANT
REGULATIONS**

**A N D THE MINISTER OF INDUSTRY
COMMERCE AND
TECHNOLOGY 1ST RESPONDENT**

**A N D THE ATTORNEY GENERAL
FOR JAMAICA 2ND RESPONDENT**

**Appearance for the Applicant as above
B. St. Michael Hylton Q.C. Solicitor General**

**Miss Cheryl Lewis and Miss Catherine Denbow
instructed by the Director of State Proceedings
for the 1st and 2nd Respondents.**

**Heard: 7th, 8th, 9th, 10th, 13th, 14th, 15th, 16th, 20th, 21st, 22nd,
January, 2003; 18th, 19th, 20th March, 2003; 23rd, 24th April and
15th December, 2003**

○ **DUKHARAN, J**

The Applicant in the first matter, Mossel (Jamaica) Limited t/a Digicel (hereinafter referred to as Digicel) seeks a Declaration as against the Office of Utilities Regulation (OUR) that in issuing a Determination Notice dated 22nd May, 2002 the OUR acted *ultra vires* its statutory mandate and acted in breach of a Ministerial Direction No. 3 dated 9th April, 2002.

○ In the second matter the OUR seeks a Declaration as against the Minister of Industry Commerce and Technology and the Attorney General (both hereinafter referred to as (The Minister) that the Ministerial Direction was unlawful, *ultra vires*, null and void. The validity of the Ministerial Direction arises in both motions before the Court and it will be convenient to deal with this first.

Section 6 of the Telecommunications Act 2000 states,

“The Minister may give to the Office such directions of a general nature as to the Policy to be followed by the Office in the performance of its functions under this Act as the Minister considers necessary in the public interest and the office shall give effect to those directions”.

Pursuant to that Section, the Minister issued a Ministerial Direction (hereinafter called the Direction) to the OUR. The terms of the Directions are as follows:

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 market place for telecommunication services.

Whereas at the heart of the 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 –

- (1) 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 competitor and investment for the new mobile carriers in Jamaica.

It is against this background that the OUR by ignoring the Direction went ahead and issued a Determination Notice “Interconnect Pricing (RIO – 4)” setting rates.

The two issues to be determined here concerns the validity of the Determination Notice and the Direction. Both Digicel and the Minister is contending that the OUR is obliged to comply with the direction. The OUR is challenging this Direction on several grounds, that it is bad in law, *ultra vires* and void.

Mr. Batts for the OUR contends that the Direction prevents the OUR from exercising its functions, duties and powers as defined by the Legislature. This is challenged on several grounds namely;

- (a) That the Minister acted counter to and in conflict with the Expressed provisions of the Telecommunications Act 2000 and the powers and functions of the OUR as stated herein.
- (b) That in issuing the said purported Ministerial Direction. The Minister misdirected himself in law and/or acted unlawfully and/or irrationally.
- (c) That the purported exercise of the Minister's power was done for a purpose inconsistent with the provisions of the Act and consequently improper"

The **Office of Utilities Regulations Act** sets out clearly the functions of the OUR and the powers granted to it by the Legislature. The functions of the OUR under the Act includes the regulating of retail and interconnection charges and the application of price caps where appropriate. It also gives the OUR the power to determine where and when these may be imposed.

The OUR contends that any such policy direction issued by the Minister must therefore be compatible with the OUR's functions under the Act. That Section 6 (Telecommunications Act) makes it clear that the

Minister is not to give any Direction which detracts from OUR interferes with the ability of the OUR to carry out its functions under the Act.

The starting point as to the test to be applied by a Review Court for determining whether an administrative decision is unlawful or not is stated in *De Smith Woolf & Jowell's in Judicial Review of Administrative Action* (5th ED.) at page 295.

“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 authorizes 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 the “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.”

It is quite clear that a review Court cannot reverse the decision of a Minister unless he does not act or exercises his discretion within the ambit of the powers conferred on him. Section 6 of the Act gives the Minister a discretion to issue directions to the OUR of a general nature as to policy

which he considers necessary in the public interest. Once this is done the OUR has no alternative but to carry out those directions.

It is the contention of the OUR that under Section 6 of the Act the Minister is not to give any direction which detracts from or interferes with the ability of the OUR to carry out its functions under the Act. By so doing the Direction prohibits or prevents the Office's discharge of its statutory function; that is to determine charges.

The OUR further contends that the Minister conceded that the Office has the statutory power to make a determination of the 'terms and conditions' of interconnection agreements but states that the direction prohibiting intervention goes to one area only, i.e. charges and that the office should allow the market to determine this. This they contend is an error of law on the part of the Minister as this has prevented the Office from doing what Parliament said it could and that is to set charges.

The Court is not in favour of a Minister or any public official having a unfettered discretion. This was demonstrated in *Padfilld et al vs. Minister of Agriculture, Fisheries and Food [1968] 1 All E.R. 694*. In this case a milk-marketing scheme was established by statute, which provided for a committee of investigation to consider a report on complaints "if the Minister in any case so directs". It was brought to the Minister's attention

that the board's terms and policies for the sale of milk to the board did not take into account certain price variations, which worked unfairly against the producers in a certain area. The Minister was asked to refer the matter to the Committee. This he refused to do stating that he had an unfettered discretion and in his view the matter was not suitable for an investigation.

The House of Lords held that the Minister's reasons "were not good reasons in law" and that his discretion was limited to the extent that it was not to be exercised in a way, "whether by misconstruction of the statute or other reason, as to frustrate the objects of the statute which conferred the discretion." The Minister was bound to exercise his discretion lawfully and not to misdirect himself in law. His decision was set aside as the reasons given by the Minister were enough to nullify his decision as his reasons was a misapprehension of his duties. However as Lord Upjohn stated at page 717,

"So I must examine the reasons given by the Minister including any Policy upon which they must be based, to see whether he has acted unlawfully and thereby overstepped the true limits of his direction, or, as it is frequently said in the prerogative writ cases, exceeded his jurisdiction. Unless he has done so, the Court has no jurisdiction to interfere. It is not a Court of Appeal and has no jurisdiction to correct the decision of the Minister acting lawfully

within his discretion, however much the Court may disagree with its exercise."

Similarly in **Laker Airways Ltd vs Department of Trade** [1977] 2

All. E.R. 182 Lord Denning M.R. said; at page 194:

"These Courts have the authority, and I would add the duty, in a proper case, when called upon to inquire into the exercise of a discretionary power by a Minister or his department. If it is found that the power has been exercised improperly or mistakenly so as to impinge unjustly on the legitimate rights or interest of the subject the Courts must so declare."

It is quite clear from the authorities that the Courts guard against a Minister acting outside of the Statutory Provisions.

Mr. Batts for the OUR submitted that Section 6 of the Telecommunication Act 2000 uses the word "directions" in a context which makes it clear that the Minister is not to direct the OUR how to decide. He further submitted that the Act does not, as did the Statute in the **Laker** case, say that if the direction and the Act should conflict the direction is to prevail. Silence on that score effectively means that the Act is to prevail in the event of conflict. The context in which the word "direction" is used demonstrates that the word "direction" in the Telecommunications Act 2000 is akin to the word "guidance" in the **Laker's** case. The general policy direction must be

compatible with the performance of the OUR'S functions under the Act and therefore the Minister has no power to override the Act and curtail the powers granted to the OUR.

Mr. Hylton, the learned Solicitor General submitted that in the *Laker Airways* case the Court of Appeal stressed that a direction had to be followed and made a distinction between directions and "guidance". He said that if Parliament had meant guidance in Section 6 of the Telecommunications Act 2000 it would have said so. This was so because Section 58 of the Act creates a Telecommunication Advisory Council to advise the Minister. That body would provide guidance and not issue directions, which the Minister may choose not to follow. He said that Section 6 provides that the OUR "shall give effect to those directions" and this is not providing for advice or guidance, but for Orders which the OUR must comply.

Mr. Hylton pointed out that there are numerous other statutes or Orders with an almost identical provision as that of Section 6, which gives a Minister the power of issuing directions. In all cases Parliament's intent is the same in which a Minister may give directions of a general nature as to policy which the authority or official shall give effect to those directions.

The main question here, was the “Direction” a specific or general policy direction? If it was a specific policy direction the Minister may well have exceeded his discretion under Section 6 of the Act. The Act speaks of a general policy direction. The object of the Act is set out in Section 3, which states;

- 3(a) to promote and protect the interest of the public by,
 - (i) promoting fair and open competition in the provision of specified services and telecommunication 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 in respect of the quality and variety of telecommunications services and equipment supplied;
- (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.

Section 3, on the face of it makes provisions for both the provider and consumer and seeks to encourage private investment and a free market environment.

Mr. Hylton submitted that the direction is of general nature relating to policy in that it directs the OUR to allow free competition by not intervening in the market to set rates, tariffs or price caps. It does not speak to a particular competitor or a particular segment of the competitors in the industry. It does not seek to set a particular rate and therefore it lacks specificity and speaks to the general policy approach that ought to be adopted in respect to interconnection.

Mr. Batts submitted that the OUR should be independent and the “direction” in Section 6 is used in a context which makes it clear that the Minister is not to direct the OUR how to decide. He placed emphasis on the fact that in the *Laker* case (*supra*) if the direction and the Act should conflict the direction is to prevail. He said that silence on that means that the Act is to prevail in the event of conflict. The general policy direction must be compatible with the performance of the OUR’S functions under the Act. He further submitted that the Minister has misdirected himself in law

in that he issued a direction which prohibited the exercise of a function granted by Statute to the OUR.

One therefore has to look at the reasons given by the Minister in issuing the Direction as the OUR has complained that the Minister failed to consider the promotion and protection of the interest of the public.

In Tesco Stores vs. Secretary of State for the Environment [1995]

1 W.L.R. 759 Lord Keith stated at page 764 –

*“If the decision maker wrongly takes the view that some consideration is not relevant and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant consideration such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the **Wednesbury** sense ...”*

When one examines the Minister’s Affidavit his reasons are set out and the protection and promotion of the public interest is mentioned and is certainly a factor that was taken into account.

He said the Direction was issued in order to ensure the protection and promotion of the interests of the consumer, promotion of fair and open competition and to encourage sustainable investments in relation to Interconnection charges and the telecommunications sector generally.

In my view the Directions is related to questions of Policy and a market-oriented approach to pricing. This certainly is in the public interest. The Minister is given the power under the Act to determine what is in the public interest. If the Minister's decision does not satisfy the **Wednesbury principle** then his decision can be regarded as *ultra vires*. In other words it would have to be unreasonable or outrageous that no Minister applying himself to relevant consideration could have issued such a Direction.

I am of the view that relevant considerations have been taken into account by the Minister when considering the promotion and protection of the interest of the public. In **DeSmith "Judicial Review of Administrative Action"** according to DeSmith –

"When the Courts review a decision they are careful not to readily interfere with the balancing of considerations which are relevant to the power that is exercised by an authority. The balancing and weighing of relevant considerations is primarily a matter for the Courts. Courts have, however, been willing to strike down as unreasonable decisions where manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration."

The Minister's Direction therefore are directions in the public interest as set out in the objects of Section 3 of the Act. In other words by allowing supply and demand to determine prices is one way of protecting the public's interest

since there are several players in the market which will give the public a choice. I therefore do not see where the Minister took irrelevant considerations into account. As Lord Greene said in the **Wednesbury** case (1948) 1 Q.B. 223 at page 230 as to reasonableness:-

“.... The decision of the local authority can be upset if it is proved to be unreasonable in the sense that the Court considers it to be a decision that no reasonable body could have come to. It is not what the Court considers unreasonable, a different thing altogether. If it is what the Court considers unreasonable, the Court may very well have different views to that of a head authority on matters of high policy of this kind.”

The OUR contends that the Minister was pressured by Digicel to issue the Direction. However an analysis and examination of his affidavit certainly refutes that allegation. It is quite clear that in his affidavit emphasis was placed on free competition, and certainly this must be in the public's interest. Section 3 of the Act sets out as one of its objects the promotion of fair and open competition as well as the protection of the consumer. It cannot therefore be said that the Minister acted without due consideration and has in my view not breached the **Wednesbury** principles.

The OUR is also contending that by issuing the Direction it prevents them from exercising its functions and powers under this OUR Act. An

examination of the Act sets out the functions of the OUR and the powers granted to it by the Legislature. Some of its functions include the regulating of retail and interconnection charges and the application of price caps where it is appropriate. Mr. Batts is contending that it is for the OUR to protect the customer and to balance the interest of the public as defined in Section 3(A) with the need to promote the telecommunications industry and to encourage economically efficient investment. It is for the OUR to determine if and when the appropriate mechanisms to achieve these ends are to be applied. The critical issue therefore, is whether the Direction properly construed frustrates the exercise by the OUR of its functions under the Act.

In the **Padfield** case (*supra*) Lord Reid said at page 699 (paragraphs C – D) –

“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court ... if the Minister, by reason, so uses his discretion, as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court.”

In **R vs Secretary of State for Foreign Affairs ex parte World Development Movement Ltd** [1994] 4 L.R.C. 198 Rose L.J. said (at p. 209)-

*“It is common ground that a power exercised outside of the statutory power is unlawful. This may be the consequence of an error of law in misconstruing the limits of the exercise of power, or because the exercise is **ultra vires**, or because irrelevant factors were taken into account.”*

It would seem on the face of it that the Direction would prohibit and/or preclude the OUR'S discharge of its statutory functions. Indeed the OUR has the statutory power to make a determination of the terms and conditions of interconnection agreements and to set rates and price caps. Although it is quite clear that the Minister cannot legitimately issue a directive which would preclude the OUR from carrying out its functions under the Act, Section 6 of the Telecommunications Act gives the Minister the power to give directions as to policy matters. Once the direction is of a general nature and the Minister exercises that discretion reasonably then the OUR must comply. Section 6 of the Telecommunications Act refers to the OUR Act and its functions. Parliament must have intended (in Section 6) that the Minister is given the power to issue directions of a general nature as

to policy. The section is quite clear and simple and needs no interpretation. The intention is quite clear.

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.

Under the OUR Act there is now provision for any such ministerial directions. However in relation to the service of telecommunication the OUR is governed by and answerable to the terms of the Telecommunications Act, an Act which was passed in the year 2000 and designed to meet the government's thrust and policy to promote economic development to Jamaica through competition in the telecommunications market.

In conclusion, 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. The Determination Notice issued by the OUR contravenes the Direction and therefore cannot stand and ought not to have been issued.

Consequently for the reasons outlined in Motion M. 136/02 is dismissed with costs.

As a result of this the Suit (M. 74/2002) brought by Digicel is purely of academic interest since both actions are connected.

Digicel is challenging Determinations which were made by the Respondent (OUR). This concerns interconnection between Cable and Wireless, Digicel and Centennial, the latter two being mobile carriers. The OUR capped the amount to be paid by Cable and Wireless to mobile carriers in respect of calls made from its fixed line customers which terminate with a mobile carrier. The OUR also set the amount to be retained by Cable and Wireless when an incoming international telephone call is received by Cable and Wireless for termination on the network of a mobile carrier.

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.

Judgment for the Applicant against the Respondent (OUR) with costs.